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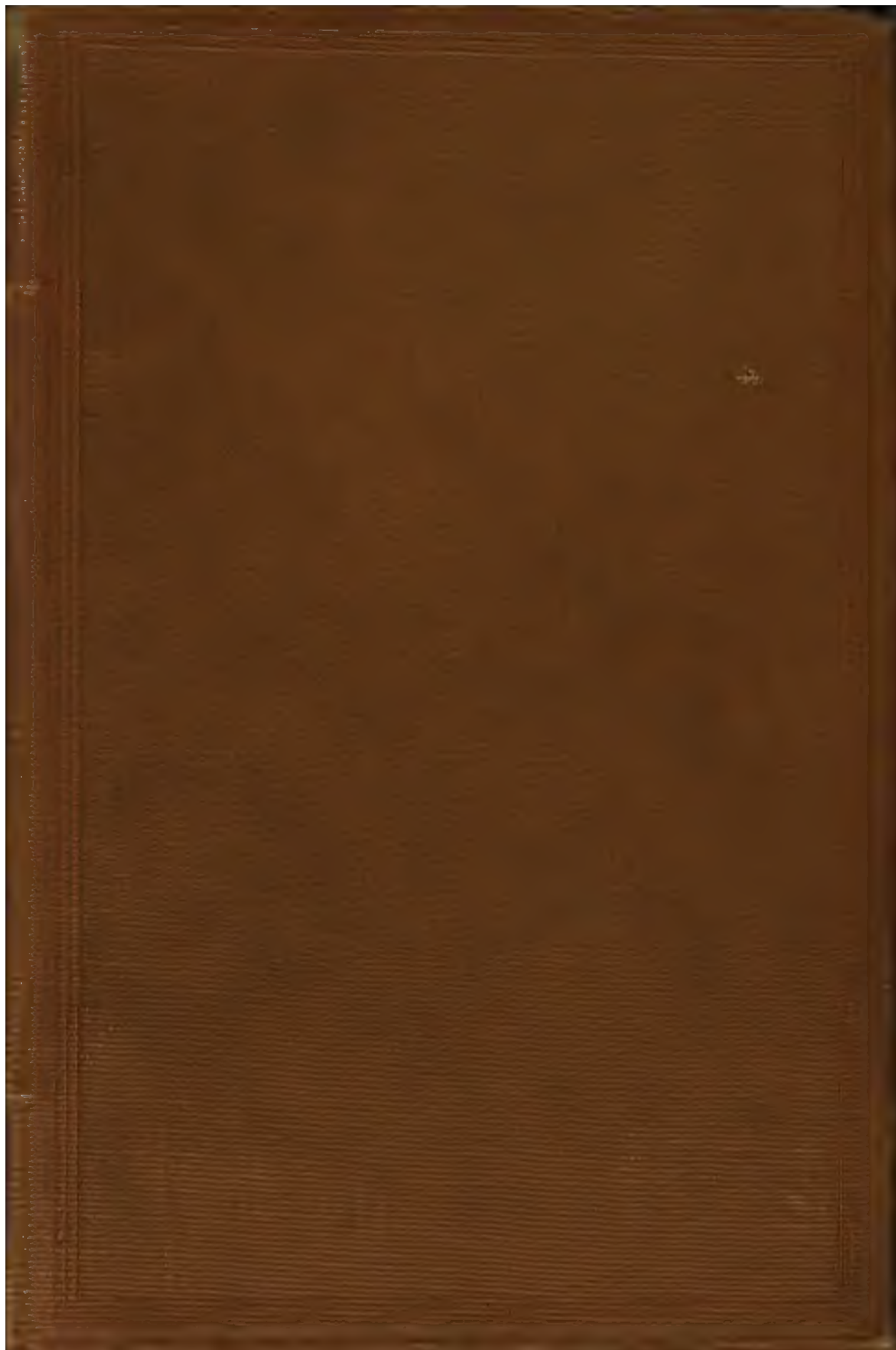
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**A TREATISE**  
**ON THE**  
**Law and Proceedings**  
**in Bankruptcy**

**BY**  
**FRANK O. LOVELAND**  
Clerk of the United States Circuit Court of Appeals for the Sixth  
Circuit; Author of "Forms of Federal Procedure,"  
and "The Appellate Jurisdiction of  
the Federal Courts."

**VOLUME ONE**

*Fourth Edition*

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To the  
**HONORABLE HORACE H. LURTON,**  
Associate Justice of the Supreme Court of the United States,  
this work is most respectfully dedicated,  
as a token of the great regard entertained for his  
talents, learning and character  
by the author.



## PREFACE

---

Since the third edition of this work was published Congress has materially amended the bankrupt law; the Supreme Court has settled many questions concerning which the lower courts held conflicting views; and the courts of bankruptcy have had occasion to decide many new questions of law and procedure.

In preparing this edition I have tried to present to the profession the law and procedure in bankruptcy at the present time, pointing out the changes made by the amendments and stating not only the rule of law applicable to each subject considered, but also the principle upon which it is founded. The text has been rewritten. Many new chapters and sections were required to bring in all these new matters in logical order. I found it impracticable to preserve the titles or numbers of the chapters and sections of the former editions. The general plan of arrangement is however the same. It is to follow step by step, in its natural course, a proceeding in bankruptcy from its inception to the final distribution and settlement of the estate, and the discharge or refusal to discharge the bankrupt, including the proper practice of reviewing bankruptcy cases in the appellate courts.

I desire to acknowledge the very valuable assistance given me by Mr. Arthur W. Blakemore of Boston, Mass., and Mr. Constant Southworth of Cincinnati, Ohio, in the preparation of this edition.

FRANK O. LOVELAND.

CINCINNATI, OHIO, February, 1912.





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# The United States Bankruptcy Law

BEING THE

Act of July 1, 1898, 30 Stat. at L. 544,  
as amended February 5, 1903, 32 Stat.  
at L. 797, June 15, 1906, 34 Stat. at L.  
367, and June 25, 1910, 36 Stat. at L. 838.

*ANNOTATED.*

Showing where each Section of the Act  
is considered in this book.



# THE UNITED STATES BANKRUPTCY LAW

BEING THE

Act of July 1, 1898, 30 Stat. at L. 544, as amended February 5, 1903, 32 Stat. at L. 797, June 15, 1906, 34 Stat. at L. 367, and June 25, 1910, 36 Stat. at L. 838.

ANNOTATED,

SHOWING WHERE EACH SECTION OF THE ACT IS CONSIDERED IN  
THIS BOOK.

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## AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES.

*Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled:*

### CHAPTER I.

#### DEFINITIONS.

**Section 1. Meaning of words and phrases.** *a* The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) "A person against whom a petition has been filed." "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) "Adjudication." "Adjudication" shall mean the date the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, the date when such decree is finally confirmed;

(3) **"Appellate courts."** "Appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States;

(4) **"Bankrupt."** "Bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) **"Clerk."** "Clerk" shall mean the clerk of a court of bankruptcy;

(6) **"Corporations."** "Corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association;

(7) **"Court."** "Court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;

(8) **"Courts of bankruptcy."** "Courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska;

(9) **"Creditor."** "Creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;

(10) **"Date of bankruptcy"; "bankruptcy,"** etc. "Date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

(11) **"Debt."** "Debt" shall include any debt, demand, or claim provable in bankruptcy;

(12.) **"Discharge."** "Discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act;

(13) **"Document."** "Document" shall include any book, deed, or instrument in writing;

(14) **"Holiday."** "Holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving;

(15) **"When deemed 'insolvent.'"** A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts;

(16) **"Judge."** "Judge" shall mean a judge of a court of bankruptcy, not including the referee;

(17) **"Oath."** "Oath" shall include affirmation;

(18) **"Officer."** "Officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer;

(19) **"Persons."** "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations;

(20) **"Petition."** "Petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named;

(21) **"Referee."** "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead;

(22) **"Conceal."** "Conceal" shall include secrete, falsify, and mutilate;

(23) **"Secured creditor."** "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(24) **"States."** "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia;

(25) **"Transfer."** "Transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security;

(26) **"Trustee."** "Trustee" shall include all of the trustees of an estate;

(27) **"Wage-earner."** "Wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year;

(28) **Words in masculine gender.** Words importing the masculine gender may be applied to and include corporations, partnerships, and women;

(29) **Importing plural.** Words importing the plural number may be applied to and mean only a single person or thing;

(30) **Importing singular.** Words importing the singular number may be applied to and mean several persons or things.

Similar provisions in other acts, see R. S. Sec. 5013 act of 1867, printed at page 1825 *post*:

This section of the act is considered in this book as follows: Clause (2) at Sections 242 and 331; Clause (3) at Sections 806; Clause (4) at Sections 386, 630 and 639; Clause (5) at Section 99; Clause (6) at Sections 123 and 125; Clause (7) at Sections 84, 352, 612, 632 and 637; Clause (8) at Section 18; Clause (9) at Sections 181, 225 and 336; Clause (10) at Sections 29 and 30; Clause (11) at Sections 289 and 317; Clause (12) at Section 740; Clause (13) at Section 378; Clause (14) at Sections 159, 200, 504 712 and 832; Clause (15) at Sections 154, 155 and 495; Clause (16) at Section 84; Clause (17) at Sections 163 and 652; Clause (18) at Sections 101, 103 and 363; Clause (19) at Sections 114, 160, 255 and 659; Clause (22) at Sections 144, 651 and 728; Clause (23) at Section 337; Clause (25) at Sections 146, 488 and 494; Clause (27) at Section 120.

## CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR  
JURISDICTION.

**Section 2. U. S. district courts; supreme court. D. C.; Territorial courts; jurisdiction.** That the courts of bankruptcy as hereinbefore defined, viz, the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

(1) **To adjudge bankrupt.** Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

(2) **Allow and disallow claims, etc.** Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(3) **Appoint receivers, etc.** Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

(4) **Try and punish bankrupts, etc.** Arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations for violations



of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) **To permit temporary transaction of business** Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this Act;<sup>1</sup>

(6) **To substitute additional persons in proceedings, etc.** Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

(7) **To collect and distribute assets.** Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

(8) **To close estates.** Close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered;

(9) **To confirm or reject compositions.** Confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

(10) **To confirm, etc., referee's findings.** Consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees;

<sup>1</sup> Clause (5) as amended by act of 1910.

In the original act it read as follows:

("5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates." (Act of 1898.)

It was amended in 1903 to read:

"(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, but not at a greater rate than in this Act allowed trustees for similar services." (Act of 1903.)

(11) **Determine exemptions.** Determine all claims of bankrupts to their exemptions;

(12.) **Discharge bankrupts, etc.** Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases;

(13) **Enforce orders.** Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) **Extradite bankrupts.** Extradite bankrupts from their respective districts to other districts;

(15) **Make orders.** Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act;

(16) **Punish for contempt.** Punish persons for contempts committed before referees;

(17) **Appoint trustees.** Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

(18) **Tax costs.** Tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy;

(19) Transfer cases to other courts of bankruptcy; and

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in an other court of bankruptcy.<sup>1</sup>

**Unspecified powers.** Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Similar provisions in other Acts—See R. S. Secs. 4972 to 4979, and 5013, Act of 1867 printed at page 1825 *post*: Sec. 6 of the Act of Aug 19, 1841, 5 Stat. at L. 440; Sec. 2 of the Act of April 4, 1800, 2 Stat. at L. 19:

<sup>1</sup> Clause (20) was added by the Act of 1910.

This section of the Act is considered in this book as follows: Section 2 at Sections 18, 19, 24, 27, 31, 34, 35, 162, 212, 410, 468, 658, 808 and 827; Clause (1) at Sections 85, 132, 160, 192, 193, 196, 199, 206, 261, 264, 416 and 632; Clause (2) at Sections 348, and 349; Clause (3) at Sections 26, 27, 36, 87, 101, 211, 212, 219, 222 and 668; Clause (4) at Sections 97, 357, 637, 659, 660 and 664; Clause (5) at Sections 87, 101, 212, 216, 219, 366 and 559; Clause (6) at Section 64; Clause (7) at Sections 555 and 580; Clause (8) at Section 605; Clause (9) at Sections 692 and 705; Clause (10) at Sections 93 and 95; Clause (11) at Sections 428 and 825; Clause (12) at Section 804; Clause (13) at Sections 90, 632, 637, 669, 676 and 684; Clause (14) at Section 642; Clause (15) at Sections 49, 51, 53, 54, 61, 62, 65, 66, 67, 211, 221, 632 and 638; Clause (16) at Sections 90, 349, 618, 637, 669, 675 and 676; Clause (17) at Section 363; Clause (18) at Section 570; Clause (19) at Sections 34, 196, 197 and 264.

## CHAPTER III.

### BANKRUPTS.

**Section 3. Acts of bankruptcy; of what to consist.** *a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States;<sup>1</sup> or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

**Petition to be filed within four months.** *b* A petition may be filed against a person who is insolvent and who has com-

<sup>1</sup> Clause (4) as amended by Act of 1903. The original Act read: "(4) made a general assignment for the benefit of his creditors." (Act of 1898.)

mitted an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after

(1) **From when to date.** The date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

**Defense of solvency.** c It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed,

**Burden of proof.** And under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

**Person denying insolvency; to testify.** d Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency,

**Burden of proof, etc.** And in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

**Petitioner to give bond.** e Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same

court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment,

**Liability for costs, etc.** In case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

**Allowance of costs, etc.** If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property.

**Counsel fees, etc., to be fixed by court.** Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

Similar provisions in other Acts—See R. S. Sec. 5021 and 5022 Act of 1867; printed at page 1825 *post*; Sec. 1 of the Act of Aug. 19 1841, 5 Stat. at L. 440; Sec. 1 of the Act of April 4 1800, 2 Stat. at L. 19:

As to seizure of bankrupt's property see R. S. Sec. 5019:

This Section of the Act is considered in this book as follows: Section 3 at Sections 17, 38, 45, 115, 144, 145, 146, 147, 148, 151, 153, 155, 156, 157, 158, 222, 233, 234 and 262; Clause *a* at Sections 17, 137, 139, 143, 191, 241, 260 and 731; Clause *b* at Sections 136, 159, 191, 199, 241, 499 and 500; Clause *c* at Sections 8, 139, 143, 234 and 241; Clause *d* at Sections 139 and 241; Clause *e* at Sections 105, 211, 214, 222 and 589.

**Section 4. Who may become bankrupts.** *a* Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.<sup>1</sup>

*b* Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.

<sup>1</sup> Sec. 4*a* as amended by Act of 1910. Prior to that Act it read: "Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt." (Act of 1898.)

**C.** The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.<sup>2</sup>

Similar provisions in other Acts—See R. S. Secs. 5014, 5021 and 5121. Act of 1867, printed at page 1825 *post.*, Secs. 1 and 14 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Secs. 1 and 2 of the Act of April 4, 1800, 2 Stat. at L. 19:

This Section of the Act is considered in this book as follows: Section 4 at Sections 16, 114, 115, 122, 160, 191, 244, 393 and 800; Clause *a* at Sections 16, 125, 126, 127, 128, 134, 157 and 160; Clause *b* at Sections 16, 117, 118, 119, 121, 124, 125, 126, 127, 128, 130, 134, 191, 199, 229 and 261.

**Section 5. Partners; partnership.** *a* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

**Administration of estate.** *b* The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

<sup>2</sup> Sec. 4*b* as amended by Act of 1910. In the original act it read: "*b* Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts." (Act of 1898.) It was amended in 1903 to read:

"*b* Any natural person, except a

wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts.

The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States." (Act of 1903.)

**Jurisdiction over one partner sufficient.** *c* The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

**Trustee's duty.** *d* The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

**Expenses.** *e* The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

**Payment of partnership debts.** *f* The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts.

**Surplus of individual property.** Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts.

**Surplus of partnership property.** Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

**Claims of partnership against individual estates, etc.** *g* The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

**Administration of estate where all partners are not bankrupt.** *h* In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

Similar provisions in other Acts, See R. S. Secs 5121, Act of 1867; printed at page 1825 *post.*, Sec. 14 of the Act of Aug. 19, 1841, 5 Stat. at L. 440:



This Section of the Act is considered in this book as follows: Section 5 at Sections 121, 251, 253 and 255; Clause *a* at Sections 114, 255, 256 and 261; Clause *b* at Sections 267 and 282; Clause *c* at Sections 136, 259, 260, 261 and 264; Clause *d* at Sections 267, 268 and 360; Clause *e* at Section 267; Clause *f* at Sections 251, 255, 266, 268, 273, 274 and 276; Clause *g* at Sections 251, 255, 268 and 276; Clause *h* at Sections 259, 262 and 266.

**Section 6. Exemptions of bankrupts.** *a* This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

Similar provisions in other Acts; See R. S. Sec. 5045; Act of 1867, printed at page 1825 *post.*, Sec. 3 of the Act of Aug. 19, 1841, 5 Stat. at L. 440. Sections 34, 35 and 53 of the Act of April 4, 1800, 2 Stat. L. 19:

This Section of the Act is considered in this book at Sections 365, 377, 413, 415, 416 and 431.

**Section 7. Duties of bankrupts.** *a* The bankrupt shall

(1) **Attend meetings.** Attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed;

(2) **Comply with orders.** Comply with all lawful orders of the court;

(3) **Examine proofs of claims.** Examine the correctness of all proofs of claims filed against his estate;

(4) **Execute papers.** Execute and deliver such papers as shall be ordered by the court;

(5) **Execute transfers.** Execute to his trustee transfers of all his property in foreign countries;

(6) **Inform trustee.** Immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act, coming to his knowledge;

(7) **Disclose false claims.** In case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee;

(8) **Prepare schedule of property.** Prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule



of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and

(9) **Submit to examination.** When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

**Bankrupt, when not compelled to attend meeting; examine claims.** *Provided, however,* That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown,

**Expenses for attending meetings.** And the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

Similar provisions in other Acts, See R. S. Secs. 5014 to 5017, 5020, 5030, 5044, 5051 and 5086, printed at page 1825, *post*; Sec. 1 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Secs. 18 and 52 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book as follows: Section 7 at Sections 281, 283, 347, 631, 632 and 633; Clause (1) at Sections 282, 631, 632 and 734; Clause (2) at Sections 616 and 632; Clause (3) at Section 633; Clause (4) at Sections 632 and 634; Clause (5) at Sections 373, 385 and 635; Clause (6) at Section 633; Clause (7) at Section 633; Clause (8) at Sections 99, 163, 165, 174, 176, 177, 178, 428, 430, 431 and 635; Clause (9) at Sections 608, 61, 616, 619, 624, 625, 632, 636, 652, 665 and 667.

**Section 8. Death or insanity of bankrupts; not to abate proceedings.** *a* The death or insanity of a bankrupt shall not

abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane:

**Widow entitled to dower, etc.** *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

Similar provisions in other Acts. See R. S. Sec. 5090; printed at page 1825 *post.*, Sec 45 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book at Sections 129, 131, 134, 256, 386, 426 and 648.

**Section 9. Protection and detention of bankrupts; exemption for arrest.** *a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

**Detention for purposes of examination.** *b* The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination.

**May be kept in custody ten days, etc.** If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Similar provisions in other Acts, See R. S. Sec. 5024 and 5107 Act of 1867, printed at page 1825, *post*. Secs. 22, 38 and 60 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book as follows: Section 9 at Sections 632, 637, 639 and 641; Clause *a* at Sections 637, 639 and 641; Clause *b* at Sections 84, 613, 637 and 638.

**Section 10. Extradition of bankrupts.** *a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

This Section of the Act is considered in this book at Section 642.

**Section 11. Suits by and against bankrupts; stay until adjudication.** *a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition;

**Further stay.** If such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

**Appearance of trustee.** *b* The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

**Commenced prior to adjudication.** *c* A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

**Time for bringing suits by or against trustees.** *d* Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

Similar provisions in other Acts with respect to staying suits, R. S. Sec. 5106, Act of 1867, printed at page 1825, *post*; as to Pending suits R. S. Sec. 5047 Act of 1867, page 1825, *post*., Secs. 3 and 5 of this

Act of Aug. 19, 1841, 5 Stat. at L. 440, Sec. 13 of the Act of April 4, 1800, 2 Stat. at L. 19. Limitations of actions by or against trustees R. S. Secs. 5056 and 5057, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book as follows: Section 11 at Section 28; Clause *a* at Sections 49, 51, 52, 56, 57, 61, 63, 65, 66, 67, 68 and 211; Clause *b* at Sections 66 and 533; Clause *c* at Sections 66 and 533; Clause *d* at Sections 539 and 550.

**Section 12. Compositions, when confirmed; when may be offered.** *a* A bankrupt may offer, either before or after adjudication, terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and the list of his creditors required to be filed by bankrupts. In compositions before adjudication the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall preside; and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed.<sup>1</sup>

**Application for confirming.** *b* An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

**Date, etc., for hearing.** *c* A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

<sup>1</sup> Sec. 12*a* as amended by the Act of 1910. Prior to that Act it read: "*a* A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or

at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts." (Act of 1898.)

**Conditions of confirmance.** *d* The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

**Distribution of consideration.** *e* Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

No provision for compositions with creditors was contained in the Act of 1800, or the Act of 1841 or the Act of 1867. The first provision is found in the Act of June 22, 1874, 18 Stat. at L. 182. Sec. 17 of that Act is embodied in R. S. Sec. 5103, page 1825, *post*.

This Section of the Act is considered in his book as follows: Section 12 at Sections 689, 690, 699 and 709; Clause *a* at Sections 237, 608, 687 and 690; Clause *b* at Sections 692 and 693; Clause *c* at Section 699; Clause *d* at Sections 84, 690, 695, 696, 697 and 699; Clause *c* at Sections 700 and 704.

**Section 13. Compositions, when set aside; upon practice of fraud.** *a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

Similar provision in prior Acts. See note to Sec. 12 above.

This Section of the Act is considered in this book at Sections 84, 705 and 709.

**Section 14. Discharges, when granted; application for.** *a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was

unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

**Hearing of application.** *b* The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by the court: *Provided*, That a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose.<sup>1</sup>

<sup>1</sup> Sec. 14 *b* as amended by the Act of 1910. In the original Act it read: "*b* The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1)

committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." (Act of 1898.) It was amended in 1903 to read:

"*b* The judge shall hear the ap-

**Confirmation discharges from debts.** *c* The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

Similar provisions in other Acts. Application and hearing R. S. Secs. 5108 and 5109, Act of 1867, page 1825, *post.*, Sec. 4 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Objections and proceedings on same R. S. Secs. 5110 to 5116 page 1825, *post.*, Secs. 4 and 12 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Secs. 36 and 37 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book as follows: Section 14 at Sections 84, 710, 721, 730 and 805; Clause *a* at Section 712; Clause *b* at Sections 356, 697, 714, 723, 724, 725, 727, 728, 729, 730, 731, 732, 733, 734, 740 and 762; Clause *c* at Sections 693, 702 and 740.

**Section 15. Discharges, when revoked.** *a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

Similar provisions in other Acts, R. S. Sec. 5120, Act of 1867, page 1825, *post.*, Sec. 4 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 34 of the Act of April 4, 1800, 2 Stat. at L. 19.

plication for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained property on credit from any person upon a materially false statement in writing made to

such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court." (Act of 1903.)



This Section of the Act is considered in this book at Section 84, 705 and 804.

**Section 16. Co-debtors of bankrupts; liability not affected by bankrupt's discharge, etc.** *a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

Similar provisions in other Acts, R. S. Sec. 5118, Act of 1867, page 1825, *post.*, Sec. 4 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 34 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book at Sections 259, 278, 301, 320, 387, 702, 794, 797 and 798.

**Section 17. Debts not affected by a discharge.** *a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) **United States and state taxes.** Are due as a tax levied by the United States, the state, county, district, or municipality in which he resides;

(2) **Liability in actions for fraud.** Are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation;

(3) **Claims not scheduled.** Have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) **Created by fraud.** Were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.<sup>1</sup>

<sup>1</sup> Sec. 17 as amended by the Act of 1903. As originally enacted it read: "*a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) Are due as a tax levied by the United States, the State, county, district, or municipality in

which he resides; (2) Are judgments in actions, for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) Have not been duly scheduled in time for proof and allowance, with the name of the creditor if



Similar provisions in other Acts, R. S. Secs. 5117 to 5119, Act of 1867, page 1825, *post.*, Sec. 4 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 34 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book as follows: Section 17 at Sections 278, 637, 641, 702, 730, 740, 743, 754, 758, 761 and 781; Clause (1) at Section 759; Clause (2) at Sections 757, 760, 761, 762, 763, 766 and 780; Clause (3) at Sections 743, 772, 773, 774, 775 and 804; Clause (4) at Sections 780, 781, 784, 785, 788 and 791.

## CHAPTER IV.

### COURTS AND PROCEDURE THEREIN.

**Section 18. Process, pleadings, and adjudications; service of petition, involuntary bankruptcy.** *a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.<sup>1</sup>

known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer in any fiduciary capacity." (Act of 1898.)

<sup>1</sup>Sec. 18*a* as amended by the Act of 1903. As originally enacted it read: "*a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ

of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time, but in case personal service can not be made, then notice shall be given by publication in the same manner

**Pleading within ten days.** *b* The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.<sup>1</sup>

**Verification.** *c* All pleadings setting up matters of fact shall be verified under oath.

**Court to determine issues when facts controverted.** *d* If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this Act, and makes the adjudication or dismiss the petition.

**Decision where pleadings not filed.** *e* If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

**If judge absent, case to be referred to referee.** *f* If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

**Hearing on filing voluntary petition.** *g* Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition.

**Absence of judge.** If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

Similar provisions in other Acts, R. S. Secs. 5024 to 5031, Act of 1867, page 1825, *post.*, Sec. 1 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 3 of the Act of April 4, 1800, 2 Stat. at L. 19.

and for the same time as provided by law for notice by publication in suits in equity in courts of the United States." (Act of 1898.)

<sup>1</sup>Sec. 18*b* as amended by the Act of 1903. As originally enacted

it read: "*b* The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow." (Act of 1898.)

This Section of the Act is considered in this book as follows: Section 18 at Sections 29, 30, 204, 205, 209 and 262; Clause *a* at Sections 101, 206 and 211; Clause *b* at Sections 84, 211, 223, 225, 226 and 228; Clause *c* at Sections 163, 199, 228, 411 and 804; Clause *d* at Sections 84, 204, 237 and 242; Clause *e* at Sections 84 and 242; Clause *f* at Sections 83, 85, 99 and 242; Clause *g* at Sections 83, 84, 85, 99 and 168.

**Section 19. Jury trials; person against whom an involuntary petition filed, entitled.** *a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed.

**Right waived.** If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

**Attendance of jury, etc.** *b* If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

**Laws as to jury trials applicable.** *c* The right to submit matters in controversy, or an alleged offense under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

Similar provisions in other Acts.

Jury trials in involuntary R. S. Secs. 5026 and 5027, Act of 1867, page 1825, *post.*, Sec. 1 of the Act of Aug. 19, 1841, 5 Stat. at L. 440.

Jury trials on applications for discharge R. S. Sec. 5111, Act of 1867, page 1825, *post.*, Sec. 4 of the Act of Aug. 19, 1841, 5 Stat. at L. 440.

As to trial of facts by jury generally See. R. S. Sec. 566.

This Section of the Act is considered in this book as follows: Section 19 at Sections 223, 827 and 830; Clause *a* at Sections 29, 142, 211, 237, 239 and 240; Clause *b* at Sections 70, 142, 240 and 734; Clause *c* at Sections 412, 657, 734 and 804.

**Section 20. Oaths, affirmations; by whom administered.** *a* Oaths required by this Act, except upon hearings in court,

may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

**Affirmations.** *b* Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

Similar provisions in other Acts, R. S. Sec. 5079 Act of 1867, page 1825, *post*. As to where oaths are required, R. S. Sections 5012, 5076 and 5077, page 1825, *post*.

This Section of the Act is considered in this book at Sections 89, 163, 199, 334, 613 and 627.

**Section 21. Evidence; compulsory attendance of witnesses.** *a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act; *Provided*, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.<sup>1</sup>

**Depositions, laws governing.** *b* The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

**Notice of taking.** *c* Notice of the taking of depositions shall be filed with the referee in every case. When deposi-

<sup>1</sup> Sec. 21*b* as amended by the Act of 1903. As originally enacted it read: "*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the State in which the

proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act." (Act of 1898.)

tions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

**Certified copies of proceedings evidence.** *d* Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

**Of order approving trustees' bond.** *e* A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

**Of order confirming composition, etc.** *f* A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

**Evidence of revesting title in bankrupts.** *g* A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

Similar provisions in other Acts. Examination of the bankrupt and other persons, R. S. Secs. 5081, 5086 and 5087, Act of 1867, page 1825, *post.*, Secs. 14 and 15 of the Act of April 4, 1800, 2 Stat. at L. 19.

Clause *b* depositions R. S. Secs 5003 to 5006, Act of 1867, page 1825, *post.*, Sec. 7 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Secs. 14 and 15 of the Acts of April 4, 1800, 2 Stat. at L. 19.

Certified copies as evidence R. S. Secs. 4992, 5054. and 5119, Act of 1867, page 1825, *post.*, Sec. 11 of the Act. of Aug. 19, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book as follows: Section 21 at Sections 349, 412, 607, 608, 609, 612 and 663; Clause *a* at Sections 35, 240, 608, 609, 610, 623, 627, 632, 652, 675 and 676; Clause *b* at Sections 240, 349 and 623; Clause *c* at Sections 349 and 623; Clause *d* at Section 92; Clause *e* at Sections 370 and 374; Clause *f* at Sections 700, 705, 802, 803 and 804; Clause *g* at Section 704.

**Section 22. Reference of cases after adjudication.** *a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

**Transfer of case to different referee.** *b* The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

Similar provisions in other Acts, R. S. Sec. 5007, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Sections 83, 84, 169 and 246.

**Section 23. Jurisdiction of the United States and State courts.** *a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

**Suits by trustees, where brought.** *b* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e.<sup>1</sup>

<sup>1</sup> Sec. 23*b* as amended by the Act of 1910. In the original Act it read: "*b* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being

administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." (Act of 1898.)

**Concurrent jurisdiction of circuit courts and courts of bankruptcy.** *c* The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

Similar provisions in other Acts, R. S. Secs. 4978 and 4979, Act of 1867, page 1825, *post.*, Sec. 8 of the Act of Aug. 19, 1841, 5 Stat. at L. 440.

This Section of the Act is considered in this book as follows: Section 23 at Sections 28, 35, 36, 37, 107, 536, 537, 538 and 808; Clause *a* at Sections 70, 72, 73, 74, 75 and 538; Clause *b* at Sections 37, 536 and 537; Clause *c* at Sections 70, 97, 357, 637 and 658.

**Section 24. Jurisdiction of appellate courts.** *a* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

**Appeals from courts not in organized circuits and in District of Columbia.** The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

**Jurisdiction of circuit court of appeals.** *b* The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

Similar provisions in other Acts, Appellate Jurisdiction generally, R. S. Secs. 4980 to 4989, page 1825, *post.* Sec. 4 of the Act of Aug. 19, 1841, 5 Stat. at L. 440.

<p>It was amended in 1903 to read:  <i>"b</i> Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings</p>	<p>in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision <i>b</i>, and section sixty-seven, subdivision <i>e</i>." (Act of 1903.)</p>
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Supervisory Jurisdiction, R. S. Secs. 4986 to 4988 Act of 1867, page 1825, *post.*, Sec. 6 of the Act of Aug. 19, 1841, 5 Stat. at L. 440.

This Section of the Act is considered in this book as follows: Clause *a* at Sections 806, 807, 808, 814, 826, 827, 828, 829, 830, 832, 852, 858 and 886; Clause *b* at Sections 719, 808, 810, 814, 815, 816, 818, 827, 828 and 852.

**Section 25. Appeals and writs of error; when taken.**

*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to-wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.

**To be within ten days; hearing.** Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

**Appeal to U. S. Supreme Court.** *b* From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. **Where amount exceeds \$2,000, etc.** Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. **Where question certified by Supreme Court Justice.** Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this Act throughout the United States.

**Trustees not to give bond.** *c* Trustees shall not be required to give bond when they take appeals or sue out writs of error.

**Certification to Supreme Court by courts.** *d* Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court



may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Similar provisions in other Acts, R. S. Secs. 4980 to 4986 and 4989, Act of 1867, page 1825, *post.*, Secs. 4 and 6 of the Act of Aug. 19, 1841, 5 Stat. at L. 440.

This Section of the Act is considered in this book as follows: Clause *a* at Sections 25, 105, 237, 350, 807, 808, 809, 810, 813, 815, 822, 823, 824, 825, 832, 835 and 847; Clause *b* at Sections 835, 852, 854, 855 and 858; Clause *c* at Sections 835, 839 and 855; Clause *d* at Sections 835, 852, 854, 859 and 866.

**Section 26. Arbitration of controversies; trustees may submit to.** *a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

**Selection of arbitrators.** *b* Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator.

**Findings of arbitrators.** *c* The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

Similar provisions in other Acts, R. S. Sec. 5061, Act of 1867, page 1825, *post.*, Sec. 43 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book at Sections 357, 555 and 708.

**Section 27. Compromises.** *a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

Similar provisions in other Acts, R. S. Sec. 5061, Act of 1867, page 1825, *post.*, Sec. 11 of the Act of Aug. 19, 1841, 5 Stat. at L. 440.

This Section of the Act is considered in this book at Sections 357, 571 and 708.

**Section 28. Designation of newspapers to publish notices.** *a* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in

the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

Similar provisions in other Acts, R. S. Sec. 5019, Act of 1867, page 1825, *post.*, Sec. 11 of the Act of Aug. 19, 1841, 5 Stat. at L. 440.

This Section of the Act is considered in this book at Sections 652 and 713.

**Section 29. Offenses; penalty for misappropriating property, etc.** *a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

**Concealing property.** *b* A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently

(1) Concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or

(2) **False oath or account, etc.** Made a false oath or account in, or in relation to, any proceeding in bankruptcy;

(3) **Presenting false claim.** Presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

(4) **Receiving property from bankrupt.** Received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or

(5) **Extorting money for forbearing to act, etc.** Extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

**Acting as referee when interested.** *c* A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon

conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or

(2) **Purchasing property, etc.** Purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

(3) **Refused to permit inspection of accounts.** Refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the court so to do.

**Prosecutions to be in one year.** *d* A person shall not be prosecuted for any offense arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

Similar provisions in other Acts, R. S. Secs. 5012 and 5132, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book as follows: Section 29 at Sections 649, 659, 661, 663, 668 and 698: Clause *a* at Sections 357, 650 and 654; Clause *b* at Sections 179, 651, 652, 653, 654, 655, 659, 663 and 725; Clause *c* at Sections 97, 657 and 668; Clause *d* at Section 659.

**Section 30. Rules, forms, and orders; United States Supreme Court to make.** *a* All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

This Section of the Act is considered in this book at Sections 88 and 776.

**Section 31. Computation of time.** *a* Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

Similar provisions in other Acts, R. S. Sec. 5013, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Sections 159, 200, 226, 504, 517, 712 and 832.

**Section 32. Transfer of cases in different courts.** *a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

Similar provision was made by general order 16 under the Act of 1867.

This Section of the Act is considered in this book at Sections 34, 196, 197 and 264.

## CHAPTER V.

### OFFICERS, THEIR DUTIES AND COMPENSATION.

**Section 33. Creation of two offices, referee and trustee.**  
*a* The offices of referee and trustee are hereby created.

Similar provisions in other Acts, R. S. Sec 4943, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Sections 78, 351 and 356.

**Section 34. Appointment, removal, and districts of referees.** *a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and

(2) **Designation of districts.** Designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

Similar provisions in other Acts, R. S. Secs. 4993 and 4997, Act of 1867, page 1825, *post*., Sec. 5 of the Act. of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 2 of the Act of 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book at Sections 78 and 81.

**Section 35. Qualifications of referees.** *a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

Similar provisions in other Acts, R. S. Secs. 4994 and 4995, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Sections 79 and 81.

**Section 36. Oath of office of referees.** *a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

Similar provisions in other Acts, R. S. Sec. 4995 Act of 1867, page 1825 *post*.,

This Section of the Act is considered in this book at Section 80.

**Section 37. Number of referees.** *a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

Similar provisions in other Acts R. S. Sec. 4993, Acts of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Section 78.

**Section 38. Jurisdiction of referees.** *a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to

(1) **To consider petitions.** Consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions;

(2) **Administer oaths, examine witnesses, etc.** Exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment;

(3) **Take possession and release property, etc.** Exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act;

(4) **Perform certain duties of bankruptcy courts.** Perform such part of the duties, except as to questions arising out of the applications of bankrupt for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and

(5) **Authorize employment of stenographers.** Upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

Similar provisions in other Acts, R. S. Secs. 4998, 4999, 5002 and 5009, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book as follows: Clause *a* at Sections 81, 83, 85 and 242; Clause (1) at Sections 84, 85, 168, 242 and 247; Clause (2) at Sections 89 and 609; Clause (3) at Sections 84, 87, 91, 99, 211, 213 and 222; Clause (4) at Sections 84, 87, 88, 91, 169, 213, 694, 699, 708 and 734; Clause (5) at Sections 89, 91, 96, 349, 590 and 620.

**Section 39. Duties of referees. *a* Referees shall**

(1) **Declare dividends.** Declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable;

(2) **Examine schedules, etc.** Examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended;

(3) **Furnish information, etc.** Furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest;

(4) **Give notices.** Give notices to creditors as herein provided;

(5) **Prepare records, etc.** Make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

(6) **Prepare schedules, etc.** Prepare and file schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so;

(7) **Preserve records, etc.** Safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded;

(8) **Transmit papers to clerks, etc.** Transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail;

(9) **Preserve evidence, etc.** Upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and

(10) **Obtain papers, etc.** Whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

**Referees not to act if interested.** *b* Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

Similar provisions in other Acts, R. S. Secs. 4998, 5000 and 5001, Act of 1867 page 1825, *post*.

This Section of the Act is considered in this book as follows: Clause *a* at Section 82; Clause (1) at Section 599; Clause (2) at Sections 170, 180 and 201; Clause (3) at Section 83; Clause (4) at Section 287; Clause (5) at Sections 94 and 96; Clause (6) at Section 175; Clause (7) at Section 83; Clause (8) at Section 96; Clause (9) at Sections 89, 91, 94, 96, 349 and 620; Clause (10) at Section 83; Clause *b* at Section 567.

**Section 40. Compensation of referees.** *a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.<sup>1</sup>

**On transfer from one to another.** *b* Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

**Where reference revoked.** *c* In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

Similar provisions in other Acts, R. S. Secs. 4990, 5008, 5124 and 5125, Act of 1867, page 1825, *post*. And general order 30 under Act of 1867; Secs. 6 and 13 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 47 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book at Sections 98, 338, 344, 579 and 584.

<sup>1</sup> Sec. 40*a* as amended by the Act of 1903. As originally enacted it read: "*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from

a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." (Act of 1898.)



**Section 41. Contempts before referees.** *a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law;

**When witness not required to attend.** *Provided,* That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

**Contempt proceedings; penalty.** *b* The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

Similar provisions in other Acts, R. S. Secs. 4999, 5002, 5005 and 5006, Act of 1867, page 1825, *post.*, Secs. 14 and 15 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book as follows: Section 41 at Sections 34, 90 169, 349, 412, 618, 669 and 675; Clause *a* at Sections 89, 349, 618, 623, 628, 637, 675 and 683; Clause *b* at Sections 84, 628 and 680.

**Section 42. Records of referees; manner of keeping.** *a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

*b* A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

**Books to be certified and transmitted to court.** *c* The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

Similar provisions in other Acts, R. S. Sec. 5000, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Sections 96 and 604.

**Section 43. Referee's absence or disability; filling vacancy.** *a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

Similar provisions in other Acts, R. S. Sec. 5007, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Sections 78 and 81.

**Section 44. Appointment of trustees.** *a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

Similar provisions in other Acts, R. S. Secs. 5034, 5036 to 5042, Act of 1867, page 1825, *post*., Sec. 3 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Secs. 6 and 7 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book at Sections 86, 211, 281, 285, 286, 351, 352, 354, 363, 605 706 and 805.

**Section 45. Qualifications of trustees.** *a* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) cor-

porations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

Similar provisions in other Acts, R. S. Sec. 5035, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Section 353.

**Section 46. Death or removal of trustees; suits not to abate, etc.** *a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

Similar provisions in other acts, R. S. Secs. 5036, 5039, 5042 and 5048, Act of 1867, page 1825, *post*.

This Section of the Act is considered in this book at Sections 355, 363 and 648.

**Section 47. Duties of trustees.** *a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates;

(2) **Collect money, etc.** Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.<sup>1</sup>

<sup>1</sup> Sec. 47a Clause 2 as amended by the Act of 1910. As originally enacted it read: "Collect and reduce to money the property of the states for which they are trustees,

under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest." (Act of 1898.)

(3) **Deposit money, etc.** Deposit all money received by them in one of the designated depositories;

(4) **Disburse money; how.** Disburse money only by check or draft on the depositories in which it has been deposited;

(5) **Furnish information.** Furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest;

(6) **Keep accounts.** Keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts;

(7) **Detailed statements to creditors.** Lay before the final meeting of the creditors detailed statements of the administration of the estates;

(8) **Make final reports.** Make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors;

(9) **Pay dividends.** Pay dividends within ten days after they are declared by the referees;

(10) **Report condition of estates.** Report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and

(11) **Exemptions.** Set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

**Concurrence of two or three necessary.** *b* Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

**File adjudication in recorder's office.** *c* The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the

filing fee, shall be paid out of the estate of the bankrupt as part of the cost and disbursements of the proceedings.<sup>1</sup>

Similar provisions in other Acts, R. S. Secs 5059, 5062 and general order 19, Act of 1867, page 1825, *post*. Sec. 9 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 54 of the Act of April 4, 1800, 2 Stat. at L. 19.

This Section of the Act is considered in this book as follows: Clause *a* at Section 603; Clause (1) at Section 596; Clause (2) at Sections 358, 371, 372, 381, 404, 406, 535, 555, 596; Clause (3) at Section 359; Clause (4) at Section 599; Clause (5) at Section 357; Clause (6) at Section 360; Clause (7) at Sections 360 and 603; Clause (8) at Sections 287, 360 and 603; Clause (9) at Sections 357 and 599; Clause (10) at Sections 360, 598 and 599; Clause (11) at Sections 428 and 431; Clause *b* at Section 357; Clause *c* at Sections 357, 364 and 370.

**Section 48. Compensation of trustees, receivers and marshals.** (a) Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lien holders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

**Three trustees.** (b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

**Withhold compensation.** (c) The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

<sup>1</sup> This clause was added by the Act of 1903.

**Compensation receivers and marshals.** (d) Receivers or marshals appointed pursuant to section two, subdivision three, of this Act shall receive for their services, payable after they are rendered, compensation by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees, as the court may allow, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such compositions: *Provided, further*, That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this Act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee: *Provided, further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.

**Compensation for conducting business.** (e) Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lien holders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on

moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided, further*, That before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section fifty-eight of this Act.”<sup>1</sup>

<sup>1</sup> Sec. 48a as amended by the Act of 1910. In the original Act it read: “a Trustees shall receive as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars,

“b In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

“c The court may, in its discretion, withhold all compensation

from any trustee who has been removed for cause.” (Act of 1898.)

Sec. 48a was amended in 1903 to read:

“a Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on all moneys disbursed by them as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars, and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.” (Act of 1903.)



Similar provisions in other Acts, R. S. Secs. 5099, 5124 and 5127, Act of 1867, page 1825, *post*; Sec. 6 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 29 of the Act of April 4, 1800, 2 Stat. at L. 19.

This section of the Act is considered in this book at Sections 219, 338, 364, 365, 366, 579 and 584.

**Section 49. Accounts and papers of trustees.** *a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

Similar provisions in other Acts, R. S. Sec. 5062, Act of 1867, page 1825, *post*.

This section of the Act is considered in this book at Sections 89, 357 and 361.

**Section 50. Bonds of referees and trustees.** *a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

**Of trustees.** *b* Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

**Of new trustee, etc.; amount may be increased.** *c* The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

**Surety's property, value.** *d* The court shall require evidence as to the actual value of the property of sureties.



**Two necessary.** *e* There shall be at least two sureties upon each bond.

**Excess of property.** *f* The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

**Corporations may be.** *g* Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

**Filing of bonds.** *h* Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

**Bond, trustee's liability.** *i* Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

**Joint.** *j* Joint trustees may give joint or several bonds.

**Failure to give creates vacancy.** *k* If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

**Suits upon referees'.** *l* Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

**Suits upon trustees'.** *m* Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

Similar provisions in other Acts, R. S. Secs. 4995 and 5036, Act of 1867, printed at page 1825, *post*.

This section of the Act is considered in this book as follows: Clause *a* at Section 80; Clause *b* at Sections 354 and 355; Clause *c* at Sections 281, 285 and 355; Clause *d* at Sections 80 and 355; Clause *e* at Sections 80 and 355; Clause *f* at Sections 80 and 355; Clause *g* at Sections 80 and 355; Clause *h* at Sections 80 and 355; Clause *i* at Section 355; Clause *j* at Section 355; Clause *k* at Sections 80 and 355; Clause *l* at Section 80; Clause *m* at Section 355.

**Section 51. Duties of clerks.** *a* Clerks shall respectively

(1) **To account.** Account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) **Collect fees, etc.** Collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) **Deliver papers to referee, etc.** Deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) **Pay referee.** And within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

This section of the Act is considered in this book at Sections 99 and 166.

**Section 52. Compensation of clerks and marshals.** *a* Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

**Of marshals.** *b* Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

Similar provisions in other Acts, R. S. Secs, 5124, 5125 and 5127, Act of 1867, page 1825, *post*; Sec. 13 of the Act of Aug. 19, 1841, 5 Stat. at L. 440, Secs. 46 and 47 of the Act of April 4, 1800, 2 Stat. at L. 19.

This section of the Act is considered in this book as follows: Clause *a* at Section 100; Clause *b* at Section 102.

**Section 53. Duty of Attorney-General to report annually.** *a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

This section of the Act is considered in this book at Section 103.

**Section 54. Statistics of bankruptcy proceedings.** *a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

Similar provisions in other Acts, R. S. Sec. 5127 Act of 1867, page 1825, *post*.

This section of the Act is considered in this book at Section 103.

## CHAPTER VI.

### CREDITORS.

**Section 55. Meetings of creditors.** *a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

**Presiding officer, duties.** *b* At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of cred-

itors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

**Creditors' duty.** *c* The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

**Subsequent meetings of.** *d* A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

**Call of meeting by court.** *e* The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

**Final meeting.** *f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

Similar provisions in other Acts. As to holding first meeting, see R. S. Secs 5014, 5032 to 5035, Act of 1867; Sec. 7 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 6 of the Act of April 4, 1800, 2 Stat. at L. 19.

As to subsequent meetings, see R. S. 5092 to 5098, Act of 1867.

This section of the Act is considered in this book as follows: Clause *a* at Sections 211 and 280; Clause *b* at Sections 86, 281, 282 and 608; Clause *c* at Section 281; Clause *d* at Section 287; Clause *e* at Section 287; Clause *f* at Sections 287 and 603.

**Section 56. Voters at meetings of creditors.** *a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

**Holders of secured claims not entitled, etc.** *b* Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either

the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

Similar provisions in other Acts. See R. S. Secs 5034 and 5035, Act of 1867.

This section of the Act is considered in this book as follows: Clause *a* at Sections 282, 284, 287 and 691; Clause *b* at Sections 187, 190, 282, 338 and 579.

**Section 57. Proof and allowance of claims; of what to consist.** *a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

**When founded upon a writing.** *b* Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

**After proved, may be filed.** *c* Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

**Allowance of claims, etc.** *d* Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

**Claims of secured creditors, etc.** *e* Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

**Claims, hearing objections.** *f* Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

**Preferred claims.** *g* The claims of creditors who have received preferences, voidable under section sixty, subdivision *b*, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances.<sup>1</sup>

**Value of securities held by secured creditors, etc.** *h* The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

**Claims secured by individual undertaking.** *i* Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

**Penalty, forfeiture, debts due as, allowance.** *j* Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

**Reconsideration of claims.** *k* Claims which have been allowed may be reconsidered for cause and reallocated or re-

<sup>1</sup> Sec. 57 *g* as amended by the Act of 1903. As originally enacted it read: "*g* The claims of creditors who have received prefer-

ences shall not be allowed unless such creditors shall surrender their preferences." (Act of 1898.)

jected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

**Recovery of dividend.** *l* Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

**Claims of one bankrupt against another.** *m* The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

**Time for proving claims.** *n* Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment:

**Of infants, etc.** *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

Similar provisions in other Acts. See R. S. Secs. 5077 to 5084, Act of 1867; Secs. 5 and 7 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Secs. 16, 37 and 39 of the Act of April 4, 1800, 2 Stat. at L. 19.

This section of the Act is considered in this book as follows: Clause *a* at Sections 334, 335 and 336; Clause *b* at Sections 334 and 345; Clause *c* at Section 344; Clause *d* at Sections 283, 344 347 and 348; Clause *e* at Sections 185, 282, 338, 339 and 579; Clause *f* at Sections 288 and 347; Clause *g* at Sections 282, 288, 323, 329, 342, 343, 349, 494, 498 and 577; Clause *h* at Sections 329, 338, 339, 340, 453, 574 and 579; Clause *i* at Sections 304, 321, 329, 339, 586, 595 and 794; Clause *j* at Sections 289 and 759; Clause *k* at Sections 283 and 349; Clause *l* at Sections 349 and 357; Clause *m* at Sections 303 and 329; Clause *n* at Sections 290, 291, 327, 328, 331, 332 and 691.

**Section 58. Notices to creditors.** *a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors;



(4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.<sup>1</sup>

**Of first meeting.** *b* Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting.

**Other notices.** Other notices may be published as the court shall direct.

**By referee.** *c* All notices shall be given by the referee, unless otherwise ordered by the judge.

Provisions for notices in other Acts: First meeting, R. S. Sec. 5019; of meetings generally, R. S. Sec. 5094; of composition, R. S. Sec. 5103; of petition for discharge, R. S. Sec. 5109; of dividends, R. S. Sec. 5102, Sec. 9 of the Act of Aug, 19, 1841, 5 Stat. at L. 440, and Sec. 29 of the Act of April 4, 1800, 2 Stat. at L. 19; of filing trustees' account, R. S. Sec. 5096.

This section of the Act is considered in this book as follows: Clause *a* at Sections 29, 82, 91, 219, 280, 287, 360, 363, 366, 563, 571, 574, 575, 576, 580, 599, 603, 617, 691, 694, 699, 708 and 713; Clause *b* at Section 280; Clause *c* at Sections 82, 84, 101, 280 and 287.

**Section 59. Petition, who may file as voluntary bankrupt.**  
*a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

**Involuntary.** *b* Three or more creditors who have provable claims against any person which amount in the aggregate,

<sup>1</sup> Sec. 58 *a* as amended by the Act of 1910. As originally enacted, it read: "*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions

or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings." (Act of 1898.)



in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

**To be in duplicate.** *c* Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

**Notice to creditors not joined in petition.** *d* If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard;

**Hearing of case, etc.; when dismissed.** If upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

**Creditors, computing number of.** *e* In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

**Appearance of.** *f* Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

**Notice of dismissal.** *g* A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors, and to that end the court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses,

and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard.<sup>1</sup>

Similar provisions in other Acts. Voluntary petitioners, R. S. Sec. 5044, Act of 1867, printed page 1825, *post*; Sec. 7 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Involuntary petitions, R. S. Sec. 5021, Act of 1867, printed 1825, *post*; Sec. 1 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Secs. 1 and 2 of the Act of April 4, 1800, 2 Stat. at L. 19; Intervening petitioners, R. S. Sec. 5026.

This section of the Act is considered in this book as follows: Clause *a* at Sections 134, 160, 163 and 247; Clause *b* at Sections 181, 183, 185, 186, 187, 189, 190 and 199; Clause *c* at Sections 99, 165, 199 and 200; Clause *d* at Sections 199, 228 and 235; Clause *e* at Section 187; Clause *f* at Sections 186, 225, 226, 242, 247 and 836; Clause *g* at Sections 171, 183 and 247.

**Section 60. Preferred creditors.** *a* A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.<sup>2</sup>

<sup>1</sup> Sec. 59 *g* as amended by the Act of 1910. As originally enacted, it read: "*g* A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors." (Act of 1898.)

<sup>2</sup> Sec. 60*a* as amended by the Act of 1903. As originally enacted, it read: "*a* A person shall be deemed to have given a preference

if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." (Act of 1898.)

**Preference, when given; voidable.** *b* If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.<sup>1</sup>

**Preferred creditor giving further credit; set off of new credit.** *c* If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's

<sup>1</sup> Sec. 60*b* as amended by the Act of 1910. Prior to that Act this clause read: "*b* If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." (Act of 1898.)

This clause was again amended

in 1903 to read: "*b* If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." (Act of 1903.)

estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

**Payments to attorneys, etc.; re-examination of.** *d* If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

Similar provisions in other Acts: As to preferential and fraudulent transfers, see R. S. Secs. 5128 to 5132, Act of 1867, printed at page 1825, *post*.

This section of the Act is considered in this book as follows: Section 60 at Sections 147, 148, 381, 382, 447, 470, 471, 483, 488, 490, 492, 494, 495, 498, 500, 514, 517, 529 and 591; Clause *a* at Sections 147, 493, 494, 496, 498, 499, 512, 517, 522, 532 and 545; Clause *b* at Sections 37, 38, 183, 323, 342, 358, 369, 371, 434, 437, 465, 474, 494, 497, 498, 505, 508, 509, 535, 536, 542, 543, 545 and 551; Clause *c* at Section 323; Clause *d* at Sections 107, 526 and 591.

## CHAPTER VII.

### ESTATES.

**Section 61. Depositories for money.** *a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees.

**Bond.** And shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

This section of the Act is considered in this book at Section 359.

**Section 62. Expenses of administering estates; report and approval.** *a* The actual and necessary expenses incurred by

officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

Similar provisions in other Acts. See R. S. Secs. 5099 and 5127, Act of 1867, printed page 1825, *post*; Sec. 29 of the Act of April 4, 1800, 2 Stat. at L. 19.

This section of the Act is considered in this book at Sections 100, 367, 588 and 590.

**Section 63. Debts which may be proved.** *a* Debts of the bankrupt may be proved and allowed against his estate which are

(1) **Fixed liability.** A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

(2) **Costs of suit due etc.** Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;

(3) **Costs incurred before filing petition.** Founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt;

(4) **On open account.** Founded upon an open account, or upon a contract express or implied; and

(5) **Judgments, etc.** Founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

**Allowances of unliquidated claims.** *b* Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

Similar provisions in other Acts. See R. S. Secs. 5067 to 5070, Act of 1867, printed at page 1825, *post*; Sec. 5 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 39 of the Act of April 4, 1800, 2 Stat. at L. 19.

This section of the Act is considered in this book as follows: Section 63 at Sections 181, 182, 288, 289, 296, 304, 306, 325, 348 and 754; Clause *a* at Sections 288, 289, 291, 292, 294 and 298; Clause (1) at Sections 294, 295, 296, 298, 302, 305, 307, 325 and 757; Clause (2) at Section 306; Clause (3) at Section 306; Clause (4) at Sections 301, 307, 312, 315, 325 and 326; Clause (5) at Sections 297 and 758; Clause *b* at Sections 290, 291, 302, 309, 311, 322, 332 and 754.

**Section 64. Debts which have priority; taxes.** *a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

**Order of payment.** *b* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be

(1) **Cost of preserving estate.** The actual and necessary cost of preserving the estate subsequent to filing the petition;

(2) **Filing fees.** The filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery.<sup>1</sup>

(3) **Cost of administration, etc.** The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing

<sup>1</sup> Sec. 64 *b* clause 2, as amended by the Act of 1903. As originally enacted it read: "The filing fees paid by creditors in involuntary cases." (Act of 1898.)

the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow;

(4) **Wages of workmen, etc.** Wages due to workmen, clerks, travelling or city salesmen<sup>2</sup> or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and

(5) **Owing to person entitled to priority, etc.** Debts owing to any person who by the laws of the States or the United States is entitled to priority.

**Payment of claims accruing after composition set aside or discharge revoked.** *c* In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

Similar provisions in other Acts. See R. S. Sec. 5101, Act of 1867, printed at page 1825, *post*; Sec. 5 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sec. 62 of the Act of April 4, 1800, 2 Stat. at L. 19.

This section of the Act is considered in this book as follows: Section 64 at Sections 15, 249, 331, 341, 582, 583, 586 and 592; Clause *a* at Sections 357, 586 and 587; Clause *b* at Sections 15, 105, 106, 108, 111, 220, 306, 313, 583, 587, 588, 589, 590, 591, 592, 594 and 595; Clause *c* at Sections 582, 706 and 805.

**Section 65. Dividends, declaration and payment on allowed claims.** *a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

**Declaration of first.** *b* The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the

<sup>2</sup> The words "travelling or city salesmen" were inserted in this clause by the Act of June 15, 1906, 34 Stat. at L. 267.



amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *provided*, that the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And *provided, further*, that the final dividend shall not be declared within three months after the first dividend shall be declared.<sup>1</sup>

**Creditors receiving, not affected by proof of subsequent claims, etc.** *c* The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

**Preference of certain creditors.** *d* Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

**Limit to claimant's right to collect.** *e* A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

<sup>1</sup> Sec. 65 *b* as amended by the Act of 1903. As originally enacted it read: "*b* The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals

five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order." (Act of 1898.)



Similar provisions in other Acts. See R. S. Sections 5092 to 5097, Act of 1867, printed at page 1825, *post*; Section 10 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Sections 29 and 30 of the Act of April 4, 1800, 2 Stat. at L. 19. 3

This section of the Act is considered in this book as follows: Clause *a* at Sections 597 and 599; Clause *b* at Sections 287, 599 and 603; Clause *c* at Sections 597 and 599; Clause *d* at Sections 597 and 599; Clause *e* at Section 597.

**Section 66. Unclaimed dividends; after six months paid into court.** *a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

**After one year, distributed.** *b* Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt:

**Of minors.** *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

This section of the Act is considered in this book at Sections 357 and 602.

**Section 67. Liens; unrecorded claims not.** *a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

**Trustee subrogated to rights of creditor.** *b* Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

**Lien, judgment, etc.; created within four months, to be dissolved.** *c* A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if

(1) **If defendant were insolvent.** It appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or

(2) **Knowledge of.** The party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or

(3) **Through fraud.** That such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved.

**Trustee subrogated, etc.** But the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

**Liens given in good faith, etc.** *d* Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.<sup>1</sup>

**Conveyances, etc., subsequent to act and within four months of petition; to defraud, etc., void.** *e* That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration;

<sup>1</sup> Sec. 67 *d* as amended by the Act of 1910. As originally enacted it read: "*d* Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present con-

sideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act." (Act of 1898.)

**Property remains part of assets.** And all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim same by legal proceedings or otherwise for the benefit of the creditors.

**Conveyances, etc., within four months of petition; void under state laws; void under this act.** And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.<sup>1</sup>

**Liens, etc., created through legal proceedings; void, etc.** That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same.

**Property passes to trustee.** And shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid.

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<sup>1</sup> This Clause was added by the Act of 1903.

**Court may order conveyances; purchaser for value.** And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

Similar provisions in other Acts. As to valid liens protected, see R. S. Section 5075, Act of 1867, printed at page 1825, *post*; Section 2 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Section 63 of the Act of April 4, 1800, 2 Stat. at L. 19.

As to when attachment liens dissolved, see R. S. Section 5044, Act of 1867, printed at page 1825, *post*.

As to fraudulent transfers, see R. S. Section 5129, Act of 1867, printed at page 1825, *post*.

This section of the Act is considered in this book as follows: Section 67 at Sections 413, 432, 465 and 490; Clause *a* at Sections 371, 372, 406, 434, 437, 441, 467, 471, 472, 474, 532 and 583; Clause *b* at Sections 358, 440, 472, 473 and 493; Clause *c* at Sections 371, 437, 440 and 493; Clause *d* at Sections 57, 434, 435, 455, 466, 470, 505, 519, 594 and 692; Clause *e* at Sections 37, 38, 183, 342, 371, 381, 383, 413, 434, 437, 470, 471, 474, 490, 497, 499, 505, 520, 535, 536, 542, 543 and 548; Clause *f* at Sections 42, 45, 53, 55, 56, 58, 59, 138, 150, 184, 306, 371, 381, 382, 427, 432, 434, 435, 437, 438, 439, 440, 445, 447, 448, 450, 451, 453, 461, 463, 465, 542, 544, 594, 758, 797 and 810.

**Section 68. Set-offs and counterclaims; allowed.** *a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

**Not allowed.** *b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

Similar provisions in other Acts. See R. S. Section 5072, Act of 1867, printed at page 1825, *post*; Section 5 of the Act of Aug. 19, 1841, 5 Stat. at L. 440; Section 42 of the Act of April 4, 1800, 2 Stat. at L. 19.

This section of the Act is considered in this book at Sections 316, 321, 323, 334 and 512.

**Section 69. When property may be seized; possession of property.** *a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders.

**Bond of indemnity.** Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained.

**Released on giving bond.** Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

Similar provisions in other Acts. See R. S. Section 5024, Act of 1867, printed at page 1825, *post*.

This section of the Act is considered in this book at Sections 84, 87, 101, 211, 222 and 608.

**Section 70. Title to property.** *a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification,

**Vested in trustee.** Shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt to all

- (1) **Documents.** Documents relating to his property;
- (2) **Patents, etc.** Interests in patents, patent rights, copyrights, and trade-marks;
- (3) **Certain powers.** Powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person;

(4) **Transferred in fraud.** Property transferred by him in fraud of his creditors;

(5) **Which might have been transferred, etc.** Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him:

**Policy of insurance.** *Provided,* That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and

(6) **Rights of action upon contracts.** Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

**Appraisal of property.** *b* All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court.

**Sale for not less than seventy-five per centum of appraised value.** Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

**Trustee to convey title.** *c* The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

**Vesting title on; setting composition aside.** *d* Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

**May avoid certain transfers, etc.** *e* The trustee may avoid any transfer by the bankrupt of his property which any cred-

itor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication.

**Recovery of property.** Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.<sup>1</sup>

**Title revested on confirming composition.** *f* Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him.

Similar provisions in other Acts, As to property passing to the trustee generally, See R. S. Sections 5044 to 5053, Act of 1867, printed at page 1825, *post*; Sections 2 and 3 of the Act of Aug. 19, 1841, 5 Stat. at L. 440. Sections 10, 11, 13, 17, 27 and 50 of the Act of April 4, 1800, 2 Stat. at L. 19.

As to selling property See R. S. Sections 5062 to 5066 and 5075 Act of 1867, printed at page 1825, *post*;

This Section of the Act is considered in this book as follows: Section 70 at Sections 34, 87, 358, 376, 377, 382 and 491; Clause *a* at Sections 215, 358, 365, 368, 370, 371, 372, 377, 381, 413, 416, 428, 446 453 and 605; Clause (1) at Section 378; Clause (2) at Section 379; Clause (3) at Section 380; Clause (4) at Sections 371 and 381; Clause (5) at Sections 379, 384, 398, 399, 403 and 446; Clause (6) at Sections 402 and 403; Clause *b* at Sections 357, 431, 564, 568 and 569; Clause *c* at Sections 338, 371, 512 and 568; Clause *d* at Sections 371, 706 and 805; Clause *e* at Sections 37, 371, 381, 434, 437, 497, 535, 536, 542, 543, 548 and 551; Clause *f* at Sections 371, 702 and 704.

#### THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

**Force and effect; petition for voluntary bankruptcy; involuntary.** *a* This Act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

**Cases pending under State laws.** *b* Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

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<sup>1</sup> The last Clause was added by the Act of 1903.



**Section 71. Clerks to keep indexes and make searches, etc.** That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts; provided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.<sup>1</sup>

This Section of the Act is considered in this book at Section 99.

**Section 72. No additional fees to referees or trustees.** That neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this Act.<sup>2</sup>

This section of the Act is considered in this book at Sections 98, 364, 366 and 739.

**Section 19 of the Act of 1903.** That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.

**Section 14 of the Act of 1910.** That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of said Act approved July first, eighteen hundred and ninety-eight, as amended by said Act approved February fifth, nineteen hundred and three, and as further amended by said Act approved June fifteenth, nineteen hundred and six.

This Section of the Act is considered in this book at Sections 98, 364, 366 and 739.

<sup>1</sup> Sec. 71 was added by the Act of 1903.

<sup>2</sup> Sec. 72 as amended by the Act of 1910. This Section was first introduced into the Act by the Act of 1903 and read as follows:

“That neither the referee nor the

trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act:”









# THE LAW AND PROCEEDINGS IN BANKRUPTCY.

## CHAPTER I.

### A BRIEF HISTORY OF BANKRUPT LAW.

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| SEC.                                   | SEC.  |
| 1. Bankrupt laws of the Romans.        | 5. The Act of 1800.                                 |
| 2. Bankrupt laws in other countries.   | 6. The Act of 1841.                                 |
| 3. English bankrupt laws.              | 7. Law of 1867.                                     |
| 4. Bankrupt laws of the United States. | 8. A brief comparison of the Acts of 1867 and 1898. |

#### § 1. Bankrupt laws of the Romans.

In very early times the debtor was at the mercy of his creditors.<sup>1</sup> He might be imprisoned or suffer bodily torture, as his creditors willed.

The first steps toward a system of bankruptcy were taken with the object of relieving the debtor. These laws in some cases were carried to such an extent as to work great injustice to the creditors. The rights of the creditors were then again considered, but in connection with the rights of the debtor. Then for the first time appeared the chief principles of the law of bankruptcy, namely, that when a man is unable to pay his just debts the property remaining to him rightly belongs

<sup>1</sup> Mr. Justice Blackstone, in his Commentaries (Vol. 2, pp. 472, 473), refers to the early Roman laws on this subject. The laws of the twelve tables provided that creditors might cut the debtor's body in pieces, and each of them take his proportionate share. These laws provided that the creditors might imprison the debtor in chains, or subject him to stripes

and hard labor at their mercy, and sometimes sell him, his wife and children into perpetual slavery. Later, it is true, an equally vicious law was enacted for the benefit of the debtor, which provided that if an insolvent debtor would *swear* that he had not enough left to pay his debts, he should not be required to give up even that which he had in his possession.

to his creditors, and ought to be distributed ratably among them towards the satisfaction of their debts. It was later that the debtor was released from future liability in respect to those debts, although from the first he was relieved from corporal punishment.

The first law resembling in any marked degree a bankrupt law, as it is understood at the present time, is found in the Roman law of cession—*cessio bonorum*. It was introduced by Julius Cæsar, and provided that if a debtor yielded up all his fortune to his creditors he was secured from being dragged to a goal "*omni quoque corporali cruciatu semoto.*"<sup>2</sup>

The law of cessions extended to all classes of persons, much like the present bankrupt law of the United States, but it did not release or discharge the debt or exempt the future acquisitions of the debtor from execution for the debt.<sup>3</sup> It merely exempted the debtor from imprisonment and corporal punishment.

## § 2. Bankrupt laws in other countries.

Similar laws were introduced in other continental countries in Europe.

Chancellor Kent, writing in the first quarter of the present century, said:<sup>4</sup> "And it may be laid down as the law of Germany, France, Holland, Scotland, England, etc., that insolvent laws are not more extensive in their operation than the *cessio bonorum* of the civil law. In many parts of Germany, as we are informed by Huberus and Heineccius, a *cessio bonorum* does not even work a discharge of the debtor's person, and much less of his future property. But in Germany the *cessio bonorum* has the severe operation of depriving the insolvent of his remedy for a personal trespass committed prior to the cession, so far as pecuniary compensation is in question."

<sup>2</sup> 2 Black Com. 473.

<sup>3</sup> 1 Kent Com. 422-3. In *Fitzgerald v. Phillips*, 4 Martin (La.), O. S. 292, Judge Derbigny cites the *cessio bonorum* (1, 4, 5 and 6) of the Roman law to the effect that

only so much of the property acquired after a cession as exceeded the amount necessary to the debtor's support was liable for his debts prior to the cession.

<sup>4</sup> 1 Kent Com. 423.

According to the Spanish law, property which the debtor acquired after his cession was not *all* liable for his debts, but only so much of it as exceeded the amount necessary for his support.<sup>5</sup>

It is not within the scope of this sketch to consider the bankrupt laws of all countries. While the present act was pending, the judiciary committee of the House of Representatives took no little pains to ascertain from different sources what other countries had done in respect to bankruptcy legislation. This committee reported to congress December 16, 1897, that the following countries have bankruptcy laws: Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Costa Rica, Denmark, England, France, Germany, Guatemala, Haiti, Honduras, Ireland, Italy, Liberia, Mexico, Netherlands, Norway, Paraguay, Portugal, Roumania, Russia, Scotland, Spain, Sweden, Turkey, Uruguay and Wales. The committee did not ascertain whether or not there was a bankruptcy law in Chile, Colombia, Dominican Republic, Hawaii, Japan, Korea, Peru, Syria, Switzerland or Venezuela.

It will be observed that, aside from China and possibly Japan, there are no countries of any considerable importance but what have bankruptcy laws in the modern sense of the word.

"In China the various foreign nationalities, except the United States, have bankruptcy laws which are enforced against their nationals, those of Germany being very strict, and others perhaps less so. . . . There never was such a law in existence among the Chinese as a bankruptcy law. All delinquents in China pass into the dishonored class, and are soon put under process of coercive termination of a business career, and are subject to punishment by bamboo blows. The laws against bankrupts in China are, theoretically, very severe, a failure of \$1,500 to \$5,000 entailing banishment, and from \$5,000 upward, summary decapitation. No distinc-

<sup>5</sup> But the early law of Louisiana, which was also founded on the civil law, contained no such ex-

emption. *Fitzgerald v. Phillips*, 3 Martin, O. S. 588; 4 Martin, O. S. 292.

tion is made between fraudulent bankruptcy and unavoidable ones."

In Guadeloupe there is no relief whatever for a bankrupt.

In Siam "there are no bankruptcy laws, as we understand them. When a man's assets fall short of his liabilities he either compounds with his creditors or leaves the country hurriedly. If taken, his own person and those of his family may be held until the debt be paid."

### § 3. English bankrupt laws.

The bankrupt law was an innovation on the common law. The English system of bankruptcy was borrowed directly from continental jurisprudence.<sup>6</sup> "We have fetched," said Lord Coke, "as well the name as the wickedness of bankrupts from foreign nations."<sup>7</sup> The English word bankrupt is derived from the Italian, *banca rotta*, meaning a broken bank or bench.<sup>8</sup>

The English system of bankruptcy originated in 1542 with the statute of 34 and 35 Henry VIII., chap. 4. It has been frequently modified by subsequent legislation, but it has never been abolished during any period since that time. Originally a bankrupt was considered a criminal offender.<sup>9</sup>

The law of Henry VIII. was directed against debtors, whether traders or not, who sought fraudulently to evade the

<sup>6</sup> 2 Blackstone's Com. 472.

<sup>7</sup> 4 Inst. 277.

<sup>8</sup> See Skeat's Etym. Dic., subject, Bankrupt; Century Dic., subject, Bankrupt; 2 Blackstone's Com. 472.

"It is said to have been the custom in Italy to break the bench, or counter, of a money-changer upon his failure; but the allusion is probably figurative, like *break*, *crash*, *smash*, similarly used in English."—*Century Dic.*, BANKRUPT.

Mr. Justice Blackstone suggests another derivation, when he says:

"Some choose to adopt the word *route*, which in French signifies a trace, or track, and tells us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offence (34 Hen. VII., c. 4), 'against such persons as do make bankrupt' is a literal translation of the French idiom, *qui font banque route*."—2 Blackstone's Com. 472 N.

<sup>9</sup> 2 Blackstone's Com. 471.

payment of their debts, or, as it was expressed in the act, "who, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown or keep their houses, not minding to pay, or return to pay, any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit from other men for their own pleasure and delicate living, against all reason, equity and good conscience." The next statute was that of 13 Elizabeth, chap. 7. By this statute the law of bankruptcy was restricted to traders, and certain acts were prescribed, called acts of bankruptcy, upon the committing of which a trader became liable to be adjudged a bankrupt.

It was not until the statutes of 4 Anne, chap. 17, and 10 Anne, chap. 15, that the bankrupt law lost its criminal nature. The bankrupt law then became an equitable system. The bankrupt, upon surrendering his property and conforming to the requisitions of the bankrupt law, was entitled to a certificate of discharge. This was obtained only with the consent of a specified majority of his creditors. When it was issued it released him from liability for his prior debts.

In 1825, by the general bankrupt act of 6 George IV., chap. 16, the former statutes were consolidated and many important alterations introduced.

In the year 1831 an important change was made in the mode of administering the bankrupt law. Courts of bankruptcy were established by the statute of 1 and 2 William IV., chap. 56. Before this time the law had been administered by the lord chancellor or by commissioners appointed by the chancellor. This statute removed the jurisdiction of bankrupt cases in the first instance from the court of chancery to that of bankruptcy, reserving only an appeal from that court to the lord chancellor as to matters of law and equity and questions of evidence. Other important alterations were introduced. Thus under this statute there was no deed of assignment of the bankrupt's property, but the property vested in the assignees by operation of law under their appointment.

This statute was followed by 5 and 6 William IV., chap. 29, and by 5 and 6 Victoria, chap. 122, which further mod-



ified the law and the organization of the courts. The numerous statutes relating to bankruptcy were again consolidated by the bankrupt law consolidation act of 1849. This was amended in a few particulars by the act 15 and 16 Victoria, chap. 77, and by the bankruptcy act, 1854. A further amendment of the law of bankruptcy, known as the "Bankrupt Act, 1861," 24 and 25 Victoria, chap. 134, abolished the court for the relief of insolvent debtors and transferred its jurisdiction to the court of bankruptcy. By this act non-traders were made subject to the law of bankruptcy. By the "Bankruptcy Amendment Act, 1868," 31 and 32 Victoria, chap. 104, further changes were made.

After unsuccessful attempts in several successive sessions of parliament to reform the bankrupt laws, the general bankrupt act of 32 and 33 Victoria, chap. 71, was passed in 1869. This act in turn was followed by an act entitled "An act to amend and consolidate the laws of bankruptcy," 46 and 47 Victoria, chap. 52, passed in 1883, to take effect from the first of January, 1884. This act, with its amendments, comprises all the statute law relating to bankrupts, except the provisions for the punishment of fraudulent debtors, which are contained in the Debtors' Act of 1869, 32 and 33 Victoria, chap. 62, which were not repealed by the act of 1883.<sup>10</sup> This act of 1883 has been several times amended. The principal amendments are: the act of 50 and 51 Victoria, chaps. 57 and 66, passed September 16, 1887; the act of 51 and 52 Victoria, chap. 62, passed December 24, 1888; the act of 53 and 54 Victoria, chap. 71, passed August 18, 1890, and the act of 60 and 61 Victoria, chap. 19, passed July 15, 1897.

It is not, however, within the scope of this work to discuss the English acts at length, or to follow step by step the development of the present system of bankruptcy in England.

<sup>10</sup> "By the Bankruptcy Act, 1883, the Bankruptcy Act, 1869, is repealed, subject to provisions for carrying out proceedings pending under it. But the Debtors' Act,

1869, remains in force, subject only to such alterations as were necessary for adapting it to the new Bankruptcy Act." (Robson Bank, page 21.)

For this purpose the reader is referred to modern works on English bankrupt laws.<sup>11</sup>

#### § 4. Bankrupt laws of the United States.

Congress has established four systems of national bankruptcy in this country.

The first system originated with the act of April 4, 1800,<sup>12</sup> which was repealed December 19, 1803.<sup>13</sup> There was no national bankruptcy act thereafter until the act of August 19, 1841.<sup>14</sup> This statute was repealed within two years after its passage,<sup>15</sup> and again the nation was without a uniform system of bankruptcy. The third general act was passed March 2, 1867,<sup>16</sup> by the 39th congress. The system established by this statute existed eleven years, and was terminated September 1, 1878, by the act of June 7, 1878.<sup>17</sup> The present statute, establishing a uniform system of bankruptcy throughout the United States, was passed July 1, 1898,<sup>18</sup> and amended by the Act of February 5, 1903,<sup>19</sup> and the Act of June 25, 1910.<sup>19\*</sup>

It may be observed that each of these systems differed materially from all the others, although necessarily similar in many respects. It may be, therefore, of interest in considering the present statute to review briefly the principal provisions of the former legislation in the United States on the subject of bankruptcies.

#### § 5. The Act of 1800.

The first national bankrupt act<sup>20</sup> was confined to "any merchant, or other person, residing in the United States, actually using the trade of merchandise, by buying and selling in gross or by retail, or dealing in exchange, or as a banker,

<sup>11</sup> Robson's Law and Practice in Bankruptcy (1894); Williams' Bankruptcy Practice (1898).

<sup>12</sup> 2 Stat. at L. 19.

<sup>13</sup> 2 Stat. at L. 248.

<sup>14</sup> 5 Stat. at L. 440.

<sup>15</sup> Act of March 3, 1843, 5 Stat. at L. 614.

<sup>16</sup> 14 Stat. at L. 517.

<sup>17</sup> 20 Stat. at L. 99, 1 Supp. 170.

<sup>18</sup> 30 Stat. at L. 544. This statute is printed in full at the end of this volume.

<sup>19</sup> 32 Stat. at L. 797.

<sup>19\*</sup> 36 Stat. at L. 838.

<sup>20</sup> Act of April 4, 1800. 2 Stat. at L. 19.

broker, factor, underwriter or marine insurer.”<sup>21</sup> Under this act proceedings in bankruptcy could be instituted only by a creditor—involuntary bankruptcy—and not by the insolvent himself. There was no provision in this act for voluntary bankruptcy.

Under this statute bankruptcy proceedings could be commenced only after the person to be adjudged a bankrupt had committed an act of bankruptcy specified in the act.

The act provided that it should constitute an act of bankruptcy if a person liable to be adjudged a bankrupt, “with intent unlawfully to delay or defraud his or her creditors, depart from the state in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she can not be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or shall secretly convey his or her goods out of his or her house, or conceal them to prevent their being taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months or more, or escape therefrom, or whose land or effects being attached by process issuing out of or returnable to any court of common law, shall not, within two months after written notice thereof, enter special bail

Cases arising under or construing this act are: *Tucker v. Oxley*, 5 Cranch, 34, 3 L. Ed. 29; *Harrison v. Sterry*, 5 Cranch, 289, 3 L. Ed. 104; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *Richards v. Maryland Ins. Co.*, 8 Cranch, 84, 3 L. Ed. 496; *Wood v. Owings*, 1 Cranch, 239, 2 L. Ed. 94; *Blight v. Ashley*, No. 1541, Fed. Cas., Pet. C. C. 15; *Barnes v. Billington*, No. 1015 Fed. Cas., 1 Wash. C. C. 29;

*Marks v. Barker*, No. 9096, Fed. Cas., 1 Wash. C. C. 178; *Humphreys v. Blight*, No. 6870, Fed. Cas., 1 Wash. C. C. 44, 4 Dall. 370; *Lucas v. Morris*, No. 8587, Fed. Cas., 1 Paine, 396.

As to the powers of congress, see also *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; Sec. 9, *post*.

<sup>21</sup> Act of April 4, 1800, 2 Stat. at L. 19, Sec. 1.

and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she may be arrested at or before the return day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt.”<sup>22</sup>

Within six months after such act had been committed a petition for a commission of bankruptcy might be preferred by a creditor or partnership whose single debt amounted to one thousand dollars, or by two creditors whose debts amounted to fifteen hundred dollars, or by more than two creditors whose debts amounted to two thousand dollars.

Under the act of 1800, proceedings in bankruptcy were instituted by filing a petition for a commission of bankruptcy in the district court for the district in which the debtor resided. The judge of the district court thereupon issued such commission, appointing commissioners of such bankrupt not exceeding three in number.<sup>23</sup> Immediately upon taking the oath prescribed by the act, they proceeded to execute the commission and to administer the estate of the bankrupt.

The administration of the estate in brief was as follows: Upon due examination and sufficient cause shown against the person charged, the commissioners declared him to be a bankrupt, and took into their possession all of his real and personal property, together with his deeds, books of account, papers, etc. They held the same until an assignee was chosen by the creditors at a meeting called for that purpose.

<sup>22</sup> 2 Stat. at L. 21, Sec. 1.

<sup>23</sup> By Sec. 14 of the Act of April 29, 1802, 2 Stat. at L. 164, provision was made for general com-

missioners of bankruptcy to be appointed by the President of the United States.

It was the duty of the assignee to hold the title to the estate and to collect the assets of the bankrupt. Within one year after the commission issued the assignee was required to report the amount of moneys in his possession at a meeting of the commissioners and creditors duly called by notice. The commissioners in their judgment declared the first dividend at this meeting. This was paid to all creditors who had proved their claims before the commissioners. Provisions were made for similar dividends subsequently, until the whole estate of the bankrupt had been distributed *pro rata* among the creditors.

The commissioners reported to the court what had been done in making their return of the commission. The debtor was thereupon entitled to be discharged from all debts by him due and owing at the time he was declared a bankrupt. A certificate of discharge was issued by the court to such bankrupt, which might be pleaded in bar of any claims which had been or might have been proven before the commissioners.

The life of this act was limited to five years, but owing to the inconvenience of reaching federal courts this system became unpopular, and the act was repealed by the act of December 19, 1803.<sup>24</sup>

## § 6. The Act of 1841.

The second act<sup>25</sup> provided for voluntary as well as involuntary bankruptcy.

Any person whatsoever residing in the United States owing debts which were not created in consequence of a defalcation

<sup>24</sup> 2 Stat. at L. 248.

<sup>25</sup> Act of August 19, 1841, 5 Stat. at L. 440.

The following are cases under the act: *Nelson v. Carland*, 1 How. 265, 11 L. Ed. 126; *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236; *Lessee of Waller v. Best*, 3 How. 111, 11 L. Ed. 518; *Ex parte The City Bank of New Orleans*, 3 How.

292, 11 L. Ed. 603; *Nugent, Assignee, v. Boyd*, 3 How. 426, 11 L. Ed. 664; *Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690; *Shawhan v. Wherritt*, 7 How. 627, 12 L. Ed. 847; *In re Shouse, Crabbe*, 482, No. 12815, Fed. Cas.; *Wakeman v. Hoyt*, No. 17051, Fed. Cas., 5 Law Rep. 309; *Albany Exch. Bank v. Johnson*, No. 131, Fed. Cas., 5 Law

as a public officer, or an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, was entitled under this act to be declared a bankrupt upon his own request and to have his estate administered accordingly.

Any person being a merchant, or using the trade of merchandise, or a retailer of merchandise, or any banker, factor, broker, underwriter or marine insurer owing debts to the amount of not less than two thousand dollars, was liable to be declared a bankrupt at the request of one or more of his creditors to whom he owed debts amounting in the whole to not less than five hundred dollars, provided he had committed an act of bankruptcy.

An act of bankruptcy was defined in these words, "whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter or marine insurer, shall depart from the state, district or territory of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested; or shall willingly or fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels or evidence of debt." <sup>26</sup>

Rep. 313; *Atkinson v. Farmers' Bank*, No. 609, Fed. Cas., Crabbe 529; *In re Bonnet*, No. 1632, Fed. Cas., 1 N. Y. Leg. Obs. 310; *Fisher, et al., v. Currier*, No. 4818, Fed. Cas., 5 Law Rep. 217; *Jones v. Sleeper*, No. 7496, Fed. Cas., 2 N. Y. Leg. Obs. 131; *Stewart v. Loomis*, No. 13433, Fed. Cas.; *Baldwin v. Rosseau*, No. 803 Fed. Cas., 1 N. Y. Leg. Obs. 391; *In re House*, No. 6735 Fed. Cas., 1 N. Y.

Leg. Obs. 348; *Ex parte Potts*, No. 11344, Fed. Cas., Crabbe 469; *Barton v. Tower*, No. 1085, Fed. Cas., 5 Law Rep. 214; *Ex parte Galbraith*, No. 5187, Fed. Cas., 1 N. Y. Leg. Obs. (note) 5; *Gassett, et al., v. Morse*, No. 5264, Fed. Cas., 3 N. Y. Leg. Obs. 350; *Hutchins v. Taylor*, No. 6953, Fed. Cas., 5 Law Rep. 289.

<sup>26</sup> 5 Stat. at L. 442.

Proceedings under this act were instituted by a petition filed by the bankrupt, setting forth a list of his creditors, with the amounts due each, together with an inventory of his property and assets of every description, or by a petition filed by a creditor, stating the nature of the act of bankruptcy, the amount of his debts, and alleging the total indebtedness of the bankrupt to be more than two thousand dollars.

This petition was filed and all proceedings in the case were had in the district court for the district in which the person supposed to be a bankrupt resided or had his place of business. The court appointed an assignee, in whom the title to all the bankrupt's property, real, personal and mixed, vested by operation of law. The assignee proceeded to collect the assets of the bankrupt, prosecute and defend suits, and had general authority to sell, manage and dispose of the estate. Proofs of debts and claims were made before the court, either by oral testimony or depositions. In order to secure a speedy settlement and close the proceedings, it was made the duty of the court to order and direct a collection of the assets and a reduction of the same into money and a distribution thereof at as early a period as practicable, consistently with a due regard to the interests of the creditors.

A bankrupt who made a *bona fide* surrender of his property and complied with the orders and directions of the court was entitled to a certificate of discharge from all his debts. This was to be decreed and allowed by the court which had declared him bankrupt. There were several exceptions to this rule, but they are not important in this connection.

The same objection was raised to this act that had been made to the act of 1800, for the nation was still in its infancy, and the means of transportation were exceedingly limited. But in addition to this the following is found in the report of the judiciary committee in the 52d Congress, first session, in its discussion of the act of 1841: "That law became the sub-

ject of political contention, and was repealed, to take effect March 3, 1843.”<sup>27</sup>

### § 7. Law of 1867.

The act of 1867,<sup>28</sup> with its subsequent amendments,<sup>29</sup> established a system of national bankruptcy, which was in full operation for eleven years. Although the act of 1867 differs in many respects from that of 1898, there are many points of similarity between the two statutes. The courts were frequently called upon to construe the provisions of the act of 1867 and its amendments. Many questions, which will arise under the present act, may be considered settled by these decisions. Although many decisions under the former act are not controlling with reference to very many provisions of the present act, yet very many of them are important in throwing light upon the meaning of terms and provisions employed. It is obvious that certain provisions were introduced in the present act for the purpose of settling disputed questions and to avoid judicial construction of provisions of the prior act.

The cases decided under the act of 1867 therefore become important in construing the present statute. To intelligently use the earlier decisions in construing and applying the present act, it will be necessary to constantly consult the text of the act itself, and to compare it with similar provisions of

<sup>27</sup> Act of March 3, 1843, 5 Stat. at L. 614.

See Report of the House Committee on Judiciary, 55th Congress, 2d session, discussing the Act of 1898.

<sup>28</sup> Act of March 2, 1867, 14 Stat. at L. 517.

<sup>29</sup> The principal amendment to this act was passed June 22, 1874, 18 Stat. at L. 178, and at the same time a complete substitute for the act was enacted in title sixty-one of the Revised Statutes. The provisions of the amendment of 1874 are incorporated in the Revised

Statutes, edition of 1878. The Act of 1867 was also amended by the Act of July 27, 1868, 15 Stat. at L. 227; by the Act of June 30, 1870, 16 Stat. at L. 173; by the Act of July 14, 1870, 16 Stat. at L. 276; by the Act of June 8, 1872, 17 Stat. at L. 334; by the Act of Feb. 13, 1873, 17 Stat. at L. 436; by the Act of March 3, 1873, 17 Stat. at L. 577; by the Act of Feb. 18, 1875, 18 Stat. at L. 320; by the Act of July 26, 1876, 19 Stat. at L. 102, and by the Act of Feb. 27, 1877, 19 Stat. at L. 252.



the act of 1898. For this purpose the act of 1867, as revised and amended, is printed in full in another place.<sup>80</sup> It is therefore unnecessary to state the general scheme of this system here. The reader is referred to the act itself for such information.

The principal objection to the act of 1867 was the great expense of administering it, and in some parts of the country the inefficiency of the officers appointed to assist the courts in executing the law. It was repealed, to take effect September 1, 1878.<sup>81</sup>

The next national system of bankruptcy in this country was established by the act of July 1, 1898.<sup>82</sup>

### § 8. A brief comparison of the Acts of 1867 and 1898.

**SIMILARITY OF THE ACTS.**—The general scope and objects sought to be accomplished by these two statutes are substantially the same. In both instances congress evidently intended to legislate fully on “the subject of bankruptcies.” Each statute provides that proceedings may be instituted by the insolvent or by his creditors. In other words, each statute establishes voluntary as well as involuntary bankruptcy.

The principal ends of each statute are to provide a system of bankruptcy, the object of which is, *first*, to ascertain whether the person whose affairs are drawn in question has become a bankrupt; *second*, if so, to take into legal custody all his property and assets of every description for the purpose of making a fair and just distribution among his creditors; *third*, to protect the creditors from frauds and unjust preferences; *fourth*, to ascertain the amount due to the several creditors and their priority; *fifth*, to relieve the bankrupt from his load of debts and to discharge him free to acquire property, which shall not be liable to the payment of ante-bankrupt debts. In short, the acts seek to enable every

<sup>80</sup> See page 865, *post*.

<sup>82</sup> 30 Stat. at L. 544.

<sup>81</sup> Act of June 7, 1878, 20 Stat. at L. 99, 1 Supp. 170.

honest debtor, irrespective of whether he becomes bankrupt upon his own or the petition of his creditors, to have fair treatment and a speedy consideration of his rights; and that the creditors shall have their claims considered, allowed, and the assets of the debtor ratably divided.

The administration of each law is confided to particular United States courts, designated as courts of bankruptcy. These courts act to a large extent through special officers, subject to have their action reviewed by the judge. In 1867 these officers were called registers and assignees; in 1898 they are called referees and trustees. The action of the courts of bankruptcy under each act is subject within limits to review by the appellate courts of the United States.

**POINTS OF DIFFERENCE BETWEEN THE ACTS.**—The act of 1898 differs in many respects from the act of 1867. The chief points of difference between the acts may be briefly stated as follows:

*First*, Under the act of 1867 a person could take advantage of voluntary bankruptcy only when his debts exceeded the amount of three hundred dollars. Under the present act all limitation is removed as to the amount of indebtedness. He may even proceed without expense upon filing an affidavit of his poverty.

*Second*, Under the act of 1867 corporations could take the benefit of their voluntary provisions. A corporation could not institute proceedings to declare itself a bankrupt under the present act, until the amendment of 1910.<sup>32\*</sup>

*Third*, Under the act of 1867, as amended, any person owing debts provable in bankruptcy exceeding the amount of three hundred dollars could be proceeded against by one of his creditors, but under the act of 1898 a person must be indebted to the amount of one thousand dollars or more in order to be adjudged a bankrupt.

*Fourth*, Under the act of 1867 a person might become a bankrupt although solvent,<sup>33</sup> but solvency may be pleaded

<sup>32\*</sup> B. A. 1898, Sec. 4, as amended by the act of June 25, 1910, 36 Stat. at L. 838.

<sup>33</sup> By reference to Section 5021 of the Revised Statutes it will be seen that the act of 1867, as amended, provides that any bank-

in bar <sup>84</sup> of any proceeding in bankruptcy under the act of 1898.

*Fifth*, Another important difference between the two acts is in the time when the property passes out of the bankrupt. Under the act of 1867 the title to the bankrupt's property vested upon a deed of conveyance in the assignee as of the date of filing the petition in bankruptcy; but it vests in the trustee by operation of law under the act of 1898 as of the date of the adjudication in bankruptcy.

*Sixth*, Another difference in the manner of administering the bankrupt's estate is the more convenient number of officers. Under the act of 1867 one or more registers were appointed for the district, but the act of 1898 provides for at least one referee in each county in the state.

*Seventh*, The act of 1867 provided no means of arbitration in addition to the regular course in bankruptcy.<sup>85</sup> Under the present act the majority of all creditors, whose claims have been allowed, may secure the possession of the property, and obtain for the debtor a dismissal of the case. In addition to this, provision is also made for the arbitration and for the compromise of controversies.

*Eighth*, Under the act of 1867 the "operative, clerk and house servant" were allowed priority over other claims to an amount not exceeding fifty dollars for labor performed. Under the present act the amount is fixed at three hundred dollars to each claimant.

er, broker, merchant, trader, manufacturer or miner, who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days shall be deemed to have committed an act of bankruptcy, and to have become liable to be adjudged a bankrupt. He may be worth a million dollars over and above his liabilities, and yet such a failure for fourteen days would

make him liable to the involuntary provisions of the act; or if he fraudulently stopped payment of his commercial paper, that constituted an act of bankruptcy at once.

<sup>84</sup> B. A. 1898, Sec. 3c.

<sup>85</sup> It, however, was introduced by the amendment of June 22, 1874, 18 Stat. at L. 178, Sec. 17. R. S., Sec. 5103.

*Ninth*, Under the act of 1867, as amended, no discharge was granted to a debtor whose assets did not equal fifty per centum of the claims proved against his estate, for which he was held liable as principal debtor, unless the assent in writing of a majority in number and value of his creditors was filed in the case at or before the time of the hearing of the application for a discharge. Under the act of 1898 no assent is required from the creditors. If the debtor has acted dishonestly by committing certain acts forbidden in the act he will not be discharged; if he has acted honestly he will be. The granting or withholding of it is dependent upon the honesty of the man, not upon the value of his estate.

*Tenth*, Another point of difference between the two acts will be noticed in a comparison between the fees allowed. The expense of the proceedings is very much reduced in the act of 1898.

There are other differences which will be referred to hereafter as the various questions arising under the present statute are discussed.

## CHAPTER II.

**THE NATIONAL BANKRUPT ACT AND STATE  
INSOLVENT LAWS.**

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| <p><b>SEC.</b><br/> 9. The power of congress to enact bankrupt laws.<br/> 10. The states may enact bankrupt and insolvent laws.<br/> 11. State insolvent laws with reference to impairing the obligation of a contract.<br/> 12. State insolvency laws are suspended by the bankrupt act.</p> | <p><b>SEC.</b><br/> 13. When the bankrupt act took effect.<br/> 14. Insolvent laws.<br/> 15. How far state insolvency laws are superseded by the bankrupt act.<br/> 16. State insolvency laws are in force as to persons not reached by the bankrupt act.<br/> 17. The effect of the bankrupt act upon state assignment laws.</p> |
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**§ 9. The power of Congress to enact bankrupt laws.**

The power of congress to establish a system of bankruptcy depends, like the other powers of congress, solely upon the constitution of the United States. The only provision in the constitution relating to such legislation is that "congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States."<sup>1</sup>

This has been construed by the courts to be a grant of plenary power.<sup>2</sup> Under the authority of this provision congress has full power to legislate on "the subject of bankruptcies," with the one qualification that its laws thereon shall be uniform throughout the United States.

<sup>1</sup> U. S. Const. Art. 1, Sec. 8, clause 4. See Story on the Constitution, Secs. 1105-1115.

<sup>2</sup> *In re Klein*, 1 How. 277, note; *Hurley v. Devlin*, 151 Fed. Rep. 919, 18 Am. B. R. 627; *Silverman's case*, No. 12855 Fed. Cas., 1 Saw. 410; *In re California Pac. R. Co.*, No. 2315, Fed. Cas., 3 Saw. 240; *In re Jordan*, No. 7514, Fed. Cas., 8 N. B. R. 180; *In re Reiman*, No. 11673, Fed. Cas., 7 Ben. 455; *In re*

*Irvine*, 1 Penn. L. J. 291; *Kunzler v. Kohaus*, 5 Hill 317.

In *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, the Supreme Court of Massachusetts, construing the present act, and speaking of the power of congress to pass a bankrupt law superseding state insolvent laws, said: "Of the power of congress to pass an act having this effect there can be no doubt." See also, *In re Brusser Co.*, 90 Fed. Rep. 651.

It is therefore necessary to consider what is meant by "the subject of bankruptcies." It was contended at one time that the framers of the constitution intended to restrict the laws of congress with such scope only as the English bankrupt laws had when the constitution was adopted. But the courts ruled that the subject was not so limited.<sup>3</sup>

Again, it was contended that it was restricted to bankrupt laws as distinguished from insolvent laws. But it may be regarded as settled that the subject of bankruptcies, as used in the constitution, includes both bankrupt and insolvent laws.<sup>4</sup> Speaking of this distinction, Mr. Justice Marshall observed:<sup>5</sup> "This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law." And Judge Cowan, after reviewing the definition of bankruptcy, said:<sup>6</sup> "Looking thus at the uniform popular acceptance of the word from earliest times, and in all English countries, and supposing that to be the true one, I read the constitution thus: 'Congress shall have power to establish uniform laws on the subject of any person's general inability to pay his debts throughout the United States.' "

It has also been held that the power of the national legislature is not limited to bankrupt laws relating to any particular class of persons, as traders, merchants, etc., but that congress may pass laws applying to all or any persons within the United States.<sup>7</sup>

<sup>3</sup> *In re Reiman*, No. 11673, Fed. Cas., 7 Ben. 455; *In re Klein*, 1 How. 277, note; *In re Silverman*, No. 12855, Fed. Cas., 1 Saw. 410.

<sup>4</sup> *In re Klein*, 1 How. 277, note; *Thompson v. Alger*, 53 Mass. 442; *Kunzler v. Kohaus*, 5 Hill 317; *Keene v. Mould*, 16 Ohio 12; *McCormick v. Pickering*, 4 N. Y. 276; *Rowan v. Holcomb*, 16 Ohio 463; *Loud v. Pierce*, 25 Me. 233; *Lalor v. Wattles*, 8 Ill. 225; *State Bank*

*v. Wilborn*, 6 Ark. 35; *Reed v. Vaughn*, 15 Mo. 137; *Cutter v. Folsom*, 17 N. H. 139; *In re Irwine*, 1 Penn. L. J. 291; *Morse v. Hovey*, 1 Sandf. Ch. 187.

<sup>5</sup> *In Sturgess v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529.

<sup>6</sup> *In Kunzler v. Kohaus*, 5 Hill 321.

<sup>7</sup> *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *Hanover Nat.*

Congress has power also to modify the obligation of contracts in the legitimate exercise of the power to establish bankrupt laws.<sup>8</sup> This is incidental to the power directly given by the constitution. Hence congress may provide for the discharge of a debtor, releasing him from contracts existing at the time the law is passed. An act of congress may be constitutional, when, if the same act was passed by a state legislature, it would be unconstitutional.<sup>9</sup>

Another incident growing out of this delegated power is the authority to commit the execution of the system to the courts of the United States, and to prescribe such modes of procedure and means of administering the system as it may deem best suited to carry the law into successful operation.<sup>10</sup>

It may be observed that the extent to which this power shall be exercised rests in the discretion of congress, subject only to the qualification that such laws shall be uniform through the United States. The uniformity required relates to national legislation only, and therefore the laws of the

*Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113, 8 Am. B. R. 1; *In re Klein*, 1 How. 277, note; *In re California Pac. R. Co.*, No. 2315, Fed. Cas., 3 Saw. 240; *Sweatt v. Boston, etc., R. Co.*, No. 13684, 3 Cliff. 339; *Winter v. Iowa, etc., R. Co.*, No. 17890, Fed. Cas., 2 Dill, 487; *Kunzler v. Kohaus*, 5 Hill 317.

<sup>8</sup> *In re Klein*, 1 How. 277, note; *Kunzler v. Kohaus*, 5 Hill 317; *Sackett v. Andross*, 5 Hill 327; *Keene v. Mould*, 16 Ohio 12; *McCormick v. Pickering*, 4 N. Y. 276; *Loud v. Pierce*, 25 Me. 233; *In re Reiman*, No. 11675, Fed. Cas., 12 Blatch. 562.

<sup>9</sup> The constitution expressly prohibits states from passing laws "impairing the obligation of a contract." Const., Art. 1, Sec. 10.

*In re Jordan*, No. 7514, Fed. Cas., 8 N. B. R. 180, Judge Dick, speaking of the Bankruptcy Act of 1867, said: "If this state had adopted the present bankrupt law it would have been unconstitutional, as it impairs the obligation of contracts and affects the rights of citizens of other states. Congress, however, could adopt the very language and principles of such state law and enact it as a national law, and such action would be constitutional; as it would constitute a system of bankruptcy uniform among the states."

<sup>10</sup> *Mitchell v. Mf. Co.*, No. 9662, Fed. Cas., 2 Story 648; *Goodall v. Tuttle*, No. 5533, Fed. Cas., 3 Biss. 219; *Sherman v. Bingham*, No. 12762, Fed. Cas., 3 Cliff. 552.

several states, as those regulating exemptions, may be left in force so long and to such extent as congress may see fit.<sup>11</sup>

The power of congress to establish laws on the subject of bankruptcies is exclusive, while exercised, but when or so far as it is not exercised its existence does not defeat state legislation.<sup>12</sup> The effect of a national bankrupt law is to suspend only, not to extinguish state laws.<sup>13</sup> The disability is removed when the act of congress is repealed, and the state laws become immediately operative without re-enactment.<sup>14</sup>

The Bankruptcy Act of 1898 is constitutional and valid legislation.<sup>15</sup>

### **§10. The States may enact bankrupt and insolvent laws.**

State legislatures may pass bankrupt or insolvent laws, provided there be no act of congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligations of contracts.<sup>16</sup>

Prior to the adoption of the constitution of the United States the several "states could exercise almost every legislative power, and among others, that of passing bankrupt

<sup>11</sup> *Darling v. Berry*, 13 Fed. Rep. 668; *In re Beckerford*, No. 1209, Fed. Cas., 1 Dill 45; *In re Jordan*, No. 7514, Fed. Cas., 8 N. B. R. 180; *In re Jordan*, No. 7515, Fed. Cas., 10 N. B. R. 427; *In re Kean* No. 7630, Fed. Cas., 2 Hughes 322; *In re Rouse, Hazard & Co.*, 41 Law Bul. (Cinti.) 34, s. c. 1 Nat. Bank News 75.

<sup>12</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Baldwin v. Hale*, 1 Wall 223, 17 L. Ed. 531; *Cook v. Moffat*, 5 How. 295, 12 L. Ed. 159. See also *Power of States*, Sec. 10, *post*.

<sup>13</sup> See *State Insolvency laws* are suspended by the Bankrupt Act, Sec. 12, *post*.

<sup>14</sup> *Baldwin v. Hale*, 1 Wall 223, 17 L. Ed. 531; *Butler v. Goreley*,

146 U. S. 303, 36 L. Ed. 981; *Tua v. Carriere*, 117 U. S. 209, 29 L. Ed. 855.

<sup>15</sup> *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113, 8 Am. B. R. 1; *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383.

<sup>16</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Bank of Tennessee v. Horn*, 17 How. 157, 15 L. Ed. 70; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531; *Farmers & M. Bank v. Smith*, 6 Wheat. 130, 5 L. Ed. 224; *Gilman v. Lockwood*, 4 Wall 409, 18 L. Ed. 432.



laws.”<sup>17</sup> They retained all such powers after its adoption, except those expressly granted to the national government. A part of the powers so granted are to be exercised exclusively by congress, and the subject is completely taken away from the state legislatures. Other powers were yielded by the states to be exclusively exercised by congress, provided that body saw fit to legislate upon the subject. But until the national legislature exercised this power, the state legislatures retained the power to enact laws on the same subject. The power to pass laws “the subject of bankruptcies” is of the latter class of grants.<sup>18</sup>

There are two restrictions to the power of the several states to enact bankrupt or insolvent laws, regulating the distribution of the estates of insolvents and authorizing the discharge of the debtors from their obligations and liabilities. These restrictions are:

*First*, A state has no power to enact a bankrupt law impairing the obligation of contracts, whether there is a national bankrupt act or not.<sup>19</sup>

*Second*, When congress establishes a national system of bankruptcy, the state insolvent laws, in so far as they are in conflict with the act of congress, are superseded and limited by the national act so long as it is in force.<sup>20</sup>

### **§ 11. State insolvent laws with reference to impairing the obligation of a contract.**

The constitution expressly forbids a state passing any law impairing the obligation of a contract.<sup>21</sup> This prohibition applies to bankrupt laws and acts as a general limitation upon

<sup>17</sup> Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529.

See also *Blanchard v. Russell*, 13 Mass. 1.

<sup>18</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Tua v. Carriere*, 117 U. S. 201, 29 L. Ed. 855; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606.

<sup>19</sup> As to State Insolvent laws impairing the obligation of contracts, see Sec. 11, *post*.

<sup>20</sup> As to the effect of a national bankruptcy system upon State Insolvent laws, see Secs. 12 *et seq.*, *post*.

<sup>21</sup> U. S. Const., Art. 1, Sec. 10.

the power of the state legislature, whether there is a national bankrupt law in force or not. Yet each state, so long as it does not impair the obligation of any contract, has the power by its laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction.<sup>22</sup>

A state has no power to enact a bankrupt law which operates to discharge a debtor from a contract entered into previous to its passage.<sup>23</sup> This is true, whether the parties to the contract are citizens of the same or different states.<sup>24</sup> The reason for this rule is that the effect of such a law is to terminate the obligation under a contract, which was not and could not have been made in view of the statute, because it was not in existence at the time the contract was made.

Whether a state may pass a bankrupt law which shall discharge a debtor from contracts entered into *after* the passage of the act has been the subject of much discussion. From the decisions it may be stated that a fair and ordinary exercise of power to pass bankrupt laws by the state does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. Whether such a state statute is repugnant to the constitution or not depends upon the citizenship of the parties to the contract.

It was held by a divided court in the case of *Ogden v. Saunders*<sup>25</sup> that a state bankrupt law discharging the person and property of the debtor does not violate the obligation of a contract entered into subsequent to its passage by citizens of that state. The reason is, that the citizens of a state are subject to its laws, and contracts made by them within its

<sup>22</sup> *Smith v. Union Bank*, 5 Pet. 518, 526, 8 L. Ed. 212; *Crapo v. Kelly*, 16 Wall. 610, 630, 21 L. Ed. 430; *Denny v. Bennett*, 128 U. S. 489, 498, 32 L. Ed. 491; *Walworth v. Harris*, 129 U. S. 355, 32 L. Ed. 712; *Geilinger v. Philippi*, 133 U. S. 246, 257, 33 L. Ed. 614; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. Ed. 613.

<sup>23</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Farmers*

and *Mechanics Bank v. Smith*, 6 Wheat. 130, 5 L. Ed. 224.

<sup>24</sup> *Farmers and Mechanics Bank v. Smith*, 6 Wheat. 130, 5 L. Ed. 224.

<sup>25</sup> 12 Wheat. 213, 6 L. Ed. 606. In this case, *Saunders*, a citizen of New York, drew bills on *Ogden* in New York, which were accepted and protested there. *Ogden* was afterwards discharged under the insolvent laws of New York,

territory are made with reference to such laws. The principle established by this case has never been overruled nor extended in subsequent cases.

It has been uniformly held that a state bankrupt or insolvent law could have no effect upon a contract made, either within or without such state, between citizens of different states.<sup>26</sup> The reason for this is, that the state has no jurisdiction beyond its own territory, and can not affect a contract entered into by a person of another state who can not be presumed to act with reference to the laws of a state of which he is not a citizen. Such state laws are held not to apply to contracts by citizens of the same state unless made within such state.<sup>27</sup> It makes no difference that the contract entered into between a citizen of one state and a citizen of another is made payable where the insolvent law exists.<sup>28</sup>

If, however, the creditor makes himself a party to proceedings under the insolvent law he will be bound by them, like any other party to judicial proceedings, and is not to be heard

passed previous to the contract of acceptance. He pleaded this discharge to an action brought against him in the district court of Louisiana. A majority of the court decided that the bankrupt or insolvent law was not a law impairing the obligation of that contract, but overruled his plea of discharge under that act.

See also Springer v. Foster, No. 13266, Fed. Cas., 2 Story 383, in which Judge Story stated the settled doctrine of the supreme court to be that no state insolvent law can discharge the obligation of any contract made in the state, except such contracts as are made between citizens of that state. He refers to the case of Ogden v. Saunders, *supra*, to support this proposition.

<sup>26</sup> Boyle v. Zacharie, 6 Pet. 348, 8 L. Ed. 423; Suydam v. Broadnax, 14 Pet. 67, 10 L. Ed. 357; Cook v. Moffatt, 5 How. 295, 12 L. Ed. 159; Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; Newton v. Hagerman, 22 Fed. Rep. 525; Springer v. Foster, No. 13266, Fed. Cas., 2 Story 383; Woodhill v. Wagner, No. 17975, Fed. Cas., Baldwin, 296.

<sup>27</sup> McMillan v. McNeill, 4 Wheat. 209, 4 L. Ed. 552. But see Marsh v. Putnam, 3 Gray, 551, where the contracting parties were citizens of the state passing the insolvent law; also Blanchard v. Russell, 13 Mass. 1.

<sup>28</sup> Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; Baldwin v. Bank of Newberry, 1 Wall. 234, 17 L. Ed. 534; Gilman v. Lockwood, 4 Wall. 409, 18 L. Ed. 432.

afterwards to object that his debt was excluded by the constitution from being affected by the law.<sup>29</sup>

**§12. State insolvency laws are suspended by the bankrupt act.**

As soon as a national bankruptcy act goes into effect all state insolvency laws in force at the time must yield so far as they are in conflict with the act of congress.<sup>30</sup> This is well settled by the decisions of the federal <sup>31</sup> and state <sup>32</sup> courts.

The reason for this is that the power of congress to legislate on the "subject of bankruptcies" is unlimited, and is exclusive to the extent that it is exercised.<sup>33</sup> A national bankruptcy act is the supreme law of the land. It is paramount to a state law having the same general object. The two can not act at the same time upon the same subject-matter, upon the same persons—both debtors and creditors—and upon the same rights without collision. The state law must

<sup>29</sup> *Clay v. Smith*, 3 Pet. 411, 7 L. Ed. 723; *Gilman v. Lockwood*, 4 Wall. 409, 18 L. Ed. 432; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531; *Perley v. Mason*, 64 N. H. 6.

<sup>30</sup> As to what constitutes a state insolvency law, see Sec. 14, *post*. As to what extent they are suspended, see Sec. 15, *post*.

<sup>31</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531; *Johnson v. Crawford & Yothers*, 154 Fed. Rep. 761; *In re Pickens Mfg. Co.*, 158 Fed. Rep. 894; *In re Mason Sash, Door and Lumber Co.*, 112 Fed. Rep. 323, 7 Am. B. R. 66; affirmed on point in *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 8 Am. B. R. 29; *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651; *In re Etheridge Furniture Co.*, 92 Fed. Rep. 329, 1 Am. B. R. 112; *In re Richard*, 94 Fed. Rep. 633, 2 Am. B. R. 506;

*In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9; *In re Salmon*, 143 Fed. Rep. 395, 16 Am. B. R. 122.

<sup>32</sup> *Harbaugh v. Costello*, 184 Ill. 110; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178; *Foley-Bean Lumber Co. v. Sawyer*, 76 Minn. 118; *First Nat. Bank v. Ware*, 95 Me. 388, 395; *Wescott Co. v. Berry*, 69 N. H. 505; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324; *In re Reynolds*, 8 R. I. 485; *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206; *Lavender's Lessee v. Gosnell*, 43 Md. 153; *Steelman v. Mattix*, 36 N. J. Law 344; *Fisk v. Montgomery*, 21 La. Ann. 446; *Van Nostrand v. Carr*, 30 Md. 128; *Boese v. Lock*, 53 How. Prac. 148; *Com. v. O'Hara*, 6 Phila. 402; *Lumber Co. v. Sawyer*, 76 Minn. 118; *Ketcham v. McNamara*, 72 Conn. 709, 6 Am. B. R. 160.

<sup>33</sup> See Power of Congress to enact bankrupt laws, Sec. 9, *ante*.

therefore yield in so far as it conflicts with the act of congress. The effect of a national bankruptcy law is to suspend the operation of the state insolvency laws and not to repeal or destroy them.<sup>34</sup>

Except as such legislation is in conflict with the bankruptcy statute it is in full force and effect during the existence of the federal bankrupt act.<sup>35</sup> An insolvent law may be amended, repealed or enacted by a state during the existence of the federal bankrupt act. Such legislation will be valid, though the operation of it in some respects is suspended while the bankrupt law continues in force.<sup>36</sup>

All disability is removed from the state legislation on the subject of insolvency, when the act of congress is repealed, and the state laws become immediately operative without reenactment, and, if amended during the existence of the bankrupt law, they become operative in their amended form.<sup>37</sup>

<sup>34</sup> *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981; *Tua v. Carriere*, 117 U. S. 209, 29 L. Ed. 855; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531; *Johnson v. Crawford & Yothers*, 154 Fed. Rep. 761, 18 Am. B. R. 608.

<sup>35</sup> *Johnson v. Crawford & Yothers*, 154 Fed. Rep. 761, 18 Am. B. R. 608; *In re Wright*, 95 Fed. Rep. 807, 811, 2 Am. B. R. 592. Affirmed under the style of *In re Worcester County* (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 815, 42 C. C. A. 637, 4 Am. B. R. 496; *In re Daniels*, 110 Fed. Rep. 745, 6 Am. B. R. 699; *In re Goldberg Bros.*, 144 Fed. Rep. 566, 16 Am. B. R. 521.

See also Sec. 15, *post*.

<sup>36</sup> *In re Wright*, 95 Fed. Rep. 807, 811, 2 Am. B. R. 592; *Simpson v. City Savings Bank*, 56 N. H. 466; *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206, 12 Am. B. R. 392; *Palmer v. Hixon*, 74 Me. 447; *Seattle Coal & Transp. Co. v. Thomas*, 57 Cal. 197.

*In Tua v. Carriere*, 117 U. S. 201, 209, 29 L. Ed. 855, the supreme court said: "The circumstance alleged by the plaintiff that in the revision of 1870 the insolvent law was formerly re-enacted is entirely immaterial. If those laws had then been enacted for the first time, they would, so far as inconsistent with the bankrupt act, have been inoperative while that act remained in force, but upon its repeal would have come into operation. The enactment of the insolvent law during the life of the bankrupt act would have been merely tantamount to a provision that the former should take effect on the repeal of the latter."

<sup>37</sup> *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981; *Tua v. Carriere*, 117 U. S. 209, 29 L. Ed. 855; *Baldwin v. Hale*, 1 Wall. 223, 17 L. Ed. 531; *In re Wright*, 95 Fed. Rep. 807, 2 Am. B. R. 592; *Orr v. Lisso*, 33 La. Ann. 476; *Lothrop v.*

An insolvent law may be amended after the repeal of the national act.<sup>38</sup> Proceedings may be instituted under an insolvent law, after it has been revived by the repeal of the bankruptcy act, founded upon acts committed prior to the repeal.<sup>39</sup>

### § 13. When the bankrupt act took effect.

It is well settled by the decisions of the federal and state courts that the present bankrupt law went into effect for the purpose of suspending the operation of state insolvency laws on July 1, 1898<sup>40</sup> and on the first moment of that day.<sup>41</sup>

The act expressly provides that it "shall go into full force and effect upon its passage; provided however, that no peti-

Foundry Co., 128 Mass. 120; *Lavender's Lessee v. Gosnell*, 43 Md. 153; *Ward v. Proctor*, 7 Met. (Mass.) 308.

<sup>38</sup> *Torrens v. Hammond*, 10 Fed. Rep. 900.

<sup>39</sup> *Lothrop v. Foundry Co.*, 128 Mass. 120; *Palmer v. Hixon*, 74 Me. 447; *Fisher v. Currier*, 7 Met. (Mass.) 424.

<sup>40</sup> *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651; *In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9; *In re Curtis*, 91 Fed. Rep. 737, 1 Am. B. R. 440; *Blake, Moffat & Towne v. Valentine Co.*, 89 Fed. Rep. 691, 1 Am. B. R. 372; *In re Hall Co.*, 121 Fed. Rep. 992, 10 Am. B. R. 88; *Wescott Co. v. Berry*, 69 N. H. 505, 4 Am. B. R. 264; *Harbaugh v. Costello*, 184 Ill. 110; *Foley-Bean Co. v. Sawyer*, 76 Minn. 118; *First Nat. Bank v. Ware*, 95 Me. 388.

In *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, the Supreme Judicial Court of Massachusetts used this language: •

"The question in this case is, whether this act so far superseded

the insolvency laws of this commonwealth from the time of its passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after July 1, 1898.

"The plain implication is, that proceedings commenced in the state courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time. We are of opinion that the language was chosen to make clear the purpose of congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute."

<sup>41</sup> *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383.

tion for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof. Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it.”<sup>42</sup>

It will be observed that the act by its own provision was made effective from the day of its passage so far as state legislation is concerned. It did not, however, affect insolvency proceedings already instituted under the state statute.<sup>42\*</sup> This provision did not prevent a debtor from filing a voluntary petition in bankruptcy and obtaining a discharge, although insolvency proceedings were pending in the state court.<sup>43</sup> No proceeding could be instituted under the state insolvency laws thereafter which conflicted with the jurisdiction conferred by the bankrupt act upon the federal courts.<sup>44</sup>

The act of 1867 fixed the date at which the act should take effect for some purposes as June 1, 1867.<sup>45</sup> The act of August 19, 1841, provided that the act should take effect from and after the first day of February, 1842.<sup>46</sup>

The weight of authority in the circuit courts (having final jurisdiction of bankruptcy cases), as well as in the state courts, is to the effect that the national bankrupt law of 1867, like the present act, *ipso facto* suspended all state legislation upon the subject of bankruptcies in conflict with the national act (2).<sup>47</sup>

<sup>42</sup> Last clause of the Act of July 1, 1898, 30 Stat. at L. 554.

<sup>42\*</sup> Osborn v. Fender, 88 Minn. 309.

<sup>43</sup> *In re* Mussey, 99 Fed. Rep. 71, 3 Am. B. R. 592; *In re* Bates, 100 Fed. Rep. 263, 4 Am. B. R. 56.

<sup>44</sup> See cases cited in the first note to this section.

<sup>45</sup> Act of March 2, 1867, 14 Stat. at L. 541, Sec. 50; *Traders Bank v. Campbell*, 14 Wall. 87, 94, 20 L. Ed. 832; *Martin v. Berry*, 37 Cal. 208; *Day v. Bardell*, 97 Mass. 246;

*Chamberlain v. Perkins*, 51 N. H. 340.

<sup>46</sup> Act of August 19, 1841, 5 Stat. at L. 449, Sec. 17; *Griswold v. Pratt*, 9 Met. 16.

<sup>47</sup> *Globe Ins. Co. v. Cleveland Ins. Co.*, No. 5486, Fed. Cas., 14 N. B. R. 311; *In re* Beisenthal, No. 1236, Fed. Cas., 14 Blatch, 146; *In re* Independent Insurance Co., No. 7017, Fed. Cas., 1 Holmes 103; *Macdonald v. Moore*, No. 8763, Fed. Cas., 8 Ben. 579; *In re Reynolds*, No. 11723, Fed. Cas., 9 N.



**§14. Insolvent laws.**

An insolvent law may be said generally to be one from which voluntary or involuntary proceedings to administer the estate of an insolvent debtor derive potency and force,<sup>48</sup> as distinguished from statutes prescribing a mode by which a common law or equitable right may be enforced to distribute the estate of an insolvent debtor among his creditors.<sup>49</sup>

A distinction was attempted to be made at one time between an insolvent and a bankrupt law, on the ground that the former provided for voluntary and the latter for involuntary proceedings. The act of 1841 embraced the essential features of both the bankrupt and insolvent laws of England.

B. R. 50; *In re* Stubbs, No. 13557, Fed. Cas., 4 N. B. R. 376; *Platt v. Preston*, No. 11219, 19 N. B. R. 241; *Van Nostrand v. Carr*, 30 Md. 128; *Rowe v. Page*, 54 N. H. 194; *Chamberlain v. Perkins*, 51 N. H. 340; *Martin v. Berry*, 37 Cal. 208; *Shears v. Solhinger*, 10 Abb. Prac., N. S. 287.

But see *contra* *Reed Bros. & Co. v. Taylor*, 32 Iowa 209; *Cook v. Rogers*, 31 Mich. 391; *Langley v. Perry*, No. 8067, Fed. Cas., 2 N. B. R. 596; *Sedgwick v. Place*, No. 12622, Fed. Cas., 1 N. B. R. 673; *Bostwick v. Burnett*, 74 N. Y. 317; *Sadler v. Immel*, 15 Nev. 265.

<sup>48</sup>*In re* Salmon, 143 Fed. Rep. 395, 16 Am. B. R. 122; *Ketcham v. McNamara*, 72 Conn. 709, 6 Am. B. R. 160; *Moody v. Port Clyde Dev. Co.*, 102 Me. 365, 18 Am. B. R. 275; *Thornhill v. Bank*, No. 13992, Fed. Cas., 1 Woods 1.

<sup>49</sup>*Randolph v. Scruggs*, 190 U. S. 533, 537, 47 L. Ed. 1165, 10 Am. B. R. 1; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *In re* Sievers, 91 Fed. Rep. 366, 1 Am. B. R. 117; *In re* Romanow, 92 Fed. Rep. 510, 1 Am. B. R. 461; *Carling v. Seymour*

*Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 8 Am. B. R. 29; *In re* Gutwillig, 90 Fed. Rep. 475, 1 Am. B. R. 78.

In *Mayer v. Hellman*, 91 U. S. 496, 502, 23 L. Ed. 377, Mr. Justice Field speaking of an assignment for the benefit of creditors in Ohio observed: "There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision."

In *Carling v. Seymour* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 8 Am. B. R. 29, the case was clearly planted on a state insolvent law, but the jurisdiction of the state court was upheld on the ground that the bill stated a case for the appointment of a receiver and the foreclosure of mortgages within its equity jurisdiction irrespective of the insolvent law.



A question was made whether that part of it which was essentially an insolvent law was within the constitutional power of congress. It was decided in the affirmative.<sup>50</sup> Since that time, so far as the law of this country is concerned, the distinction between bankrupt and insolvent laws has been practically obliterated.

The elements of an insolvent or bankrupt law are insolvency, surrender of property, its administration by a trustee or commissioner, distribution among creditors of the assets, and the discharge of the insolvent debtor from the unpaid balance of his debts and from arrest and imprisonment.<sup>51</sup> It is not essential that a statute contains a provision for the discharge of the debtor to render it an insolvent or bankrupt law.<sup>52</sup> The federal bankrupt act of 1867 expressly excepted corporations from the right to a discharge.\*

Where proceedings against an insolvent corporation to wind up its affairs derive their potency and force from the state statute the bankrupt act undoubtedly suspends the operation of that state law, as to all corporations within the purview of the bankrupt statute,<sup>53</sup> but not with respect to other corporations.<sup>54</sup> If these proceedings do not originate in the state insolvency statute, although they may be regulated to a certain extent by it, the operation of the state law is not suspended.<sup>55</sup>

<sup>50</sup> Klein's Case, 1 How. 277u; Kinzler v. Kohaus, 5 Hill (N. Y.) 317; Sackett v. Andross, 5 Hill (N. Y.) 327.

<sup>51</sup> Thornhill v. Bank, No. 13992, Fed. Cas., 1 Woods 1.

<sup>52</sup> *In re* Salmon, 143 Fed. Rep. 395, 16 Am. B. R. 122; Moody v. Port Clyde Dev. Co., 102 Me. 365, 18 Am. B. R. 275; *In re* Curtis, 91 Fed. Rep. 737, 1 Am. B. R. 440; *In re* Marshall Paper Co. (C. C. A. 1st Cir.), 102 Fed. Rep. 872, 43 C. C. A. 38, 4 Am. B. R. 468; *In re* Reynolds, No. 11723, Fed. Cas., 9 N. B. R. 50, per Mr. Justice Brad-

ley; *In re* Merchants Ins. Co., No. 9441, Fed. Cas., 3 Biss. 162; Harbaugh v. Costello, 184 Ill. 110.

\* R. S. Sec. 5122.

<sup>53</sup> Moody v. Port Clyde Dev. Co., 102 Me. 365, 18 Am. B. R. 275; Mauran v. Crown Carpet Lining Co., 23 R. I. 324, 6 Am. B. R. 734; *In re* Storck Lumber Co., 114 Fed. Rep. 360, 8 Am. B. R. 86; *In re* Merchants Ins. Co., No. 9441, Fed. Cas., 3 Biss. 162.

<sup>54</sup> Herron Co. v. Superior Ct., 136 Cal. 279, 8 Am. B. R. 92.

<sup>55</sup> See cases cited in the two notes following.

Voluntary assignments for the benefit of creditors<sup>56</sup> and proceedings to wind up the affairs of an insolvent corporation through a receiver appointed by a court of equity,<sup>57</sup> are the ordinary remedies of the common law and equity and will be given effect until directly called in question by a petition in bankruptcy.<sup>58</sup> If a court of bankruptcy seasonably obtains jurisdiction of the parties, it is entitled to administer the estate of the insolvent and the jurisdiction of the state court must yield to the paramount authority of the bankruptcy court.<sup>59</sup>

<sup>56</sup> *Randolph v. Scruggs*, 190 U. S. 533, 537, 47 L. Ed. 1165, 10 Am. B. R. 1; *Boese v. King*, 108 U. S. 329, 27 L. Ed. 760; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 37; *In re Sievers*, 91 Fed. Rep. 366, 1 Am. B. R. 117; *In re Gutwillig*, 90 Fed. Rep. 475, 1 Am. B. R. 78; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461. For a further consideration of this subject see laws regulating assignments for creditors. Sec. —, *post*.

<sup>57</sup> *In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *In re Wilmington Hosiery Co.*, 120 Fed. Rep. 180, 9 Am. B. R. 579; *State ex rel., Strohl v. Superior Ct.*, 20 Wash. 545, 2 Am. B. R. 92; *In re Empire Metallic Bedstead Co.* (C. C. A. 2nd Cir.), 98 Fed. Rep. 981, 39 C. C. A. 372, 3 Am. B. R. 575; *In re Harper Bros.* 100 Fed. Rep. 266, 3 Am. B. R. 804.

<sup>58</sup> *Randolph v. Scruggs*, 190 U. S. 533, 537, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re Watts v. Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *State ex rel Strohl v. Superior Ct.*, 20 Wash. 545, 2 Am. B. R. 92; see also Secs. 15 to 17, *post*.

<sup>59</sup> *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1; *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 76 C. C. A. 409, 16 Am. B. R. 664; *In re Lengert Wagon Co.*, 110

Fed. Rep. 927, 6 Am. B. R. 535; *In re Lesser*, 100 Fed. Rep. 433, 439, 3 Am. B. R. 815, affirmed (C. C. A. 2nd Cir.), 5 Am. B. R. 320.

*In re Watts & Sachs*, 190 U. S. 1, 27, 47 L. Ed. 933, 10 Am. B. R. 113, Mr. Justice Fuller speaking of a receivership said: "The operation of the bankruptcy laws of the United States can not be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

In *Randolph v. Scruggs*, 190 U. S. 533, 536, 47 L. Ed. 1165, 10 Am. B. A. 1, an assignment for the benefit of creditors being held legal, Mr. Justice Holmes observed: "It is admitted that a general assignment for the benefit of creditors, made within four months from the filing of a petition in bankruptcy, is void as against the trustee in bankruptcy, so far as it interferes with his administering the property assigned. This could not be denied."

State statutes regulating the administration of insolvent estates have been held to be strictly insolvent laws and superseded by the bankrupt act in Californit,<sup>60</sup> Connecticut,<sup>61</sup> Georgia,<sup>62</sup> Illinois,<sup>63</sup> Indiana,<sup>64</sup> Kentucky,<sup>65</sup> Louisiana,<sup>66</sup> Maine,<sup>67</sup> Maryland,<sup>68</sup> Massachusetts,<sup>69</sup> Minnesota,<sup>70</sup> Missouri,<sup>71</sup> Nevada,<sup>72</sup> New Hampshire,<sup>73</sup> Pennsylvania,<sup>74</sup> Rhode Island<sup>75</sup> and Wisconsin.<sup>76</sup>

<sup>60</sup> *Martin v. Berry*, 37 Cal. 208.

<sup>61</sup> *In re Hall Co.*, 121 Fed. Rep. 992, 10 Am. B. R. 88; *Ketcham v. McNamara*, 72 Conn. 709, 6 Am. B. R. 160.

<sup>62</sup> *In re Pickens Mfg. Co.*, 158 Fed. Rep. 894, 20 Am. B. R. 202; *In re Mason Sash, etc., Co.*, 112 Fed. Rep. 323, affirmed on this point under the style of *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1; *Corner v. Coates*, 69 Ga. 491.

But see *Boston Mercantile Co. v. Ould-Carter Co.*, 123 Ga. 458.

<sup>63</sup> *Harbaugh v. Costello*, 184 Ill. 110; *In re Curtis*, 91 Fed. Rep. 737, 1 Am. B. R. 440, aff. (C. C. A. 7th Cir.), 94 Fed. Rep. 630, 36 C. C. A. 430, 12 Am. B. R. 226; *Hanchett v. Waterburg*, 115 Ill. 220.

<sup>64</sup> *In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9.

<sup>65</sup> *In re Etheridge Furniture Co.*, 92 Fed. Rep. 329, 1 Am. B. R. 12; *In re McKee (Jefferson Co. Ct.)*, 1 Am. B. R. 311.

But see *Downer v. Porter*, 116 Ky. 422; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *Simonson v. Sinsheimer* (C. C. A. 6th Cir.), 95 Fed. Rep. 948, 37 C. C. A. 337.

<sup>66</sup> *Thornhill v. Bank*, No. 13992, Fed. Cas., 1 Woods 1; *Fisk v. Montgomery*, 21 La. Ann. 446.

<sup>67</sup> *Littlefield v. Gay*, 96 Me. 422, 8 Am. B. R. 409; *First Nat. Bank v. Ware*, 95 Me. 388; *Moody v. Port Clyde Dev. Co.*, 102 Me. 365, 18 Am. B. R. 275.

<sup>68</sup> *In re Storck Lumber Co.*, 114 Fed. Rep. 360, 8 Am. B. R. 86; *Lavender's Lessee v. Gosnell*, 43 Md. 153; *Van Nostrand v. Carr*, 30 Md. 128.

<sup>69</sup> *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178; *In re Eames*, No. 4237, Fed. Cas., 2 Storey 322.

<sup>70</sup> *Foley-Bean Lumber Co. v. Sawyer*, 76 Minn. 118.

<sup>71</sup> *In re Salmon*, 143 Fed. Rep. 395, 16 Am. B. R. 122.

<sup>72</sup> *Sadler v. Immel*, 15 Nev. 265.

<sup>73</sup> *Wescott v. Berry*, 69 N. H. 505, 4 Am. B. R. 264; *Rowe v. Page*, 54 N. H. 190.

<sup>74</sup> *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct., 206; *Peckhaus' Assigned Estate*, 35 Pa. Super. Ct., 330.

<sup>75</sup> *In re Reynolds*, 8 R. I. 485; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 324, 6 Am. B. R. 734.

<sup>76</sup> *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651; *Holden v. Burton*, 78 Wis. 326; *Second Ward Bank v. Schranck*, 97 Wis. 258.

See also *Binder v. McDonald*, 106 Wis. 332, 340; *Duryea v. Muse*, 117 Wis. 399.

It may be observed that in many cases, the court speaks of the entire state system as an insolvent law, without observing the distinction between insolvent and assignment laws. State statutes which only assume to deal with the making and administration of common law assignments are not insolvent or bankrupt laws. Such laws are not affected by the bankrupt act.<sup>77</sup> Illustrations of such statutes may be found in very many of the states, for example in New York,<sup>78</sup> New Jersey,<sup>79</sup> New Mexico,<sup>80</sup> Ohio<sup>81</sup> and Vermont,<sup>82</sup> which merely prescribe the mode by which common law or equitable rights may be enforced and are not affected by the bankrupt act. There is a bankrupt or insolvent law in Ohio,<sup>83</sup> New York,<sup>84</sup> Michigan,<sup>85</sup> and also in many other states, which is undoubtedly superseded by the bankrupt act. Proceedings are rarely, if ever, instituted under these statutes. The regular proceeding in those states, before as well as since the bankrupt act, has been a common law deed of assignment regulated by a code of procedure.<sup>86</sup>

### **§15. How far state insolvency laws are superseded by the Bankrupt Act.**

The insolvency laws of a state are superseded by the national bankrupt act only in so far as they conflict with the

<sup>77</sup>See the effect of the national bankrupt act upon state assignment laws, Sec. 13, *post*.

<sup>78</sup>*In re* Gutwillig, 90 Fed. Rep. —, 1 Am. B. R. 78.

<sup>79</sup>*Steelman v. Mattix*, 36 N. J. 344; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760; *Singer v. Nat. Bedstead Co.*, 65 N. J. Eq. 290.

<sup>80</sup>*Grunsfeld v. Brownell*, 12 N. M. 192.

<sup>81</sup>*Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *In re* Farrell (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63.

<sup>82</sup>*Hilliard v. Burlington Shoe Co.*, 76 Vt. 57.

<sup>83</sup>Bates' Ohio Stats. Secs. 6359 to 6383. *Wood v. Funk*, 7 O. (Pt. 1) 196; *Ex parte* Scott, 19 O. S. 581; *Smith v. Parsons*, 1 O. 236.

<sup>84</sup>Secs. 2149-2187 of the New York Code of Civil Procedure.

<sup>85</sup>The Insolvent Debtor Laws, Mich. Comp. Stats. 1887, ch. 262.

<sup>86</sup>*Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760; *In re* Gutwillig, 90 Fed. Rep. 475, 1 Am. B. R. 78; *Duryea v. Muse*, 117 Wis. 399; *Downer v. Porter*, 116 Ky. 422; *Hilliard v. Burlington Shoe Co.*, 76 Vt. 57; *Cook v. Rogers*, 31

federal statute.<sup>87</sup> In respect to all persons and matters expressly or impliedly omitted from the operation of the bankrupt act, the state insolvent laws remain in full force and effect and may be enforced by the federal or state courts.<sup>88</sup>

It is clear that the general provisions of a state insolvent law are superseded by the bankrupt act in respect to taking possession, through the officers appointed by the court, of the entire property of an insolvent reached by the bankrupt act, and distributing it among his creditors. This is the object sought to be accomplished and the end attained in the bankruptcy court under the national bankrupt act.<sup>89</sup> For the same reason a state law which releases the debtor from the unpaid balance of his debt is inoperative during the life of a national bankrupt act. A state statute allowing priority to labor claims is superseded by the bankrupt act, which expressly provides for this class of claims.<sup>90</sup>

State insolvency laws continue to be operative and enforceable with respect to such matters as the bankrupt law does not cover.

State remedies against debtors, whose debts are not released by a discharge in bankruptcy, are not affected by the

Mich. 391, per Graves ch. J. *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63.

<sup>87</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *Boese v. King*, 108 U. S. 379, 27, L. Ed. 760; *In re Worcester County* (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; *Johnson v. Crawford & Yothers*, 154 Fed. Rep. 761; *In re Gutwillig*, 90 Fed. Rep. 475, 1 Am. B. R. 78; *Patty-Joiner & Eubank Co. v. Cummins*, 93 Tex. 598.

<sup>88</sup> *In re Worcester County* (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 815, 42 C. C. A. 637, 4 Am. B. R. 496; *In re Bennett* (C. C. A. 6th Cir.), 153 Fed. Rep. 673, 82 C. C. A. 531, 18 Am. B. R. 320; *Geery's Ap-*

*peal*, 43 Conn. 289; *Simpkins v. Savings Bank*, 56 N. H. 466; *Scully v. Kirkpatrick*, 79 Pa. St. 324; *Herron Co. v. Superior Ct.*, 136 Cal. 279, 8 Am. B. R. 124; *Old Town Bank v. McCormick*, 96 Md. 341, 10 Am. B. R. 767.

<sup>89</sup> See Sec. 12, *ante*.

<sup>90</sup> *In re Rouse, Hazard & Co.* (C. C. A. 7th Cir.), 91 Fed. Rep. 96, 1 Am. B. R. 234; *In re Slomka* (C. C. A. 2nd Cir.), 122 Fed. Rep. 630, 58 C. C. A. 322, 9 Am. B. R. 635.

See also *In re Laird* (C. C. A. 6th Cir.), 109 Fed. Rep. 550, 554, 48 C. C. A. 538, 6 Am. B. R. 1, where the labor claims had become a fixed lien by virtue of insolvency proceedings in the state court.

bankrupt act.<sup>91</sup> Nor does the existing bankruptcy law meet the case of an absconding debtor, so as to prevent the issuance of a domestic attachment.<sup>92</sup> Poor debtor laws, and those which provide for the release of insolvent convicts,<sup>93</sup> and statutes in aid of execution,<sup>94</sup> are in the same situation. The bankrupt act has no provision adapted to these cases.

The general laws of the states providing for the settlement of the estates of insolvent persons deceased are not affected by the bankrupt act.<sup>95</sup> A court of bankruptcy has no jurisdiction to adjudge a deceased person to be a bankrupt or to administer his estate.<sup>96</sup>

The general laws of the states relating to exemptions are expressly preserved by Section 6 of the bankrupt act.

The courts of bankruptcy have repeatedly enforced provisions of state statutes not covered by the bankruptcy act; for example, those with respect to liens on the property of insolvents,<sup>97</sup> The reason is that these are priorities expressly preserved by Section 64*b*, clause 5, of the bankrupt act. In

<sup>91</sup> *Scully v. Kirkpatrick*, 79 Pa. 324; *Hubert v. Horter*, 81 Pa. 39; *Ex parte Winternitz*, 10 Pitts. Leg. J. N. S. 61.

<sup>92</sup> *McCullough v. Goodhart*, 8th Dist. (Pa.) 378, 3 Am. B. R. 85.

<sup>93</sup> *Jordan, Marsh & Co. v. Hall*, 9 R. I. 219; *In re Reynolds*, No. 11723, Fed. Cas.,<sup>9</sup> 9 N. B. R. 50, per Mr. Justice Bradley; *Mason v. Haile*, 12 Wheat. 370, 6 L. Ed. 660.

<sup>94</sup> *Ex parte Crawford* (C. C. A. 3rd Cir.), 154 Fed. Rep. 769, 83 C. C. A. 474, 18 Am. B. R. 618; *In re Meyers & Co.* (Ref. op.), 1 Am. B. R. 347; *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161.

<sup>95</sup> *Hawkins v. Learned*, 54 N. H. 333.

<sup>96</sup> *Vaccaro v. Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 437, 43 C. C. A. 279, 4 Am. B. R. 474; *Adams v. Terrell*, 4 Fed. Rep. 796, 802;

*In re Temple*, No. 13825, Fed. Cas., 4 Saw. 92.

<sup>97</sup> *In re Wright*, 95 Fed. Rep. 807, 2 Am. B. R. 592, affirmed under the style of *In re Worcester County* (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; *In re Bennett* (C. C. A. 6th Cir.), 153 Fed. Rep. 673, 82 C. C. A. 531, 18 Am. B. R. 320; *In re Goldberg Bros.*, 144 Fed. Rep. 566, 16 Am. B. R. 521; *In re Laird* (C. C. A. 6th Cir.), 109 Fed. Rep. 550, 48 C. C. A. 538; *In re Crow*, 116 Fed. Rep. 110, 7 Am. B. R. 545; *In re Falls City Shirt Mfg. Co.*, 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re Lewis*, 99 Fed. Rep. 935, 4 Am. B. R. 51; *In re Daniels* 110 Fed. Rep. 745, 6 Am. B. R. 699; *In re Byrne*, 97 Fed. Rep. 762, 3 Am. B. R. 268.

fact it is hard to conceive of any priority to which one may be entitled by the laws of a state, under Section 64 of the bankruptcy act, unless it be priority created by an insolvent law.

**§16. State insolvency laws are in force as to persons not reached by the Bankrupt Act.**

The insolvency laws of a state are superseded by the national bankrupt act only in so far as they conflict with the federal statute.<sup>98</sup>

The state insolvency laws continue to be operative and enforceable with respect to such persons and corporations as the bankrupt law does not reach.<sup>99</sup>

All persons and corporations not subject to either the voluntary or involuntary provisions of the bankrupt act may proceed or be proceeded against under a state insolvency law.<sup>100</sup>

The bankrupt act expressly excepts from its operation municipal, railroad, insurance and banking corporations.<sup>101</sup> The affairs of such corporation may be wound up in insolvency under the local laws. Congress has provided another method of winding up the affairs of an insolvent national bank.<sup>102</sup> Private bankers are within the provisions of the present bankrupt act.<sup>103</sup>

In case an insolvent debtor may become a voluntary, but not an involuntary, bankrupt or *vice versa*, proceedings in a state court may be maintained by or against him under a state insolvency law in respect to matters to which the bankrupt act does not apply.<sup>104</sup>

<sup>98</sup> See Sec. 15, *ante*

<sup>99</sup> *Old Town Bank v. McCormick*, 96 Md. 341, 10 Am. B. R. 767; *Herron & Co. v. Superior Ct.*, 138 Cal. 279, 8 Am. B. R. 492; *Geery's Appeal*, 43 Conn. 289; *Rittenhouse's Insolvent Estate*, 30 Pa. Super. Ct., 470; *Simpkins v. State Sav. Bank*, 56 N. H. 466; *Citizens Nat. Bank v. Gass*, 23 Pa. Super. Ct. 125; *Shepardson's Appeal*, 36 Conn. 24.

<sup>100</sup> As to who may be adjudged bankrupts under the act of 1898 see Sec. 114 *et seq.*, *post*.

<sup>101</sup> B. A. 1898, Sec. 4, as amended June 25, 1910, 36 Stat. at L. 838; See 124, *post*.

<sup>102</sup> R. S. Secs. 5220 to 5243.

<sup>103</sup> B. A. 1898, Sec. 4b, *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566.

<sup>104</sup> *Old Town Bank v. McCormick*,



The reason for this is that the bankrupt statute supersedes the state laws only so far as there is collision between them and there is no conflict in regard to such insolvencies. The mere fact that the bankrupt act reaches a debtor for certain purposes does not bar all proceedings by or against him under the state laws. If this were so there would be no remedy in either the federal or state courts in many cases. The debtor would be excluded from the state courts by virtue of the bankrupt act in cases which are not reached by, but are expressly excepted from the operation of the bankrupt act. This can not be so, because the state laws are clearly operative in all cases which are not within the provisions of the United States law.

The present bankrupt statute prior to the amendment of 1910 was not applicable, in its voluntary feature, to any corporation.<sup>105</sup> It was applicable in its involuntary feature to certain corporations enumerated in the statute and to none other.<sup>106</sup> For the reasons given above any corporation could resort to a state court prior to 1910 to have its affairs wound up by a state insolvent law.<sup>107</sup>

Since that time the bankrupt statute does not affect the operation of state insolvency laws with respect to winding up corporations not included within the provisions of the national law.<sup>108</sup> That is to say, municipal, railroad, insurance and banking corporations since the amendment of 1910.<sup>109</sup>

96 Md. 341, 10 Am. B. R. 767; *Citizens Nat. Bank v. Gass*, 29 Pa. Super. Ct. 125; *Rittenhouse's Insolvent Estate*, 30 Pa. Super. Ct. 470; *Geery's Appeal*, 43 Conn. 289; *Shepardson's Appeal*, 36 Conn. 23; *Simpson v. Savings Bank*, 56 N. H. 466.

But see *Littlefield v. Gay*, 96 Me. 422, 8 Am. B. R. 409.

<sup>105</sup> B. A. 1898, Sec. 4a.

<sup>106</sup> B. A. 1898, Sec. 4b.

<sup>107</sup> In *Randolph v. Scruggs*, 190 U. S. 533, 537, 47 L. Ed. 1165, 10 Am. B. R. 1, speaking of a voluntary assignment by a corporation in a state court, Mr. Justice Holmes

said: "No doubt, the corporation had notice of the bankruptcy law, but it could not go into bankruptcy by voluntary petition, and there is no objection to a debtor's distributing his property equally among his creditors of his own motion, if bankruptcy proceedings do not intervene."

<sup>108</sup> *Herron Co. v. Super. Ct.*, 136 Cal. 279, 8 Am. B. R. 492. (The bankrupt act was extended to mining companies after this decision by the amendment of February 5, 1903.)

<sup>109</sup> Secs. 48 *et seq.*, *post.*



The present bankrupt statute is not applicable, in its involuntary feature, to debtors owing less than one thousand dollars.<sup>110</sup> Such debtors may avail themselves of the voluntary feature of the statute.<sup>111</sup> If the state insolvency law permits compulsory proceedings against a person whose debts amount to less than that sum, creditors may proceed against their debtor in the state court, because the federal statute does not reach the case.<sup>112</sup>

The present bankrupt statute expressly excepts farmers and wage-earners from the operation of its involuntary feature.<sup>113</sup> They may avail themselves of the voluntary feature of the statute.<sup>114</sup> Congress did not thereby render inoperative the involuntary feature of a state insolvent law, which applies to farmers and tillers of the soil, by excepting that class from the involuntary part of the national statute.<sup>115</sup>

A farmer, or a wage-earner, or a debtor owing less than one thousand dollars may, but he can not be compelled to, file a voluntary petition under the bankrupt act. If he does not avail himself of the voluntary feature of the bankrupt act, his creditors may proceed against him in the state court under any statute which may reach him.<sup>116</sup> Notwithstanding proceedings have been instituted against him in the state court, a debtor may invoke the jurisdiction of a court of bankruptcy to administer his estate and grant a discharge, and the court has power

<sup>110</sup> B. A. 1898, Sec. 4b. See Sec. 43, *post*.

<sup>111</sup> B. A. 1898, 4a. See Sec. 42, *post*.

<sup>112</sup> Shepardson's Appeal, 36 Conn. 23.

<sup>113</sup> B. A. 1898, Sec. 4b. See Sec. 43, *post*.

<sup>114</sup> B. A. 1898, Sec. 4a. See Sec. 42, *post*.

<sup>115</sup> Old Town Bank v. McCormick, 69 Md. 341, 10 Am. B. R. 767; Citizens Nat. Bank v. Gass, 29 Pa. Super. Ct. 125; Rittenhouse's In-

solvent Estate, 30 Pa. Super. Ct. 470; Miller v. Jackson, 34 Pa. Super. Ct. 31.

But see Littlefield v. Gay, 96 Me. 422, 8 Am. B. R. 409.

<sup>116</sup> Old Town Bank v. McCormick, 69 Me. 341, 10 Am. B. R. 767; Citizens Nat. Bank v. Gass, 29 Pa. Super. Ct. 125; Rittenhouse's Insolvent Estate, 30 Pa. Super. Ct. 470; Shepardson's Appeal, 36 Conn. 23.

But see Littlefield v. Gay, 96 Me. 422, 8 Am. B. R. 409.

to grant the discharge although the property may have been distributed among his creditors by the state court.<sup>117</sup> A state court has no power to enjoin a debtor from filing a voluntary petition in bankruptcy.<sup>118</sup>

A creditor can not proceed against his debtor under a state statute because he is unable to secure a sufficient number of creditors to join with him to file a creditors' petition. The bankrupt law governs the case, although the creditor is not able to comply with its terms. The state law is superseded by the bankrupt act in such a case.

### **§ 17. The effect of the Bankrupt Act upon state assignment laws.**

It is well settled that a common law deed of trust or a general assignment for the benefit of creditors is not rendered unlawful or void by the bankrupt act.<sup>119</sup> This is true even where the state insolvency system is suspended by the bankrupt act.<sup>120</sup>

The right of a debtor to make an assignment for the benefit of his creditors, in the language of Mr. Chief Justice Marshall, "results from that absolute ownership which every man claims over that which is his own."<sup>121</sup> It stands upon its own basis of the common law and does not derive its potency from statute. It is a disposition of property in virtue of ownership and the power of contracting, as distinguished from a disposition commanded by positive law. It is permitted by the

<sup>117</sup> *In re* Bates, 100 Fed. Rep. 263, 4 Am. B. R. 56; *In re* Mussey, 99 Fed. Rep. 71, 3 Am. B. R. 592.

<sup>118</sup> *Filligin v. Thornton*, 49 Ga. 384.

<sup>119</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165; 10 Am. B. R. 1; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760; *In re Sievers*, 91 Fed. Rep. 366, 1 Am. B. R. 117; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461; *Cook*

*v. Rogers*, 31 Mich. 391; *Pogue v. Rowe*, 236 Ill. 157; *Downer v. Porter*, 116 Ky. 422; *Thompson v. Shaw*, 104 Me. 85; *Pleasant Hill Cemetery v. Davis*, 76 Me. 289; *Beck v. Parker*, 65 Pa. St. 262; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63.

<sup>120</sup> *Pogue v. Rowe*, 236 Ill. 157; *Peckham's Assigned Estate*, 35 Pa. Super. Ct. 332.

<sup>121</sup> *In Brashear v. West*, 7 Pet. 608, 614, L. Ed.

laws of the several states and is not prohibited by the bankrupt act absolutely, although the state court may be compelled to yield jurisdiction to enforce the trust under the deed of assignment if proceedings in bankruptcy are seasonably instituted.

There are assignment laws in many of the states regulating the distribution of estates voluntarily assigned for the benefit of creditors. These regulations vary in the different states, but in a general way they have similar features. They require the deed of assignment to be recorded, and give a particular state court jurisdiction to administer the estate. They require the assignee to give a bond and to file an inventory of the property. They require creditors who wish to claim under the assignment to present their claims within a fixed time. They authorize the collection of assets by the assignee by suit, and his discharge upon the settlement of the trust. And they provide for the distribution of the proceeds of the assigned estate among the creditors *pro rata*. Statutes of this character are not superseded by the mere existence of a bankruptcy act.<sup>122</sup>

For the purpose of preventing fraudulent and preferential transfers some state assignment laws provide that any assignment, mortgage or deed of trust, made by a debtor in contemplation of insolvency and for the purpose of giving a preference, shall operate as an assignment and transfer of all his property and inure to the benefit of all his creditors *pro rata*, if proceedings for that purpose are begun in the state court within a limited time. Statutes of this character merely regulate what property shall vest in the assignee under the

<sup>122</sup> Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377; Boese v. King, 108 U. S. 379, 27 L. Ed. 760; *In re* Sievers, 91 Fed. Rep. 366, 1 Am. B. R. 117; Patty-Joiner, etc., Co. v. Cummins, 93 Tex. 598, 4 Am. B. R. 269; Downer v. Porter, 116 Ky. 422; Grunsfeld Bros. v. Brownell, 12 N. Mex. 192; Duryea v. Muse,

117 Wis. 399, 11 Am. B. R. 234; Armour Packing Co. v. Brown, 76 Minn. 465; Hilliard v. Burlington Shoe Co., 176 Vt. 57; Singer v. Nat. Bedstead Co., 65 N. J. Eq. 290; Steelman v. Mattix, 36 N. J. L. 344; *In re* Farrell (C. C. A. 6th Cir.), 175 Fed. Rep. 505, 100 C. C. A. 63.

deed of assignment and are within the class of assignment laws which are not superseded by the bankrupt act.<sup>123</sup>

In some states the legislation has to a certain extent absorbed these common law assignments into the local system of insolvency. Without compelling a debtor to make an assignment the statute treats such an assignment as an act of insolvency, upon which proceedings under the state insolvent law may be instituted.<sup>124</sup> It does not follow in such cases that the assignment for the benefit of creditors is void, because the state insolvency system is superseded by the bankrupt act. If the assignment is good at common law it may be enforced by the state courts,<sup>125</sup> or it may be treated as an act of bankruptcy for the purpose of invoking the jurisdiction of a court of bankruptcy.<sup>126</sup>

There is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent as a proceeding in the court, derives its potency from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy and such is undoubtedly superseded by the bankrupt act.<sup>127</sup> The other derives its potency, not from the law, but from the contract or deed of the debtor, is administered under and according to the provisions of the

<sup>123</sup> *Downer v. Porter*, 116 Ky. 422; *Ebersole v. Adams*, 73 Ky. 83; *Grunsfeld Bros. v. Brownell*, 12 N. Mex. 192; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63.

<sup>124</sup> *Harbaugh v. Costello*, 184 Ill. 110; *Hanchett v. Waterbury*, 115 Ill. 220.

<sup>125</sup> *Pogue v. Rowe*, 236 Ill. 157; *Peckham's Assigned Estate*, 35 Pa. Super. Ct. 330; *Beck v. Parker*, 65 Pa. St. 262; *Cook v. Rogers*, 31 Mich. 391; *Boese v. King*, 108 U. S. 375, 27 L. Ed. 760.

<sup>126</sup> B. A. 1898, Sec. 3, Clause 4. *In re Curtis*, 91 Fed. Rep. 737, 1 Am. B. R. 440; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461; *Davis v. Bohle* (C. C. A. 8th Cir.), 92 Fed. Rep. 325, 34 C. C. A. 372, 1 Am. B. R. 12; *In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9, and *In re Etheridge Furniture Co.*, 92 Fed. Rep. 329, 1 Am. B. R. 112, were cases founded on a general assignment in states where the general insolvency system was held to be superseded by the bankrupt act.

<sup>127</sup> See Secs. 14 and 15, *ante*.

deed, supplemented only by a salutary legislative safeguard and does not result in a discharge of the debtor from his obligations.<sup>128</sup>

A state court may proceed to administer the estate, assigned for the benefit of creditors, in accordance with the deed of trust unless it is compelled to yield to a court of bankruptcy.<sup>129</sup> Such proceedings in state courts have uniformly been recognized as valid and binding on the parties.<sup>130</sup>

It may be said generally that if proceedings in bankruptcy are instituted within four months after the general assignment for the benefit of creditors, the court of bankruptcy is entitled to administer the estate and the jurisdiction of the state court must yield to the paramount authority of the bankruptcy court.<sup>131</sup> If no proceedings in bankruptcy are instituted within four months, the state court may proceed to administer the estate and the proceedings can not be assailed by the trustee in bankruptcy subsequently appointed,

<sup>128</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *In re Gutwillig*, 90 Fed. Rep. 475, 1 Am. B. R. 78; *In re Sievers*, 91 Fed. Rep. 366, 1 Am. B. R. 117; *Cook v. Rogers*, 31 Mich. 391; *Beck v. Parker*, 65 Pa. St. 262; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63.

<sup>129</sup> As to the jurisdiction of property assigned for the benefit of creditors, see Sec. 38, *post*.

<sup>130</sup> *Louisville Trust Co. v. Comin-gor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *Summers v. Abbott* (C. C. A. 8th Cir.), 122 Fed.

Rep. 36, 58 C. C. A. 352, 10 Am. B. R. 524; *In re Chase* (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 59 C. C. A. 629, 13 Am. B. R. 677; *In re Pattee*, 143 Fed. Rep. 994, 16 Am. B. R. 450; *In re Scholtz*, 106 Fed. Rep. 834, 5 Am. B. R. 782; *In re Carver*, 113 Fed. Rep. 138, 7 Am. B. R. 539; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63.

<sup>131</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *Davis v. Bohle* (C. C. A. 8th Cir.), 92 Fed. Rep. 325, 34 C. C. A. 372, 1 Am. B. R. 12; *In re Gutwillig*, 90 Fed. Rep. 475, 1 Am. B. R. 78; *Wilson v. Parr*, 115 Ga. 629, 8 Am. B. R. 230.

or by the creditors.<sup>132</sup> The trustee in bankruptcy can not recover from an assignee for the benefit of creditors any part of the estate not distributed by him at the time of bankruptcy, where the petition is not filed within the four months' period.<sup>133</sup>

<sup>132</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760; *In re Carver*, 113 Fed. Rep. 138, 7 Am. B. R. 539; *Patty-Joiner & Eubank Co. v.*

*Cummins*, 93 Tex. Sup. Ct. 603, 4 Am. B. R. 269; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63.

<sup>133</sup> *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63.

## CHAPTER III.

**THE COURTS AND THEIR TERRITORIAL JURISDICTION.**

SEC.

18. Bankruptcy courts created.

19. No separate terms in bankruptcy.

20. Territorial jurisdiction.

SEC.

21. The judicial districts.

22. Appellate courts — territorial jurisdiction.

**§ 18. Bankruptcy courts created.**

The statute creates courts of bankruptcy by conferring jurisdiction in bankruptcy on the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska.<sup>1</sup> No other courts, federal or state, have any jurisdiction in bankruptcy.<sup>2</sup>

The jurisdiction in bankruptcy is conferred upon existing courts instead of being vested in new tribunals. But these courts, when acting as courts of bankruptcy, are none the less separate and distinct courts, and exercise powers and jurisdiction separate and distinct from their powers and jurisdiction as originally constituted, to the same extent as if they were separate and distinct tribunals.<sup>3</sup>

The courts of bankruptcy are courts of record, having a limited jurisdiction, but are not inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded.<sup>4</sup>

<sup>1</sup> B. A. 1898, Sec. 1, clause 8, and Sec. 2.

<sup>2</sup> *Bray v. United States Fidelity, etc., Co.* (C. C. A. 4th Cir.), 170 Fed. Rep. 689, 96 C. C. A. 9, 22 Am. B. R. 363; *Akins v. Stadley*, 51 Ia. 414; *Broach v. Powell*, 79 Ga. 79; *Southern v. Fisher*, 6 S. C. 345; *In re Huddleston*, 1 Am. B. R. 572.

<sup>3</sup> See *Norris' Case* No. 10304, Fed. Cas., 4 N. B. R. 35.

<sup>4</sup> *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965, 4 Am. B. R. 411; *Kennedy v. Bank*, 8 How. 586, 12 L. Ed. 1209; *In re Williams*, 120 Fed. Rep. 38, 9 Am. B. R. 741; *In re Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 86; *Edelstein v. United States* (C. C. A. 8th Cir.), 149 Fed. Rep. 636, 79 C. C. A. 328, 17 Am. B. R. 652.

**§ 19. No separate terms in bankruptcy.**

A court of bankruptcy is always open for filing papers, issuing process, making orders and for all the purposes of its bankruptcy jurisdiction.<sup>5</sup> The statute expressly provides for the exercise of original jurisdiction in bankruptcy proceedings, in vacation, in chambers, and during the respective terms of the courts, which are created courts of bankruptcy.<sup>6</sup>

A court of bankruptcy has no separate terms.<sup>7</sup> A proceeding in bankruptcy, from the time of its commencement, by the filing of a petition, until the final settlement of the estate of the bankrupt, is but one suit. The proceeding is continuous, as in surrogate and probate courts where estates are administered. Any order made in the progress of the case may be subsequently amended or set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed thereby.<sup>8</sup>

A decision of a circuit court of appeals on a petition to review an order made in the progress of the bankruptcy proceedings does not become "the law of the case," so as to prevent the circuit court of appeals or the supreme court from revising it, if the case is subsequently carried to either court.<sup>9</sup>

<sup>5</sup> *United States v. Marvin*, 212 U. S. 275, 53 L. Ed. —, 22 Am. B. R. 717; *Sandusky v. National Bank*, 23 Wall. 289, 23 L. Ed. 155.

<sup>6</sup> B. A. 1898, Sec. 2.

<sup>7</sup> *Sandusky v. National Bank*, 23 Wall. 289, 23 L. Ed. 155; *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *In re Mercur*, 116 Fed. Rep. 655, 8 Am. B. R. 275; affirmed (3rd Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505; *In re Lemmon & Gale Co.* (C. C. A. 6th Cir.), 112 Fed. Rep. 300, 50 C. C. A. 247, 7 Am. B. R. 291; *In re First Nat. Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265; *Lockman v. Lang* (C. C. A. 8th Cir.), 132 Fed. Rep. 1,

65 C. C. A. 621, 624, 12 Am. B. R. 497.

<sup>8</sup> *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *In re Lemmon & Gale Co.* (C. C. A. 6th Cir.), 112 Fed. Rep. 300, 50 C. C. A. 247, 7 Am. B. R. 291; *In re Mercur*, 116 Fed. Rep. 655, 8 Am. B. R. 275, affirming (3rd Cir.) 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505; *Matter of Henschel*, 114 Fed. Rep. 968, 8 Am. B. R. 201; *Sandusky v. National Bank*, 23 Wall. 289, 23 L. Ed. 155; *In re Keyes*, 160 Fed. Rep. 763, 20 Am. B. R. 183; *In re Morse*, 168 Fed. Rep. 157, 21 Am. B. R. 709.

<sup>9</sup> *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.



The affirmance by the circuit court of appeals of an interlocutory order is not a final decision.<sup>10</sup> It still remains an interlocutory order in the case.

## **§ 20. Territorial jurisdiction.**

The several courts of bankruptcy have the same territorial limits respectively as the courts upon which bankruptcy jurisdiction is conferred now have, or as they may hereafter be changed.

Each state and territory is divided into judicial districts. In many states there are two or more districts, and some of the large districts are again divided into divisions. When a district consists of a state, its boundaries vary as those of the state vary. A court of bankruptcy is established by the act of 1898 in each judicial district, whether it consists of one or more divisions.

The time and place of holding the several district courts are given below, in connection with the counties comprising the several districts. It has been found necessary in many districts, where court is held at different places in the district, to designate certain days, in addition to the regular term days, on which the judge will be present at these several places for the purpose of hearing bankruptcy matters.

## **§ 21. The judicial districts.**

The United States are divided into judicial districts as follows:

**Alabama** is divided into three judicial districts, known as the northern, middle, and southern districts of Alabama.

The northern district includes the counties of Cullman, Jackson, Lawrence, Limestone, Madison, and Morgan, which constitute the northeastern division of said district; the counties of Colbert, Franklin, and Lauderdale, which constitute the northwestern division of said district; the counties of Cherokee, DeKalb, Etowah, Marshall, and Saint Clair, which

<sup>10</sup> *Kirwan v. Murphy*, 170 U. S. 205, 42 L. Ed. 1009.

constitute the middle division of said district; the counties of Blount, Jefferson, and Shelby, which constitute the southern division of said district; the counties of Walker, Winston, Blount, Jefferson, and Shelby, which constitute the southern division of said district; also the counties of Calhoun, Clay, Cleburne, and Talladega, which constitute the eastern division of said district; also the counties of Bibb, Greene, Pickens, Sumter, and Tuscaloosa, which constitute the western division of said district.

Terms of the district court for the northeastern division are held at Huntsville on the first Tuesday in April and the second Tuesday in October; for the northwestern division, at Florence on the second Tuesday in February and the third Tuesday in October; for the middle division, at Gadsden on the first Tuesdays in February and August; for the southern division, at Birmingham on the first Mondays in March and September; for the Jasper division, at Jasper on the second Tuesdays in January and June; for the eastern division, at Anniston on the first Mondays in May and November; and for the western division, at Tuscaloosa on the first Tuesdays in January and June.

The middle district includes the counties of Autauga, Barbour, Bullock, Butler, Chilton, Chambers, Coosa, Covington, Crenshaw, Elmore, Lee, Lowndes, Macon, Montgomery, Pike, Randolph, Russell, and Tallapoosa, which constitute the northern division of said district; the counties of Coffee, Dale, Geneva, Henry, and Houston, which constitute the southern division of said district.

Terms of the district court for the northern division are held at Montgomery on the first Tuesdays in May and December; and for the southern division, at Dothan on the first Mondays in June and December.

The southern district includes the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe, and Washington, which constitute the southern division of said district; the counties of Dallas, Hale, Marengo, Perry, and Wilcox, which constitute the northern division of said district.

Terms of the district court for the southern division are held at Mobile on the fourth Mondays in May and November; and for the northern division, at Selma on the first Mondays in May and November.

**Arkansas** is divided into two districts, known as the eastern and western districts of Arkansas.

The western district includes the counties of Sevier, Howard, Little River, Pike, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Union, and Calhoun, which constitute the Texarkana division of said district; the counties of Polk, Scott, Yell, Logan, Sebastian, Franklin, Crawford, Washington, Benton, and Johnson, which constitute the Fort Smith division of said district; the counties of Baxter, Boone, Carroll, Madison, Marion, Newton, and Searcy, which constitute the Harrison division of said district.

Terms of the district court for the Texarkana division are held at Texarkana on the second Mondays in May and November; for the Fort Smith division, at Fort Smith on the second Mondays in January and June; and for the Harrison division, at Harrison on the second Mondays in April and October.

The eastern district includes the counties of Lee, Phillips, Saint Francis, Cross, Monroe, and Woodruff, which constitute the eastern division of said district; the counties of Independence, Cleburne, Stone, Izard, Sharp, and Jackson, which constitute the northern division of said district; the counties of Crittenden, Clay, Craighead, Greene, Mississippi, Poinsett, Fulton, Randolph, and Lawrence, which constitute the Jonesboro division of said district; and the counties of Arkansas, Ashley, Bradley, Chicot, Clark, Cleveland, Conway, Dallas, Desha, Drew, Faulkner, Garland, Grant, Hot Spring, Jefferson, Lincoln, Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Vann Buren, and White, which constitute the western division of said district.

Terms of the district court for the eastern division are held at Helena on the second Monday in March and the first Monday in October; for the northern division, at Batesville

on the fourth Monday in May and the second Monday in December; for the Jonesboro division, at Jonesboro on the second Mondays in May and November; and for the western division, at Little Rock on the first Monday in April and the third Monday in October.

**California** is divided into two districts, known as the northern and southern districts of California.

The southern district includes the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare, which constitute the northern division of said district; the counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura, which constitute the southern division of said district.

Terms of the district court for the northern division are held at Fresno on the first Monday in May and the second Monday in November; and for the southern division, at Los Angeles on the second Monday in January and the second Monday in July, and at San Diego on the second Mondays in March and September.

The northern district includes the counties of Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba.

Terms of the district court for the northern district are held at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November; at Sacramento on the second Monday in April; and at Eureka on the third Monday in July.

**Colorado** constitutes one judicial district, known as the district of Colorado.

Terms of the district court shall be held at Denver on the first Tuesdays in May and November; at Pueblo on the first Tuesday in April; and at Montrose on the second Tuesday in September.

**Connecticut** constitutes one judicial district, known as the district of Connecticut.

Terms of the district court are held at New Haven on the fourth Tuesdays in February and September, and at Hartford on the fourth Tuesday in May and the first Tuesday in December.

**Delaware** constitutes one judicial district, known as the district of Delaware.

Terms of the district court are held at Wilmington on the second Tuesdays in March, June, September, and December.

**Florida** is divided into two districts, known as the northern and southern districts of Florida.

The southern district includes the counties of Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, De Soto, Duval, Hamilton, Hernando, Hillsboro, Lake, Lee, Madison, Manatee, Marion, Monroe, Nassau, Orange, Osceola, Palm Beach, Pasco, Polk, Putnam, Saint John, Sumter, Suwanee, Saint Lucie, and Volusia.

Terms of the district court for the southern district are held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April.

The northern district includes the counties of Alachua, Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Santa Rosa, Taylor, Wakulla, Walton, and Washington.

Terms of the district court for the northern district are held at Tallahassee on the second Monday in January; at Pensacola on the first Mondays in May and November; at Marianna on the first Monday in April; and at Gainesville on the second Mondays in June and December.

**Georgia** is divided into two districts, known as the northern and southern districts of Georgia.

The northern district includes the counties of Campbell, Carroll, Clayton, Cobb, Coweta, Cherokee, Dekalb, Douglas,

Dawson, Fannin, Fayette, Fulton, Forsyth, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns, and Union, which constitute the northern division of said district; the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Stephens, Walton, and White, which constitute the eastern division of said district; the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup, and Webster, which constitute the western division of said district; the counties of Bartow, Chattooga, Catoosa, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Winfield, which constitute the northwestern division of said district.

Terms of the district court for northern division of said district are held at Atlanta on the second Monday in March and the first Monday in October; for the eastern division, at Athens on the second Monday in April and the first Monday in November; for the western division, at Columbus on the first Mondays in May and December; and for the northwestern division, at Rome on the third Mondays in May and November.

The southern district includes the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Jeff Davis, Liberty, Montgomery, McIntosh, Screven, Tatnall, Toombs, and Wayne, which constitute the eastern division of said district; the counties of Baldwin, Bibb, Butts, Crawford, Dodge, Dooly, Hancock, Houston, Jasper, Jones, Laurens, Macon, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Wilcox, and Wilkinson, which constitute the western division; the counties of Burke, Columbia, Glascock, Jefferson, Jenkins, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes, and Warren, which constitute the northeastern division; the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Decatur, Echols, Grady, Irwin, Lowndes, Pierce, and Ware, which constitute the southwestern division; the counties of Baker, Ben Hill, Calhoun, Crisp, Cloquitt, Dougherty, Lee, Miller, Mitchell, Thomas, Tift, Turner, and Worth, which constitute the Albany division.

Terms of the district court for the western division are held at Macon on the first Mondays in May and October; for the eastern division, at Savannah on the second Tuesdays in February, May, August, and November; for the northeastern division, at Augusta on the first Monday in April and the third Monday in November; for the southwestern division, at Valdosta on the second Mondays in June and December; and for the Albany division, at Albany on the third Mondays in June and December.

**Idaho** constitutes one judicial district, known as the district of Idaho. It is divided into four divisions, known as the northern, central, southern, and eastern divisions.

The counties of Bonner, Kootenai, and Shoshone, constitute the northern division of said district; and the counties of Idaho, Latah, and Nez Perce, constitute the central division of said district; and the counties of Ada, Boise, Blaine, Cassia, Twin Falls, Canyon, Elmore, Lincoln, Owyhee, and Washington, constitute the southern division of said district; and the counties of Bannock, Bear Lake, Bingham, Custer, Fremont, Lemhi, and Oneida, constitute the eastern division of said district.

Terms of the district court for the northern division of said district are held at Coeur d'Alene City on the fourth Monday in May and the third Monday in November; for the central division, at Moscow on the second Monday in May and the first Monday in November; for the southern division, at Boise City on the second Mondays in February and September; and for the eastern division, at Pocatello on the second Mondays in March and October.

**Illinois** is divided into three districts, known as the northern, southern, and eastern districts of Illinois.

The northern district includes the counties of Cook, Dekalb, Dupage, Grundy, Kane, Kendall, Lake, Lasalle, McHenry, and Will, which constitute the eastern division; the counties of Boone, Carroll, Jo Daviess, Lee, Ogle, Stephenson, Whiteside, and Winnebago, which constitute the western division.

Terms of the district court for the eastern division are held at Chicago on the first Mondays in February, March, April,



May, June, July, September, October, and November, and the third Monday in December; and for the western division, at Freeport on the third Mondays in April and October.

The southern district includes the counties of Bureau, Fulton, Henderson, Henry, Knox, Livingston, McDonough, Marshall, Mercer, Putnam, Peoria, Rock Island, Stark, Tazewell, Warren, and Woodford, which constitute the northern division; the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, Dewitt, Greene, Hancock, Jersey, Logan, McLean, Macon, Macoupin, Madison, Mason, Menard, Montgomery, Morgan, Pike, Sangamon, Schuyler, and Scott, which constitute the southern division.

Terms of the district court for the northern division are held at Peoria on the third Mondays in April and October; for the southern division, at Springfield on the first Mondays in January and June, and at Quincy on the first Mondays in March and September.

The eastern district includes the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, Marion, Massac, Monroe, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, Saint Clair, Saline, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White, and Williamson.

Terms of the district court for the eastern district are held at Danville on the first Monday in March and September; at Cairo on the first Mondays in April and October, and at East Saint Louis on the first Mondays in May and November.

**Indiana** constitutes one judicial district, known as the district of Indiana.

Terms of the district court are held at Indianapolis on the first Tuesdays in May and November; at New Albany on the first Mondays in January and July; at Evansville on the first Mondays in April and October; at Fort Wayne on the second Tuesdays in June and December; and at Hammond on the third Tuesdays in April and October.



**Iowa** is divided into two judicial districts, known as the northern and southern districts of Iowa.

The northern district includes the counties of Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Blackhawk, Floyd, Mitchell, and Jackson, which constitute the eastern division of said district; the counties of Jones, Cedar, Linn, Johnson, Iowa, Benton, Tama, Grundy, and Hardin, which constitute the Cedar Rapids division; the counties of Emmet, Palo Alto, Pocahontas, Calhoun, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin, and Butler, which constitute the central division; the counties of Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury, and Monona, which constitute the western division.

Terms of the district court for the eastern division are held at Dubuque on the fourth Tuesday in April and the first Tuesday in December, and at Waterloo on the second Tuesdays in May and September; for the Cedar Rapids division, at Cedar Rapids on the first Tuesday in April and the fourth Tuesday in September; for the central division, at Fort Dodge on the second Tuesdays in June and November; and for the western division, at Sioux City on the fourth Tuesday in May and the third Tuesday in October.

The southern district includes the counties of Louisa, Henry, Des Moines, Lee, and Van Buren, which constitute the eastern division of said district; the counties of Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Marion, Warren, and Madison, which constitute the central division of said district; the counties of Carroll, Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, and Montgomery, which constitute the western division of said district; the counties of Adair, Adams, Clarke, Decatur, Fremont, Lucas, Page, Ringgold, Taylor, Union, and Wayne, which constitute the southern division of said district; the counties of Scott, Muscatine, Washington, and Clinton, which constitute the Davenport division of said district; the counties of Davis, Appanoose, Mahaska, Keokuk, Jefferson, Monroe,

and Wapello, which constitute the Ottumwa division of said district.

Terms of the district court for the eastern division are held at Keokuk on the second Tuesday in April and the third Tuesday in October; for the central division, at Des Moines on the second Tuesday in May and the third Tuesday in November; for the western division, at Council Bluffs on the second Tuesday in March and the third Tuesday in September; for the southern division, at Creston on the fourth Tuesday in March and the first Tuesday in November; for the Davenport division, at Davenport on the fourth Tuesday in April and the first Tuesday in October, and for the Ottumwa division, at Ottumwa on the first Monday after the fourth Tuesday in March, and the first Monday after the third Tuesday in October.

**Kansas** constitutes one judicial district, known as the district of Kansas. It is divided into three divisions, to be known as the first, second, and third divisions of the district of Kansas.

The first division includes the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell, Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Kiley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington, and Wyandotte.

The second division includes the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley, Hamilton, Harper, Harvey, Hodgeman, Haskell, Kingman, Kiowa, Kearney, Lane, McPherson, Morton, Meade, Ness, Pratt, Pawnee, Reno, Rice, Rush, Scott, Sedgwick, Stafford, Stevens, Seward, Sumner, Stanton, and Wichita.

The third division includes the counties of Allen, Anderson, Bourbon, Cherokee, Coffey, Chautauqua, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson, and Woodson.

Terms of the district court for the first division are held at Leavenworth on the second Monday in October; at Topeka on the second Monday in April; at Kansas City on the second Monday in January and the first Monday in October; and at Salina on the second Monday in May.

Terms of the district court for the second division shall be held at Wichita on the second Mondays in March and September; and for the third division, at Fort Scott on the first Monday in May and the second Monday in November.

**Kentucky** is divided into two districts, known as the eastern and western districts of Kentucky.

The eastern district includes the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jessamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knott, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas, and Harrison, with the waters thereof.

Terms of the district court for the eastern district are held at Frankfort on the second Monday in March and the fourth Monday in September; at Covington on the first Monday in April and the third Monday in October; at Richmond on the fourth Monday in April and the second Monday in November; at London on the second Monday in May and the fourth Monday in November; at Catlettsburg on the fourth Monday in May and the second Monday in December; and at Jackson on the first Monday in March and the third Monday in September.

The western district includes the counties of Oldham, Jefferson, Spencer, Bullitt, Nelson, Washington, Marion, Larue, Taylor, Casey, Green, Adair, Russell, Clinton, Cumberland, Monroe, Metcalfe, Allen, Barren, Simpson, Logan, Warren, Butler, Hart, Edmonson, Grayson, Hardin, Meade, Breckinridge, Hancock, Daviess, Ohio, McLean, Muhlenberg, Todd,

Christian, Trigg, Lyon, Caldwell, Livingston, Crittenden, Hopkins, Webster, Henderson, Union, Marshall, Calloway, McCracken, Graves, Ballard, Carlisle, Hickman, and Fulton, with the waters thereof.

Terms of the district court for the western district are held at Louisville on the second Mondays in March and October; at Owensboro on the first Monday in May and the fourth Monday in November; at Paducah on the third Mondays in April and November; and at Bowling Green on the third Monday in May and the second Monday in December.

**Louisiana** is divided into two judicial districts, known as the eastern and western districts of Louisiana.

The eastern district includes the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Mary, Saint Tammany, Tangipahoa, Terrebonne; and Washington, which constitute the New Orleans division; the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, Iberville, and West Feliciana; which constitute the Baton Rouge division of said district.

Terms of the district court for the New Orleans division are held at New Orleans on the third Mondays in February, May, and November; and for Baton Rouge division, at Baton Rouge on the second Mondays in April and November.

The western district includes the parishes of Saint Landry, Evangeline, Saint Martin, Lafayette, and Vermilion, which constitute the Opelousas division of said district; the parishes of Rapides, Avoyelles, Catahoula, La Salle, Grant, and Winn, which constitute the Alexandria division of said district; the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Sabine, and Red River, which constitute the Shreveport division of said district; the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln, which constitute the Monroe division of said district; the parishes of Acadia, Calcasieu, Cameron, and Vernon, which constitute the Lake Charles division of said district.

Terms of the district court for the Opelousas division are held at Opelousas on the first Mondays in January and June; for the Alexandria division, at Alexandria on the fourth Mondays in January and June; for the Shreveport division, at Shreveport on the third Mondays in February and October; for the Monroe division, at Monroe on the first Mondays in April and October; and for the Lake Charles division, at Lake Charles on the third Mondays in May and December.

**Maine** constitutes one judicial district, known as the district of Maine.

Terms of the district court are held at Portland on the first Tuesdays in February and December; at Bangor on the first Tuesday in June; and at Bath on the first Tuesday in September.

**Maryland** constitutes one judicial district, known as the district of Maryland.

Terms of the district court are held at Baltimore on the first Tuesdays in March, June, September, and December; and at Cumberland on the second Monday in May and the last Monday in September.

**Massachusetts** constitutes one judicial district, known as the district of Massachusetts.

Terms of the district court are held at Boston on the third Tuesday in March, the fourth Tuesday in June, and the second Tuesday in September, and the first Tuesday in December; and at Springfield, on the second Tuesdays in May and December.

**Michigan** is divided into two judicial districts, known as the eastern and western districts of Michigan.

The eastern district includes the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee, and Tuscola, which constitute the northern division; the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw, and Wayne, which constitute the southern division of said district.

Terms of the district court for the southern division are held at Detroit on the first Tuesdays in March, June, and November; for the northern division, at Bay City on the first Tuesdays in May and October, and at Port Huron in the discretion of the judge of said court and at such times as he shall appoint therefor. A special or adjourned term of the district court is held at Bay City for the hearing of admiralty causes, beginning in the month of February in each year.

The western district includes the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft, which constitute the northern division; the counties of Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmet, Grand, Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Lelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceano, Osceola, Ottawa, St. Joseph, Van Buren, and Wexford, which constitute the southern division of said district.

Terms of the district court for the southern division are held at Grand Rapids on the first Tuesdays in March and October; and for the northern division, at Marquette on the first Tuesdays in May and September.

**Minnesota** constitutes one judicial district, known as the district of Minnesota. It is divided into six divisions, known as the first, second, third, fourth, fifth, and sixth divisions.

The first division includes the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston.

The second division includes the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley, and Lac qui Parle.

The third division includes the counties of Chisago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott.

The fourth division includes the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti.

The fifth division includes the counties of Cook, Lake, Saint Louis, Itasca, Koochiching, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton.

The sixth division includes the counties of Stearns, Pope, Stevens, Bigstone, Traverse, Grant, Douglas, Todd, Ottertail, Roseau, Wilkin, Clay, Becker, Wadena, Norman, Polk, Red Lake, Marshall, Kittson, Beltrami, Clearwater, Mahnomen, and Hubbard.

Terms of the district court for the first division are held at Winona on the third Tuesdays in May and November; for the second division, at Mankota on the fourth Tuesdays in April and October; for the third division, at Saint Paul on the first Tuesdays in June and December; for the fourth division, at Minneapolis on the first Tuesdays in April and October; for the fifth division, at Duluth on the second Tuesdays in January and July; and for the sixth division, at Fergus Falls on the first Tuesday in May and second Tuesday in November.

**Mississippi** is divided into two judicial districts, known as the northern and southern districts of Mississippi.

The northern district includes the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, and Winston, which constitute the eastern division of said district; the counties of Benton, Coahoma, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Quitman, Tallahatchie, Tate, Tippah, Tunica, Union, Webster, and Yalobusha, which constitute the western division of said district.

Terms of the district court for the eastern division are held at Aberdeen on the first Mondays in April and October; and for the western division, at Oxford on the first Mondays in June and December, and at Clarksdale on the third Mondays in June and December.

The southern district includes the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Leflore, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which constitute the Jackson division; the counties of Bolivar, Claiborne, Issaquena, Sharkey, Sunflower, Warren, and Washing-



ton, which constitute the western division; the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which constitute the eastern division; the counties of Forest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which constitute the southern division of said district.

Terms of the district court for the Jackson division are held at Jackson on the first Mondays in May and November; for the western division, at Vicksburg on the first Mondays in January and July; for the eastern division, at Meridian on the second Mondays in March and September; and for the southern division, at Biloxi on the third Mondays in February and August.

**Missouri** is divided into two judicial districts, known as the eastern and western districts of Missouri.

The eastern district includes the city of Saint Louis and the counties of Audrain, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Montgomery, Phelps, Saint Charles, Saint Francois, Sainte Genevieve, Saint Louis, Warren, and Washington, which constitute the eastern division of said district; the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby, which constitute the northern division of said district; the counties of Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne, which constitute the southeastern division of said district.

Terms of the district court for the eastern division are held at Saint Louis on the first Mondays in May and November, and at Rolla on the second Mondays in January and June; for the northern division, at Hannibal on the fourth Monday in May and the first Monday in December; and for the southeastern division, at Cape Girardeau on the second Mondays in April and October.

The western district includes the counties of Bates, Caldwell, Carroll, Cass, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Livingston, Mercer, Putnam, Ray, Saint Clair,



Saline, and Sullivan, which constitute the western division; the counties of Barton, Barry, Jasper, Lawrence, McDonald, Newton, Stone, and Vernon, which constitute the southwestern division; the counties of Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Holt, Harrison, Nodaway, Platte, and Worth, which constitute the Saint Joseph division; the counties of Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard, Miller, Moniteau, Morgan, Osage, and Pettis, which constitute the central division; the counties of Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Laclede, Oregon, Ozark, Polk, Pulaski, Taney, Texas, Webster, and Wright, which constitute the southern division.

Terms of the district court for the western division are held at Kansas City on the fourth Monday in April and first Monday in November, and at Chillicothe on the fourth Monday in May and the first Monday in December; for the southwestern division, at Joplin on the second Mondays in June and January; for the Saint Joseph division, at Saint Joseph on the first Monday in March and third Monday in September; for the central division, at Jefferson City on the third Mondays in March and October; and for the southern division, at Springfield on the first Mondays in April and October.

**Montana** constitutes one judicial district, known as the district of Montana.

Terms of the district court are held at Helena on the first Mondays in April and November; at Butte on the first Tuesdays in February and September; at Great Falls on the first Mondays in May and October; at Missoula on the first Mondays in January and June; and at Billings on the first Mondays in March and August.

**Nebraska** constitutes one judicial district, known as the district of Nebraska. Said district is divided into eight divisions.

The counties of Douglas, Sarpy, Washington, Dodge, Colfax, Platte, Nance, Boone, Wheeler, Burt, Thurston, Dakota, Cuming, Cedar, and Dixon, constitute the Omaha division; the counties of Madison, Antelope, Knox, Pierce, Stanton, Wayne, Holt, Boyd, Rock, Brown, and Keya Paha, constitute the Norfolk division; the counties of Cherry, Sheridan, Dawes,

Box Butte, and Sioux, constitute the Chadron division; the counties of Hall, Merrick, Howard, Greeley, Garfield, Valley, Sherman, Buffalo, Custer, Loup, Blaine, Thomas, Hooker, and Grant, constitute the Grand Island division; the counties of Lincoln, Dawson, Logan, McPherson, Keith, Deuel, Garden, Morrill, Cheyenne, Kimball, Banner, and Scott's Bluff, constitute the North Platte division; the counties of Cass, Otoe, Johnson, Nemaha, Pawnee, Richardson, Gage, Lancaster, Saunders, Butler, Seward, Saline, Jefferson, Thayer, Fillmore, York, Polk, and Hamilton, constitute the Lincoln division; the counties of Clay, Nuckolls, Webster, Adams, Kearney, Franklin, Harlan, and Phelps, constitute the Hastings division; and the counties of Gosper, Furnas, Redwillow, Frontier, Hayes, Hitchcock, Dundy, Chase, and Perkins, constitute the McCook division.

Terms of the district court for the Omaha division are held at Omaha on the first Monday in April and the fourth Monday in September; for the Norfolk division, at Norfolk on the third Monday in September; for the Chadron division, at Chadron on the second Monday in September; for the Grand Island division, at Grand Island on the second Monday in January; for the North Platte division, at North Platte on the second Monday in June; for the Lincoln division, at Lincoln on the second Monday in May and the first Monday in October; for the Hastings division, at Hastings on the second Monday in March; and for the McCook division, at McCook on the first Monday in March.

**Nevada** constitutes one judicial district, known as the district of Nevada.

Terms of the district court are held at Carson City on the first Mondays in February, May, and October.

**New Hampshire** constitutes one judicial district, known as the district of New Hampshire.

Terms of the district court are held at Portsmouth on the third Tuesdays in March and September, at Concord on the third Tuesdays in June and December; and at Littleton on the last Tuesday in August.

**New Jersey** constitutes one judicial district, known as the district of New Jersey.

Terms of the district court are held at Trenton on the third Tuesdays in January, April, June, and September.

**New York** is divided into four judicial districts, known as the northern, eastern, southern, and western districts of New York.

The northern district includes the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof.

Terms of the district court for said district are held at Albany on the second Tuesday in February; at Utica on the first Tuesday in December; at Binghamton on the second Tuesday in June; at Auburn on the first Tuesday in October; at Syracuse on the first Tuesday in April; and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint.

The eastern district includes the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof.

Terms of the district court for said district are held at Brooklyn on the first Wednesday in every month.

The southern district includes the counties of Columbia, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof.

Terms of the district court for said district are held at New York City on the first Tuesday in each month.

The western district includes the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof.

Terms of the district court for said district are held at Elmira on the second Tuesday in January; at Buffalo on

the second Tuesdays in March and November; at Rochester on the second Tuesday in May; at Jamestown on the second Tuesday in July; at Lockport on the second Tuesday in October; and at Canandaigua on the second Tuesday in September.

**North Carolina** is divided into two districts, known as the eastern and western districts of North Carolina.

The eastern district includes the counties of Beaufort, Bertie, Balden, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Carteret, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Lee, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Robeson, Richmond, Sampson, Scotland, Tyrrell, Vance, Wake, Warren, Washington, Wayne, and Wilson.

Terms of the district court for the eastern district are held at Elizabeth City on the second Mondays in April and October; at Washington on the third Mondays in April and October; at Newbern on the fourth Mondays in April and October; at Wilmington on the second Monday after the fourth Mondays in April and October; and at Raleigh on the fourth Monday after fourth Mondays in April and October.

The western district includes the counties of Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey.

Terms of the district court for the western district are held at Greensboro on the first Mondays in June and December; at Statesville on the third Mondays in April and October; at Salisbury on the fourth Mondays in April and October; at Asheville on the first Mondays in May and November; at

Charlotte on the first Mondays in April and October; and at Wilkesboro on the fourth Mondays in May and November.

**North Dakota** constitutes one judicial district, known as the district of North Dakota.

The counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, and Sheridan, and all the territory in said State lying west of the Missouri River and south of the twelfth standard parallel, constitute the southwestern division of said district; and the counties of Cass, Richland, Barnes, Dickey, Sargent, Lamoure, Ransom, Griggs, and Steele, constitute the southeastern division; and the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson, constitute the northeastern division; and the counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, and McHenry, constitute the northwestern division; and the counties of Ward, Williams, and Montrail, and all the territory in said State lying west of the Missouri River and north of the twelfth standard parallel, constitute the western division. The several Indian reservations and parts thereof within said State constitute a part of the several divisions within which they are respectively situated.

Terms of the district court for the southwestern division are held at Bismarck on the first Tuesday in March; for the southeastern division, at Fargo on the third Tuesday in May; for the northeastern division, at Grand Forks on the second Tuesday in November; for the northwestern division, at Devils Lake on the first Tuesday in July; and for the western division, at Minot on the second Tuesday in October.

**Ohio** is divided into two judicial districts, known as the northern and southern districts of Ohio.

The northern district includes the counties of Ashland, Ash-tabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull, and Wayne, which constitute the eastern division; the counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa, Paulding, Putnam, Seneca,

Sandusky, Van Wert, Williams, Wood and Wyandotte, which constitute the western division of said district.

Terms of the district court for the eastern division are held at Cleveland on the first Tuesdays in February, April, and October, and at Youngstown on the first Tuesday after the first Monday in March; and for the western division, at Toledo on the last Tuesdays in April and October.

The southern district includes the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren, which constitute the western division; the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington, which constitute the eastern division of said district.

Terms of the district court for the western division are held at Cincinnati on the first Tuesdays in February, April, and October; and for the eastern division, at Columbus on the first Tuesdays in June and December; at Dayton on the first Mondays in May and November.

**Oklahoma** is divided into two judicial districts, known as the eastern and the western districts of Oklahoma.

The eastern district includes the counties of Adair, Atoka, Bryan, Craig, Cherokee, Creek, Choctaw, Coal, Carter, Delaware, Garvin, Grady, Haskell, Hughes, Johnston, Jefferson, Latimer, Le Flore, Love, McClain, Mayes, Muskogee, McIntosh, McCurtain, Murray, Marshall, Nowata, Ottawa, Okmulgee, Osage, Pittsburg, Pushmataha, Pontotoc, Rogers, Stephens, Sequoyah, Seminole, Tulsa, Washington, and Wagoner.

Terms of the district court for the eastern district are held at Muskogee on the first Monday in January; at Vinita on the first Monday in March; at Tulsa on the first Monday in April; at South McAlester on the first Monday in June; at Ardmore

on the first Monday in October; and at Chickasha on the first Monday in November in each year.

The western district includes the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Majors, Noble, Oklahoma, Osage, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward.

Terms of the district court for the western district are held at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Enid on the first Monday in June; at Lawton on the first Monday in September; and at Woodward on the first Monday in November.

**Oregon** constitutes one judicial district, known as the district of Oregon.

Terms of the district court are held at Portland on the first Mondays in March, July, and November; at Pendleton on the first Tuesday in April; and at Medford on the first Tuesday in October.

**Pennsylvania** is divided into three judicial districts, known as the eastern, middle, and western districts of Pennsylvania.

The eastern district includes the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill.

Terms of the district court are held at Philadelphia on the second Mondays in March and June, the third Monday in September, and the second Monday in December, each term to continue until the succeeding term begins.

The middle district includes the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York.

Terms of the district court are held at Scranton on the fourth Monday in February and the third Monday in October;



at Harrisburg on the first Mondays in May and December; and at Williamsport on the second Mondays in January and June.

The western district includes the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland.

Terms of the district court are held at Pittsburg on the first Monday in May and the third Monday in October; and at Erie on the third Monday in July and the second Monday in January.

**Rhode Island** constitutes one judicial district, known as the district of Rhode Island.

Terms of the district court are held at Providence on the fourth Tuesday in May and the third Tuesday in November; and at Newport on the second Tuesday in May and the third Tuesday in October.

**South Carolina** is divided into two districts, known as the eastern and western districts of South Carolina.

The western district includes the counties of Abbeville, Anderson, Cherokee, Chester, Edgefield, Fairfield, Greenville, Greenwood, Lancaster, Laurens, Newberry, Oconee, Pickens, Saluda, Spartanburg, Union, and York.

Terms of the district court for the western district are held at Greenville on the third Tuesdays in April and October.

The eastern district includes the counties of Aiken, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Hampton, Horry, Kershaw, Lee, Lexington, Marion, Marlboro, Orangeburg, Richland, Sumter, and Williamsburg.

Terms of the district court for the eastern district are held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January and the first Tuesday in November, the latter term to be solely for the trial of civil cases; and at Florence on the first Tuesday in March.



**South Dakota** constitutes one judicial district, known as the district of South Dakota.

The counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchison, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, and Yankton, and in the Yankton Indian reservation, constitute the southern division of said district; the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Schnasse, Spink, and Walworth, and in the Sisseton and Wahpeton Indian reservation, and in that portion of the Standing Rock Indian reservation lying in South Dakota, constitute the northern division; the counties of Armstrong, Buffalo, Dewey, Faulk, Hand, Hughes, Hyde, Jerauld, Lyman, Potter, Stanley, and Sully, and in the Cheyenne River, Lower Brule, and Crow Creek Indian reservations, constitute the central division, and the counties of Bennett, Butte, Custer, Fall River, Harding, Lawrence, Meade, Mellette, Pennington, Perkins, Shannon, Todd, Tripp, Washabough, and Washington, and in the Rosebud and Pine Ridge Indian reservations, constitute the western division.

Terms of the district court for the southern division are held at Sioux Falls on the first Tuesday in April and the third Tuesday in October; for the northern division, at Aberdeen on the first Tuesday in May and the second Tuesday in November; for the central division, at Pierre on the second Tuesday in June and the first Tuesday in October; and for the western division, at Deadwood on the third Tuesday in May and the first Tuesday in September.

**Tennessee** is divided into three districts, known as the eastern, middle and western districts of Tennessee:

The eastern district includes the counties of Bledsoe, Bradley, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, and Sequatchie, which constitute the southern division of said district; the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Sevier, Scott, and Union, which constitute the northern division of said district; the counties of Carter, Cocke, Greene,

Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington, which constitute the northeastern division of said district.

Terms of the district court for the southern division of said district are held at Chattanooga on the fourth Mondays in May and November; for the northern division, at Knoxville on the first Mondays in January and July; and for the northeastern division, at Greeneville on the last Mondays in March and September.

The middle district includes the counties of Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Lawrence, Lewis, Lincoln, Marshall, Maury, Montgomery, Moore, Robertson, Rutherford, Stewart, Sumner, Trousdale, Warren, Wayne, Williamson, and Wilson, which constitute the Nashville division of said district; the counties of Clay, Cumberland, De Kalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith, Van Buren, and White, which constitute the northeastern division of said district.

Terms of the district court for the Nashville division of said district are held at Nashville on the second Mondays in April and October; and for the northern division, at Cookeville on the second Mondays in May and November.

The western district includes the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby, and Tipton, which constitute the western division of said district; the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry, and Weakley, including the waters of the Tennessee River to low water mark on the eastern shore thereof wherever such river forms the boundary line between the western and middle districts of Tennessee, from the north line of the State of Alabama north to the point in Henry County, Tennessee, where the south boundary line of the State of Kentucky strikes the west bank of the river, which constitutes the eastern division of said district.

Terms of the district court for the western division of said district are held at Memphis on the fourth Mondays in May

and November; and for the eastern division, at Jackson on the fourth Mondays in April and October.

**Texas** is divided into four districts, known as the northern, eastern, western, and southern districts of Texas.

The northern district includes the counties of Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwall, which constitute the Dallas division; the counties of Archer, Baylor, Clay, Comanche, Erath, Foard, Hardeman, Hood, Jack, Palo Pinto, Parker, Tarrant, Wichita, Wilbarger, Wise, and Young, which constitute the Fort Worth division; the counties of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Gray, Hale, Hall, Hansford, Hartley, Hemphill, Hockley, Hutchinson, King, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and Wheeler, which constitute the Amarillo division; the counties of Andrews, Borden, Callahan, Dawson, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, Knox, Lynn, Martin, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throckmorton, and Yoakum, which constitute the Abilene division; the counties of Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Runnels, Schleicher, Sterling, Sutton, Tom Green, and Upton, which constitute the San Angelo division of said district.

Terms of the district court for the Dallas division are held at Dallas on the second Monday in January and the first Monday in May; for the Fort Worth division, at Fort Worth on the first Monday in November and the second Monday in March; for the Amarillo division, at Amarillo on the third Monday in April and the fourth Monday in September; for the Abilene division, at Abilene on the first Monday in October and the second Monday in April; and for the San Angelo division, at San Angelo on the third Monday in October and the fourth Monday in April.

The eastern district includes the counties of Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacog-

doches, Panola, Rains, Rusk, Smith, Van Zandt, and Wood, which constitute the Tyler division; the counties of Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Sabine, San Augustine, Shelby, and Tyler, which constitute the Beaumont division; the counties of Collin, Cook, Denton, Grayson, and Montague, which constitute the Sherman division; the counties of Camp, Cass, Harrison, Hopkins, Marion, Morris, and Upshur, which constitute the Jefferson division; the counties of Delta, Fannin, Red River, and Lamar, which constitute the Paris division; the counties of Bowie, Franklin, and Titus, which constitute the Texarkana division.

Terms of the district court for the Tyler division are held at Tyler on the fourth Mondays in January and April; for the Jefferson division, at Jefferson on the first Monday in October and the third Monday in February; for the Beaumont division, at Beaumont on the third Monday in November and the first Monday in April; for the Sherman division, at Sherman on the first Monday in January and the third Monday in May; for the Paris division, at Paris on the third Monday in October and the first Monday in March; and for the Texarkana division, at Texarkana on the third Monday in March and the first Monday in November.

The western district includes the counties of Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson, which constitute the Austin division; the counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, and Wilson, which constitute the San Antonio division; the counties of Brewster, Crane, Ector, El Paso, Jeff Davis, Loving, Reeves, Presidio, Ward and Winkler, which constitute the El Paso division; the counties of Bell, Bosque, Coryell, Falls, Hamilton, Freestone, Hill, Leon, Limestone, McLennan, Milan, Robertson, and Somervell, which constitute the Waco division; the counties of Kinney, Maverick, Pecos, Terrell, Uvalde, Valverde, and Zavalla, which constitute the Del Rio division.

Terms of the district court for the Austin division are held at Austin on the fourth Monday in January and the second Monday in June; for the Waco division, at Waco on the fourth Monday in February and the second Monday in November; for the San Antonio division, at San Antonio on the first Monday in May and the third Monday in December; for the El Paso division, at El Paso on the first Monday in April and the first Monday in October; and for the Del Rio division, at Del Rio on the third Monday in March and the fourth Monday in October.

The southern district includes the counties of Duval, La Salle, McMullen, Nueces, Webb, and Zapata, which constitute the Laredo division; the counties of Cameron, Hidalgo, and Starr, which constitute the Brownsville division; the counties of Austin, Brazoria, Chambers, Galveston, Fort Bend, Matagorda, and Wharton, which constitute the Galveston division; the counties of Brazos, Colorado, Fayette, Grimes, Harris, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, and Waller, which constitute the Houston division; the counties of Bee, Calhoun, Dewitt, Goliad, Jackson, Live Oak, Refugio, Aransas, San Patricio, and Victoria, which constitute the Victoria division.

Terms of the district court for the Galveston division are held at Galveston on the second Monday in January and the first Monday in June; for the Houston division, at Houston on the fourth Mondays in February and September; for the Laredo division, at Laredo on the third Monday in April and the second Monday in November; for the Brownsville division, at Brownsville on the second Monday in May and the first Monday in December; and for the Victoria division, at Victoria on the first Monday in May and the fourth Monday in November.

**Utah** constitutes one judicial district, known as the district of Utah.

It is divided into two divisions, to be known as the northern and central divisions. The northern division includes the counties of Boxelder, Cache, Davis, Morgan, Rich, and Weber. The central division includes the counties of Bever, Carbon,

Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, San Pete, Sevier, Summit, Tooele, Uinta, Utah, Wasatch, Washington, and Wayne.

Terms of the district court for the northern division are held at Ogden on the second Mondays in March and September; and for the central division, at Salt Lake City on the second Mondays in April and November.

**Vermont** constitutes one judicial district, known as the district of Vermont.

Terms of the district court are held at Burlington on the fourth Tuesday in February; at Windsor on the third Tuesday in May; and at Rutland on the first Tuesday in October. In each year one of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier, and one at Newport.

**Virginia** is divided into two districts, known as the eastern and western districts of Virginia.

The eastern district includes the counties of Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greenesville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland, and York.

Terms of the district court are held at Richmond on the first Mondays in April and October; at Norfolk on the first Mondays in May and November; and at Alexandria on the first Mondays in January and July.

The western district includes the counties of Alleghany, Albemarle, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson,

Page, Patrick, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott; Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, and Wythe.

Terms of the district court are held at Lynchburg on the Tuesdays after the second Mondays in March and September; at Danville on the Tuesdays after the second Mondays in April and November; at Abingdon on the Tuesdays after the first Mondays in May and October; at Harrisonburg on the Tuesdays after the first Mondays in June and December; at Charlottesville on the second Monday in January and the first Monday in July; at Roanoke on the third Monday in February and the third Monday in June; and at Big Stone Gap on the fourth Monday in January and the second Monday in August.

**Washington** is divided into two districts, known as the eastern and western districts of Washington.

The eastern district includes the counties of Spokane, Stevens, Ferry, Okanogan, Chelan, Grant, Douglas, Lincoln, and Adams, with the waters thereof, including all Indian reservations within said counties, which constitute the northern division; the counties of Asotin, Garfield, Whitman, Columbia, Franklin, Walla Walla, Benton, Klickitat, Kittitas, and Yakima, with the waters thereof, including all Indian reservations within said counties, which constitute the southern division of said district.

Terms of the district court for the northern division are held at Spokane on the first Tuesdays in April and September; for the southern division, at Walla Walla on the first Tuesdays in June and December, and at North Yakima on the first Tuesdays in May and October.

The western district includes the counties of Whatcom, Skagit, Snohomish, King, San Juan, Island, Kitsap, Clallam, and Jefferson, with the waters thereof, including all Indian reservations within said counties, which constitute the northern division; the counties of Pierce, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, with the waters thereof, including all Indian reservations within said counties, which constitute the southern division of said district.



Terms of the district court for the northern division are held at Bellingham on the first Tuesdays in April and October; at Seattle on the first Tuesdays in May and November; and for the southern division, at Tacoma on the first Tuesdays in February and July.

**West Virginia** is divided into two districts, known as the northern and southern districts of West Virginia.

The northern district includes the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley, and Jefferson, with the waters thereof.

Terms of the district court for the northern district are held at Martinsburg the first Tuesday of April and the third Tuesday of September; at Clarksburg, the second Tuesday of April and the first Tuesday of October; at Wheeling, the first Tuesday of May and the third Tuesday of October; at Philippi, the fourth Tuesday of May and first Tuesday of November; at Parkersburg, the second Tuesday of January and second Tuesday of June.

The southern district includes the counties of Jackson, Roane, Clay, Braxton, Webster, Nicholas, Pocahontas, Greenbrier, Fayette, Boone, Kanawha, Putnam, Mason, Cabell, Wayne, Lincoln, Logan, Mingo, Raleigh, Wyoming, McDowell, Mercer, Summers, and Monroe, with the waters thereof.

Terms of the district court for the southern district are held at Charleston on the first Tuesday in June and the third Tuesday in November; at Huntington, on the first Tuesday in April and the first Tuesday after the third Monday in September; at Bluefield on the first Tuesday in May and the third Tuesday in October; at Addison on the first Monday in September; and at Lewisburg on the second Tuesday in February.

**Wisconsin** is divided into two districts, known as the eastern and western districts of Wisconsin.

The eastern district includes the counties of Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green



Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago.

Terms of the district court for said district are held at Milwaukee on the first Mondays in January and October; at Oshkosh on the second Tuesday in June, and at Green Bay on the first Tuesday in April.

The western district includes the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Dunn, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood.

Terms of the district court for said district are held at Madison on the first Tuesday in December; at Eau Claire on the first Tuesday in June; at La Crosse on the third Tuesday in September; and at Superior on the fourth Tuesday in January and the second Tuesday in July.

**Wyoming** and the **Yellowstone National Park** constitute one judicial district, known as the district of Wyoming.

Terms of the district court for said district are held at Cheyenne on the second Mondays in May and November; at Evanston on the second Tuesday in July; and at Lander on the first Monday in October; and the court holds one session annually at Sheridan, and in said national park, on such dates as the court may order.

## **§ 22. Appellate Courts—Territorial jurisdiction.**

**THE SUPREME COURT.**—The territorial jurisdiction of the Supreme Court of the United States includes all of the states and territories.

One term is held annually on the second Monday in October and such adjourned or special terms as it may find necessary for the dispatch of business.<sup>11</sup>

CIRCUIT COURTS OF APPEALS.—The territorial jurisdiction and time of holding court of the several circuit courts of appeals is as follows:<sup>12</sup>

*The first circuit* includes the states of Maine, New Hampshire, Massachusetts and Rhode Island.

Annual term, first Tuesday in October; stated sessions, first Tuesday in every month; sessions for hearing cases, first Tuesday in January and October, and second Tuesday in April, at Boston, Mass.

*The second circuit* includes Vermont, Connecticut and New York.

One term of the circuit court of appeals for the second circuit is held annually at New York, N. Y., on the third Tuesday of October and such adjourned sessions as the court may from time to time designate.

*The third circuit* includes the states of New Jersey, Pennsylvania and Delaware.

The circuit court of appeals for the third circuit holds two terms in a year at Philadelphia, Pa. The March term commences on the first Tuesday in March and the October term on the first Tuesday of October in each year.

*The fourth circuit* includes the states of North Carolina, South Carolina, Maryland, Virginia and West Virginia.

The circuit court of appeals for the fourth circuit holds three terms annually at Richmond, Va., beginning on the first Tuesday in February, May and November respectively.

*The fifth circuit* includes the states of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas.

The circuit court of appeals for the fifth circuit holds a term of court at Montgomery, Ala., on the third Monday in Octo-

<sup>11</sup> Sec. 230 of the Judiciary Code of 1911.

<sup>12</sup> The territorial jurisdiction is fixed by Sec. 116 of the Judiciary

Code of 1911, and the terms for holding court by Sec. 126 of the Judiciary Code of 1911.

ber; at Atlanta, Ga., on the first Monday in October; at Fort Worth, Tex., on the first Monday in November, and at New Orleans, La., on the third Monday in November.

*The sixth circuit* includes the state of Ohio, Michigan, Kentucky and Tennessee.

The circuit court of appeals for the sixth circuit holds one term annually at Cincinnati, Ohio, beginning on the first Tuesday after the first Monday in October and adjourned sessions on the first Tuesday after the first Monday in each month except August and September.

*The seventh circuit* includes the states of Indiana, Illinois and Wisconsin.

The circuit court of appeals for the seventh circuit holds one term annually at Chicago, Ill., beginning on the first Tuesday in October. Term is divided into three sessions, beginning on the first Tuesday in October and January, and second Tuesday in April.

*The eighth circuit* includes the states of Minnesota, Iowa, Missouri, Arkansas, Nebraska, Colorado, Kansas, Wyoming, North Dakota, South Dakota, Utah, Oklahoma and the territory of New Mexico.

The circuit court of appeals for the eighth circuit holds one term annually at St. Paul, Minn., beginning on the first Monday in May; one term annually at Denver, Colo., beginning the first Monday in September, and one term annually at St. Louis, Mo., beginning the first Monday in December.

*The ninth circuit* includes the states of California, Oregon, Nevada, Washington, Idaho and Montana, also includes the territories of Alaska, Arizona and Hawaii.

The circuit court of appeals for the ninth circuit holds the October term at San Francisco, beginning on the first Monday in October. Adjourned sessions on the first Monday in each month; calendar sessions for hearing of causes commence on first Monday in October, February and May, respectively. An annual term at Seattle, Wash., beginning on the second Monday in September, for hearing of causes. An annual term in Portland, Ore., beginning on the third Monday in September, for hearing of causes.

## CHAPTER IV.

## THE JURISDICTION OF THE COURTS OF BANKRUPTCY.

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## § 23. The jurisdiction statutory.

It is well settled that the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by acts of Congress.<sup>1</sup>

A court of bankruptcy, being created by congress, depends solely for its jurisdiction and powers upon the laws of the

<sup>1</sup> Kentucky v. Powers, 201 U. S. 1, 24. 50 L. Ed. 633; Bardes v. Hawarden Bank, 178 U. S. 524, 537, 44 L. Ed. 1175, 4 Am. B. R. 163; *Ex parte Bollman*, etc., 4 Cranch 75, 2 L. Ed. 554; *United States v. Hudson*, 7 Cranch 32, 33, 3 L. Ed. 259; *Cary v. Curtis*, 3 How. 236, 245, 11 L. Ed. 576; *McIntire v. Wood*, 7 Cranch 504, 506, 3 L. Ed.

420; *United States v. Eckford*, 6 Wall. 484, 488, 18 L. Ed. 920; *Sheldon v. Sill*, 8 How. 441, 449, 12 L. Ed. 1147; *Jones v. United States*, 137 U. S. 202, 211, 34 L. Ed. 691; *The Sewing Machine Companies*, 18 Wall. 553, 571, 21 L. Ed. 914; *Holmes v. Goldsmith*, 147 U. S. 150, 158, 37 L. Ed. 118.

United States.<sup>2</sup> It has no powers except those which are expressly granted by congress, and such implied powers as may be necessary to give full force and effect to the jurisdiction conferred upon it.<sup>3</sup>

#### § 24. The statute.

Jurisdiction is conferred upon the courts of bankruptcy by Section 2 of the present act, which is as follows:

"SEC. 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to

<sup>2</sup> *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *In re Williams*, 120 Fed. Rep. 38, 9 Am. B. R. 741; *In re Morris*, No. 9825, Fed. Cas., Crabbe, 70; *Campbell's Case*, No. 2349, Fed. Cas., 1 N. B. R. 165; *Clark v. Binninger*, 38 Howard's Prac. 341.

*In re Morris*, *supra*, Judge Hopkinson, in an exhaustive opinion, reached the conclusion that neither a Chancellor in England nor a United States judge, had any powers in bankruptcy matters, other than those arising expressly or impliedly from the bankrupt statute.

In *Bardes v. Hawarden Bank*, *supra*, construing the jurisdiction of a court of bankruptcy under the present act, Mr. Justice Gray said: "He could not have sued in a district court of the United States,

because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of congress, a district court has the powers of a circuit court, or is given jurisdiction of a particular class of civil suits."

<sup>3</sup> *Brumby v. Jones* (C. C. A. 5th Cir.), 141 Fed. Rep. 318, 72 C. C. A. 466, 15 Am. B. R. 578; *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *Havens & Geddes Co. v. Pierek* (C. C. A. 7th Cir.), 120 Fed. Rep. 244, 57 C. C. A. 37, 9 Am. B. R. 569; *Real Estate Trust Co. v. Thompson*, 112 Fed. Rep. 945, 7 Am. B. R. 520; *Henrie v. Henderson* (C. C. A. 4th Cir.), 145 Fed. Rep. 316, 76 C. C. A. 196, 16 Am. B. R. 617.

“(1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions;

“(2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

“(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;

“(4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations for violations of this act, in accordance with the laws or procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

“(5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interest of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this act;

“(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

“(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

“(8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and dis-

charging the trustees, and reopen them whenever it appears they were closed before being fully administered;

“(9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases;

“(10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees:

“(11) determine all claims of bankrupts to their exemptions;

“(12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases:

“(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

“(14) extradite bankrupts from their respective districts to other districts;

“(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act;

“(16) punish persons for contempts committed before referees;

“(17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them;

“(18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy;

“(19) transfer cases to other courts of bankruptcy; and

“(20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.

“Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.”

**§ 25. Bankruptcy proceedings and suits at law and in equity.**

Two distinct classes of jurisdiction are conferred on the courts of bankruptcy by the bankrupt act.

*First.* It confers on them jurisdiction in bankruptcy over all proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets among the creditors, and the discharge or refusal of a discharge of a bankrupt.<sup>4</sup>

Bankruptcy proceedings proper include the questions between the bankrupt and his creditors as such, commencing with the petition for adjudication and ending with the administration of the estate, the discharge or refusal to discharge the bankrupt and all matters of administration generally, such as the appointment of a receiver or trustee, sales, exemptions, allowances, dividends and the like, to be disposed of summarily, all of which naturally occur in the settlement of estates. What constitutes proceedings in bankruptcy is considered more fully in another place.<sup>5</sup>

The jurisdiction of a court of bankruptcy of proceedings in bankruptcy proper is exclusive of all other courts and extends to all matters, acts and things to be done under and in virtue of bankruptcy.<sup>6</sup> This jurisdiction may be exercised in summary proceedings.<sup>7</sup> The action of the court is regularly re-

<sup>4</sup>*In re* Wood & Henderson, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *First Nat. Bank v. Title & T. Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786; *In re* Friend (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 67 C. C. A. 500, 13 Am. B. R. 595; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

<sup>5</sup>See *Bankruptcy Proceedings*, Sec. 27, *post*.

<sup>6</sup>R. S. Sec. 711; *In re* Watts v. Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *White v. Schloerb*,

178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Weinger, Bergman & Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re* Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1.

<sup>7</sup>*Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Wood & Henderson, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re* Neasmith (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128.



vised by a petition for review in all cases except those in which an appeal may be taken as in equity,<sup>8</sup> and judgments based on the verdict of a jury demanded as of right under Section 19 of the act, which are reviewable on writ of error.<sup>9</sup>

*Second.* It confers on them jurisdiction, as ordinary courts, of suits at law or in equity brought by or against the trustee in reference to alleged property of the bankrupt, or to claims alleged to be due from him or to him.<sup>10</sup> This is not a general jurisdiction of suits at law or in equity but is limited to controversies arising out of the settlement of the estates of bankrupts.<sup>11</sup> By controversies at law and in equity arising in bankruptcy proceedings is meant those independent or plenary suits which concern bankrupts' estates and which arise by intervention or otherwise between the trustee, representing the bankrupt's estate, and claimants asserting some right or interest adverse to the bankrupt or his general creditors. It does not include all controversies of this character

<sup>8</sup> B. A. 1898, Sec. 25a; see Secs. 534, *et seq.*, *post*; *In re Mueller* (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; *In re Friend* (C. C. A. 7th Cir.), 134 Fed. Rep. 778, 67 C. C. A. 500, 13 Am. B. R. 595; *In re Mertens* (C. C. A. 2nd Cir.), 142 Fed. Rep. 445, 73 C. C. A. 561, 15 Am. B. R. 701; *Francis v. McNeal* (C. C. A. 3rd Cir.), 170 Fed. Rep. 445, 95 C. C. A. 168, 22 Am. B. R. 337; *Brady v. Bernard & Kittinger* (C. C. A. 6th Cir.), 170 Fed. Rep. 576, 95 C. C. A. 656, 22 Am. B. R. 342.

<sup>9</sup> *Grant Shoe Co. v. Laird Co.*, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1; *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50.

<sup>10</sup> *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Burleigh v.*

*Foreman* (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 109, 11 Am. B. R. 74; *Doroshov v. Ott* (C. C. A. 3rd Cir.), 134 Fed. Rep. 740, 67 C. C. A. 644, 14 Am. B. R. 34; *In re First Nat. Bank* (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180.

<sup>11</sup> *Brumby v. Jones* (C. C. A. 5th Cir.), 141 Fed. Rep. 318, 72 C. C. A. 466, 15 Am. B. R. 578; *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *Havens & Geddes Co. v. Pierek* (C. C. A. 7th Cir.), 120 Fed. Rep. 244, 57 C. C. A. 37, 9 Am. B. R. 569; *Real Estate Trust Co. v. Thompson*, 112 Fed. Rep. 945, 7 Am. B. R. 520; *Henrie v. Henderson* (C. C. A. 4th Cir.), 145 Fed. Rep. 316, 76 C. C. A. 196, 16 Am. B. R. 617; *In re Girard Glazed Kid Co.*, 136 Fed. Rep. 511, 14 Am. B. R. 485; *In re Augusta Pottery Co.*, 163 Fed. Rep. 1011, 21 Am. B. R. 64.

as will be more fully pointed out hereafter in the chapter on suits against trustees.

The jurisdiction of a court of bankruptcy of controversies at law and in equity is concurrent with the state and federal courts, which may have jurisdiction of the parties and controversy.<sup>12</sup> This jurisdiction may be exercised only in an action in the nature of a plenary suit, wherein the parties can be fully heard upon pleadings and proofs according to the regular procedure at law or in equity.<sup>13</sup> The action of the court in such cases is reviewable on writ of error or appeal after a final decision as in other suits at law or in equity.<sup>14</sup>

## **§ 26. Distinction between bankruptcy proceedings and controversies arising in bankruptcy.**

The bankrupt act recognizes the distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts. The courts have construed its provisions in view of that distinction. The jurisdiction and procedure in the trial court<sup>15</sup> as well as

<sup>12</sup> Frank v. Vollkommer, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806; Skilton v. Coddington, 185 N. Y. 80; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Claflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833.

<sup>13</sup> Louisville Trust Co. v. Cominger, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Jaquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; First Nat. Bank v. Title & T. Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

<sup>14</sup> Bardes v. Hawarden Bank, 175 U. S. 526, 44 L. Ed. 261; 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Scott & Co. v. Wilson (C. C. A. 7th Cir.), 115 Fed. Rep. 284, 53 C. C. A. 76, 8 Am. B. R. 349; Stelling v. Jones Lumber Co.

(C. C. A. 7th Cir.), 116 Fed. Rep. 261, 53 C. C. A. 81, 8 Am. B. R. 521; Booneville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 43, 6 Am. B. R. 13; Steele v. Buel (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 44 C. C. A. 287, 5 Am. B. R. 165; Burleigh v. Foreman (C. C. A. 1st Cir.), 125 Fed. Rep. 217, 60 C. C. A. 107, 11 Am. B. R. 74.

<sup>15</sup> First Nat. Bank v. Title & T. Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 47; Schweer v. Brown, 195 U. S. 171, 49 L. Ed. 144, 12 Am. B. R. 673; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530.

in the appellate court <sup>16</sup> is different in these two classes of proceedings.

Whether a case is a proceeding in bankruptcy or is a controversy arising in bankruptcy depends upon the rights involved and the manner in which the jurisdiction of the court of bankruptcy is invoked for the determination of those rights.

Proceedings in bankruptcy proper manifestly include all questions arising upon the petition to obtain the benefit of the act, the application for the discharge of the bankrupt, the appointment of receivers or trustees, the allowance of exemptions, dividends and fees, orders with respect to sales of property by the trustee and all like matters of administration which naturally occur in the settlement of estates.<sup>17</sup>

A controversy arising in bankruptcy is usually presented by a contest between the trustee and a third person with respect to the title to property claimed to belong to the estate. Such contests do not in every instance present a controversy arising in bankruptcy. Some may be determined in the bankruptcy proceedings proper. It is not always easy to distinguish between them. A few general principles deduced from the cases may assist in clearing the matter.

When a trustee seeks to recover for the estate property in the possession of a person other than the bankrupt different rules apply than when the contest is over property in the possession of the trustee.

*First.* When the property in dispute is in the possession of a third person the following rules apply:

A proceeding by the trustee to recover property in the possession of a third person, claiming title to or an interest in

<sup>16</sup> *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. 3. 163; *Holden v. Stratton*, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786; *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1; *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re Mueller* (C. C. A. 6th

Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; *Dodge v. Norlin* (C. C. A. 8th Cir.), 133 Fed. Rep. 363, 66 C. C. A. 425, 13 Am. B. R. 176.

<sup>17</sup> As to what constitutes a proceeding in bankruptcy generally, see Sec. 27, *post*.

it, presents a controversy arising in bankruptcy.<sup>18</sup> This is true whether the trustee is seeking to recover a fraudulent or preferential transfer, or property owned by the bankrupt, or money owing the estate by a person who disputes the debt. The fact that the trustee alleges that he has possession of the property is not sufficient to take the case out of this rule, if the court upon inquiry finds that the claimant and not the trustee is in possession.<sup>19</sup>

On the other hand it is a step in the bankruptcy proceedings proper, where the trustee seeks to obtain possession of property held by the bankrupt,<sup>20</sup> or for the bankrupt by a bailee or agent who does not claim title to or an interest in the property.<sup>21</sup> An assignee for the benefit of creditors does not hold his title for value but is simply an agent for the distribution of the proceeds of the debtor's property among his creditors and therefore is in the same situation as a bailee or agent.<sup>22</sup>

<sup>18</sup> *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *Jaquith v. Rowley*, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; *First Nat. Bank v. Title & T. Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; *In re New York Car Wheel Wks.*, 132 Fed. Rep. 203, 13 Am. B. R. 60; *In re Adams*, 130 Fed. Rep. 788, 12 Am. B. R. 367; *Thomas v. Sugarman*, 218 U. S. 129.

<sup>19</sup> *First Nat. Bank v. Title & T. Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102, as explained in *Coder v. Arts*, 213 U. S. 223, 234, 53 L. Ed. 772, 22 Am. B. R. 1.

<sup>20</sup> *Schweer v. Brown* (C. C. A. 8th Cir.), 130 Fed. Rep. 329, 64 C. C. A. 574, 12 Am. B. R. 178; *In re Rosser* (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 41 C. C. A. 497, 4 Am. B. R. 153; *Ripon Knitting Wks. v. Schreiber*, 101 Fed. Rep. 810, 4 Am. B. R. 299; *In re Schlesinger* (C. C. A. 2nd Cir.), 102 Fed. Rep. 117, 42

C. C. A. 207, 4 Am. B. R. 361; *In re Wilson*, 116 Fed. Rep. 419, 8 Am. B. R. 612; *In re Greenberg*, 106 Fed. Rep. 496, 5 Am. B. R. 840; *In re Purvine* (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 37 C. C. A. 446, 2 Am. B. R. 787; *In re Felson*, 124 Fed. Rep. 288, 10 Am. B. R. 716.

<sup>21</sup> *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re Feldser*, 134 Fed. Rep. 307, 14 Am. B. R. 216; *In re Moore*, 104 Fed. Rep. 869, 5 Am. B. R. 151; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re Muncie Pulp Co.* (C. C. A. 2nd Cir.), 139 Fed. Rep. 546, 71 C. C. A. 530, 14 Am. B. R. 70.

<sup>22</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9; *In re*

A proceeding by the creditors, after an adjudication and before the appointment of a trustee, to recover property in the possession of a purchaser from an assignee for the benefit of creditors after an adjudication and with knowledge of the bankruptcy proceedings, was treated as a proceeding in bankruptcy and not as a controversy arising in bankruptcy.<sup>23</sup> A proceeding by a receiver or marshal to take property from the possession of an adverse claimant as well as the bankrupt or his agent, in case it is found necessary for the preservation of the estate, is a proceeding in bankruptcy as distinguished from a controversy arising in bankruptcy.<sup>24</sup>

*Second.* Where the property is in the possession of the trustee a different principle applies.<sup>25</sup>

A controversy arising in bankruptcy is presented where an adverse claimant intervenes in the bankruptcy proceedings for the purpose of asserting an independent and superior title to or lien on the property held by the trustee, claiming a right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered.<sup>26</sup> This is a contest as to who is entitled to the property in dispute—the bankrupt or the claimant. If the former,

Thompson (C. C. A. 2nd Cir.), 128 Fed. Rep. 575, 63 C. C. A. 217, 11 Am. B. R. 719, affirming 122 Fed. Rep. 174, 10 Am. B. R. 242.

<sup>23</sup> Bryan v. Bernheimer, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523.

This case in the circuit court of appeals was treated as a petition for revision though it had been carried there by an appeal and the supreme court considered the decree as rendered in the exercise of the supervisory power in bankruptcy. Holden v. Stratton, 191 U. S. 115, 48 L. Ed. 116, 10 Am. B. R. 786. If it had been a controversy arising in bankruptcy it would be reviewable only on writ of error or appeal and not on a petition for revision.

<sup>24</sup> B. A. 1898, Sec. 2, clause 3. Bryan v. Bernheimer, 181 U. S. 188,

45 L. Ed. 814, 5 Am. B. R. 523; *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432, and 146 Fed. Rep. 109, 17 Am. B. R. 48; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608; *In re Moody*, 131 Fed. Rep. 525, 12 Am. B. R. 718, s. c. 134 Fed. Rep. 628, 14 Am. B. R. 472; *In re Muncie Pulp Co.* (C. C. A. 2nd Cir.), 139 Fed. Rep. 546, 71 C. C. A. 530, 14 Am. B. R. 70; *In re Friedman*, 153 Fed. Rep. 939, affirmed (C. C. A. 2nd Cir.), 161 Fed. Rep. 260, 88 C. C. A. 306, 20 Am. B. R. 37.

<sup>25</sup> See Jurisdiction of Property in Custodia Legis, Sec. 31, *post*.

<sup>26</sup> Murphy v. Hofman Co., 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; Knapp v. Milwaukee Trust Co.,

it must be administered as part of his estate in bankruptcy; if the latter, he may withdraw it from the estate, because the creditors have no interest in it.

On the other hand it is a proceeding in bankruptcy where a creditor intervenes, recognizing the title and possession of the trustee, for the purpose of asserting a claim—either with or without security on the property—and his right to have the assets so administered and paid as to secure his share of the estate and have the validity of his lien, if he asserts one, enforced as a security for his claim.<sup>27</sup> In such proceedings there is no contest as to title. The claimant admits that the trustee should administer the property as a part of the estate in bankruptcy. He merely proves his claim and asks that he may have his lawful share in the estate to be administered.

Where a proceeding is instituted by a trustee to determine questions in relation to the distribution of property in his possession and the extent and character of liens thereon or rights therein, it is a proceeding in bankruptcy proper.<sup>28</sup> It makes no difference whether the trustee invokes the jurisdiction of the court of bankruptcy by a summary proceeding or by a plenary suit,<sup>29</sup> or whether it is necessary to bring in adverse claimants who are not parties to the proceedings in bankruptcy.<sup>30</sup>

216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *In re First Nat. Bank* (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180; *In re Mueller* (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

<sup>27</sup> *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1; *In re Antigo Screen Door Co.* (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 59 C. C. A. 248, 10 Am. B. R. 359.

<sup>28</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; *In re Kellogg* (C. C. A. 2nd Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7.

<sup>29</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45.

<sup>30</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608.

It may be said generally that where the property is in *custodia legis* and an adverse claimant is required to propound his claim against the property as an incident to a step in the bankruptcy proceedings proper, the proceeding continues to be in bankruptcy as distinguished from a controversy at law or in equity.<sup>81</sup>

## § 27. Jurisdiction of bankruptcy proceedings proper.

The jurisdiction of the courts of bankruptcy over proceedings in bankruptcy is plenary and exclusive.<sup>82</sup>

It extends to all matters, acts and things to be done under and in virtue of bankruptcy. Section 2 enumerates certain specific powers and concludes, "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any powers it would possess were certain specific powers not herein enumerated."

Jurisdiction in bankruptcy includes the power to make or refuse an adjudication in bankruptcy,<sup>83</sup> and to administer the estate of the debtor. By estate is meant the property in the possession of the debtor at the time proceedings in bankruptcy are commenced to which the trustee may fairly make a

<sup>81</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; *In re New England Piano Co.* (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59 C. C. A. 461, 9 Am. B. R. 767; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432, s. c. 146 Fed. Rep. 109; *In re Moody*, 131 Fed. Rep. 525, 12 Am. B. R. 718, and 134 Fed. Rep. 628, 14 Am. B. R. 472; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608.

<sup>82</sup> R. S. Sec. 711; *White v. Schloerb*, 178 U. S. 522, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Watts v. Sachs*, 190 U. S. 1, 47 L. Ed. 943, 10 Am. B. R. 113; *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re Wienger, Bergman & Co.*, 126 Fed. Rep. 875, 11 Am. B. R. 424; *American Trust Co. v. Wallis* (C. C. A. 3rd Cir.), 126 Fed. Rep. 464, 61 C. C. A. 342, 11 Am. B. R. 360.

<sup>83</sup> *Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127; *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965, 4 Am. B. R. 411.



pretension of claim.<sup>34</sup> It includes property of the bankrupt not within the district wherein the petition is filed.<sup>35</sup>

In administering an estate it is the duty of a court of bankruptcy to determine the proportionate share of each creditor, declare dividends, order payment and close the estate,<sup>36</sup> and in proper cases to reopen it for further proceedings.<sup>37</sup>

In the exercise of its summary jurisdiction in bankruptcy the court may order the bankrupt or his agent to pay over to the trustee such property as he has in his possession and punish him for contempt of court if he disobeys,<sup>38</sup> or compel restitution by persons who have forcibly or unlawfully seized and taken out of the custody of the court property which had lawfully come into its possession as a part of the bankrupt's property,<sup>39</sup> or determine claims against the bankrupt's property in the possession of the court,<sup>40</sup> or determine validity and

<sup>34</sup> *In re* New England Piano Co., 122 Fed. Rep. 937, 9 Am. B. R. 767; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178.

<sup>35</sup> *In re* Dempster (C. C. A. 8th Cir.), 172 Fed. Rep. 353, 97 C. C. A. 51, 22 Am. B. R. 751; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404.

<sup>36</sup> *In re* Carr, 116 Fed. Rep. 556, 8 Am. B. R. 635.

<sup>37</sup> *In re* Shaffer, 104 Fed. Rep. 982, 4 Am. B. R. 728; *In re* Newton, 107 Fed. Rep. 429, 6 Am. B. R. 52.

<sup>38</sup> *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; 5 Am. B. R. 176; *In re* Rosser (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 41 C. C. A. 497, 4 Am. B. R. 153; *In re* Wilson, 116 Fed. Rep. 419, 8 Am. B. R. 612.

An assignee for creditors is an agent of the debtor. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re* Stokes,

106 Fed. Rep. 312, 6 Am. B. R. 262.

The court has no power to order a bankrupt to pay over money which is not under his control. *American Trust Co. v. Wallis* (C. C. A. 3rd Cir.), 126 Fed. Rep. 464, 61 C. C. A. 344, 11 Am. B. R. 360.

<sup>39</sup> *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re* Briskman, 132 Fed. Rep. 201, 13 Am. B. R. 57; *In re* Alton Mfg. Co., 158 Fed. Rep. 367, 19 Am. B. R. 805; *In re* Rudnick & Co., 158 Fed. Rep. 223, 18 Am. B. R. 750.

<sup>40</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *Keegan v. King*, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re* Whitener (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198; *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623, affirmed (C. C. A. 2nd Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7.



the relative priority of conflicting claims to a fund arising from the sale of property,<sup>41</sup> or determine whether particular property in question is a part of the bankrupt's estate and subject to distribution to his creditors,<sup>42</sup> or to order paid to the trustee money in the hands of a sheriff acquired by levy and sale within four months prior to the filing of the petition in bankruptcy,<sup>43</sup> but not when the money has been paid over to the judgment creditor,<sup>44</sup> or to order paid to the trustee property in the hands of a bailee or agent who does not claim title to such property,<sup>45</sup> or to enjoin the prosecution of suits founded upon provable debts or to prevent the transfer or disposition of the debtor's property or any interference with the administration of the debtor's estate,<sup>46</sup> or to order an assessment upon the stockholders of a bankrupt corporation for unpaid subscriptions,<sup>47</sup> or to order a trustee to pay over to the owner money or property which has come into his possession by virtue of his office,<sup>48</sup> or to appoint trustees when the credit-

<sup>41</sup> *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; *Chauncey v. Dyke Bros.* (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 55 C. C. A. 579, 9 Am. B. R. 444; *In re McCallum*, 113 Fed. Rep. 393, 7 Am. B. R. 596; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608.

<sup>42</sup> *In re Kellogg*, 113 Fed. Rep. 120, 7 Am. B. R. 623; *Antigo Screen Door Co.* (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 59 C. C. A. 248, 10 Am. B. R. 359.

<sup>43</sup> *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 555; 9 Am. B. R. 476, affirming *In re Kenney* (C. C. A. 2nd Cir.), 105 Fed. Rep. 897, 45 C. C. A. 113, 5 Am. B. R. 355; *In re Baughman*, 138 Fed. Rep. 742, 15 Am. B. R. 23; *In re Vastbinder*, 132 Fed. Rep. 718, 13 Am. B. R. 148.

<sup>44</sup> *In re Blair*, 102 Fed. Rep. 987, 4 Am. B. R. 220; *In re Knicker-*

*bocker*, 121 Fed. Rep. 1004, 10 Am. B. R. 381.

See observation of Mr. Justice Brewer in *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

But see *In re Breslauer*, 121 Fed. Rep. 910, 10 Am. B. R. 33.

<sup>45</sup> *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re Moore*, 104 Fed. Rep. 869, 5 Am. B. R. 151; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re Feldser*, 134 Fed. Rep. 307, 14 Am. B. R. 216.

<sup>46</sup> *In re Jersey Island Packing Co.* (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689; *In re Wilk*, 155 Fed. Rep. 943, 19 Am. B. R. 178.

<sup>47</sup> *In re Miller Electric Maintenance Co.*, 111 Fed. Rep. 515, 6 Am. B. R. 701.

<sup>48</sup> *In re Howard* (C. C. A. 9th Cir.), 135 Fed. Rep. 721, 68 C. C.

ors fail to elect, or to punish for failure to obey lawful orders and punish for contempts committed before referees.

The court of bankruptcy is given authority to "appoint receivers or the marshals, upon application of parties in interest, in case the court finds it absolutely necessary for the preservation of the estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."<sup>49</sup> This includes property of the bankrupt in the hands of a third person and is a proceeding in bankruptcy which is not affected by Section 23, which relates only to suits by a trustee.<sup>50</sup> In case property is taken by summary proceeding opportunity must be given the claimant to propound his claim to the property.<sup>51</sup>

A sale of property by a trustee under the direction of the court, requiring adverse claimants to come in and set up their claim is a proceeding in bankruptcy.<sup>52</sup> The court of bankruptcy has jurisdiction of such a proceeding when the

A. 359, 14 Am. B. R. 296, affirming 130 Fed. Rep. 1004, 12 Am. B. R. 462.

<sup>49</sup> B. A. 1898, Sec. 2, clause 3. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *Boonville Nat. Bank v. Blakey* (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 43, 6 Am. B. R. 13; *In re Florcken*, 107 Fed. Rep. 241, 5 Am. B. R. 802.

<sup>50</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432; and 146 Fed. Rep. 109, 17 Am. B. R. 48; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608; *In re Moody*, 131 Fed. Rep. 525, 12 Am. B. R. 718; and 134 Fed. Rep. 628, 14 Am. B. R. 472; *In re Muncie Pulp Co.* (C. C.

A. 2nd Cir.), 139 Fed. Rep. 546, 71 C. C. A. 530, 14 Am. B. R. 70.

<sup>51</sup> *In re Young* (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 49 C. C. A. 283, 7 Am. B. R. 14. As was done *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432; and 146 Fed. Rep. 109, 17 Am. B. R. 48; *In re Moody*, 131 Fed. Rep. 525, 12 Am. B. R. 718, and 134 Fed. Rep. 628, 14 Am. B. R. 472.

<sup>52</sup> *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re New England Piano Co.* (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59 C. C. A. 461, 9 Am. B. R. 767.

property sold is in *custodia legis*,<sup>53</sup> and not otherwise.<sup>54</sup> The fact that the court acquires a fund arising from such sale does not give it jurisdiction to dispose of it unless it had jurisdiction of the property sold.<sup>55</sup>

Proceedings upon an application for a discharge, by which the debtor may be released from the unpaid debts, constitute a step in the bankruptcy proceedings proper.

### § 28. Bankruptcy jurisdiction exclusive.

The original jurisdiction in bankruptcy, conferred on these courts, is exclusive of the courts of the several states,<sup>56</sup> and also of the courts of the United States, not created courts of bankruptcy. The circuit courts had no bankruptcy jurisdiction under the act of 1898.<sup>57</sup>

The exclusive jurisdiction, however, is confined to matters in bankruptcy,<sup>58</sup> and does not extend to matters at law or in equity which may grow out of bankruptcy proceedings.<sup>59</sup> This principle is recognized in section 23 of the act of 1898,

<sup>53</sup> *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re New England Piano Co.* (C. C. A. 1st Cir.), 122 Fed. Rep. 937, 59 C. C. A. 461, 9 Am. B. R. 767.

<sup>54</sup> *First Nat. Bank v. Title & Trust Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

<sup>55</sup> *First Nat. Bank v. Title & Trust Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

<sup>56</sup> R. S. Sec. 711; *In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1; *Akins v. Stradley*, 51 Ia. 414; *Broach v. Powell*, 79 Ga. 79; *Southern v. Fisher*, 6 S. C. 345.

<sup>57</sup> *Bray v. United States Fidelity, etc., Co.* (C. C. A. 4th Cir.), 170

Fed. Rep. 689, 96 C. C. A. 9, 22 Am. B. R. 363; *Hatch v. Curtin*, 146 Fed. Rep. 200, 16 Am. B. R. 629.

*In Cruchet v. Red Rover Min. Co.*, 155 Fed. Rep. 486, 18 Am. B. R. 814, Judge Colt dismissed a creditor's bill in the circuit court and discharged a receiver, because bankruptcy proceeding had been begun in another district prior to filing the bill and the bankruptcy court had exclusive jurisdiction to administer the estate.

<sup>58</sup> See Sec. 27, *ante*.

<sup>59</sup> *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806; *Skilton v. Codington*, 185 N. Y. 80; *Bindsell v. Smith*, 61 N. J. Eq. 645; *Reed v. Equitable Trust*, 115 Ga. 780, 8 Am. B. R. 242.

which provides for instituting such suits in the circuit courts of the United States and in the state courts. The former acts did not expressly confer or recognize any jurisdiction in the state courts, but the federal and state judges held that R. S. Sec. 711 did not divest the state courts of any jurisdiction at law or in equity.<sup>60</sup>

When jurisdiction in bankruptcy attaches, which it does as soon as the petition is filed,<sup>61</sup> it extends over the bankrupt and his estate. It extends to all the property of the bankrupt situate within the United States whether within or without the territorial jurisdiction of the court of bankruptcy.<sup>62</sup> The filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction.<sup>63</sup>

The trustee is vested with the title of the bankrupt's property as of the date when he is adjudged a bankrupt, and it is then in the legal custody of the court.<sup>64</sup> Property thus surrendered to a trustee can not be affected by any other court attempting to interfere with or withdraw the property from

<sup>60</sup> *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542; *Clafin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Clark v. Ewing*, 3 Fed. Rep. 83; *Scott v. Kelly*, 22 Wall. 57, 22 L. Ed. 729; *In re Miller*, No. 9551, Fed. Cas., 6 Biss. 30; *Cook v. Whipple*, 55 N. Y. 150.

<sup>61</sup> See effect of filing the petition. Sec. 29, *post*.

<sup>62</sup> *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re Dempster* (C. C. A. 8th Cir.), 172 Fed. Rep. 355, 97 C. C. A. 51, 22 Am. B. R. 751; *Hurley v. Devlin*, 151 Fed. Rep. 919, 18 Am. B. R. 627.

<sup>63</sup> See Sec. 29 *post*. *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re Weinger*, *Bergman & Co.*, 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re Reynolds*,

127 Fed. Rep. 760, 11 Am. B. R. 758; *In re Dempster* (C. C. A. 8th Cir.), 172 Fed. Rep. 355, 97 C. C. A. 51, 22 Am. B. R. 751.

See observation of Mr. Justice Peckham in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 353, 50 L. Ed. 782, 15 Am. B. R. 633, with reference to this phrase.

<sup>64</sup> *In re Baughman*, 138 Fed. Rep. 742, 15 Am. B. R. 23; *In re Vastbinder*, 132 Fed. Rep. 718, 13 Am. B. R. 148; *In re Reynolds*, 127 Fed. Rep. 760, 11 Am. B. R. 758; *In re Hughes*, 170 Fed. Rep. 809, 22 Am. B. R. 303; *Carter v. Hobbs*, 92 Fed. Rep. 594, 1 Am. B. R. 215.

See also *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

the possession of the trustee.<sup>65</sup> All claims against the bankrupt's property and all controversies concerning the same, including title to the property, which was in his possession at the time of filing the petition, should be presented and adjudicated in the court of bankruptcy.<sup>66</sup> Where the bankruptcy court in the exercise of its customary jurisdiction obtains the lawful custody of property to which liens attach, it has jurisdiction to determine the relative priorities of conflicting claims to the fund realized from the sale of the property.<sup>67</sup>

All suits against the bankrupt, founded upon a claim from which a discharge would be a release, and pending at the time of the filing of a petition against him, may be stayed until after an adjudication or dismissal of the petition; if such person is adjudged a bankrupt such action may be further stayed until twelve months after the date of such adjudication;

<sup>65</sup> *White v. Schloerb*, 178 U. S. 545, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Walsh Bros.*, 159 Fed. Rep. 560, 20 Am. B. R. 472; *In re Briskman*, 132 Fed. Rep. 201, 13 Am. B. R. 57.

A referee or a trustee is an officer of the court, and his possession is the possession of the court, and the familiar cases turning upon the relations of marshals and receivers are applicable with equal force to the protection of a trustee. *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Shields v. Coleman*, 157 U. S. 168, 39 L. Ed. 660; *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815.

<sup>66</sup> *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178, 2 N. B. N. 721; *Whitney v. Wenman*, 198 U. S. 539, 552, 49 L. Ed. 1157, 14 Am. B. R. 45; *Keegan v. King*, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re Russell* (C. C. A. 2nd Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658; *In re Chambers Calder Co.*, 98 Fed.

Rep. 865, 3 Am. B. R. 537; *In re Corbett*, 104 Fed. Rep. 872, 5 Am. B. R. 224; *In re Whitener* (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198; *In re Emslie* (C. C. A. 2nd Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126.

In *Hurley v. Devlin*, 151 Fed. Rep. 919, 18 Am. B. R. 627, it was held that when a bankrupt dies pending bankruptcy, the court of bankruptcy only can settle the widow's dower.

<sup>67</sup> *Chauncey v. Dyke Bros.* (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 55 C. C. A. 579, 9 Am. B. R. 444; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530.

In *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; the supreme court held that when property was in the custody of the court "jurisdiction exists to determine the controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

or if within that time such person applies for a discharge, then until the question of such discharge is determined.<sup>68</sup> The court may, however, direct the trustee to prosecute or defend a pending suit.

The filing of a petition in bankruptcy does not *propria vigore* abate or suspend a suit pending in a state court at the time.<sup>69</sup> Although the bankrupt court has exclusive jurisdiction of all proceedings in bankruptcy, it does not, upon such proceedings being instituted, draw to it all manner of controversies with the bankrupt.<sup>70</sup> State courts are entitled to notice of some kind before they are required to yield jurisdiction over a pending case.<sup>71</sup> Some cases may proceed to final settlement in the state court; others must be stayed if application is made for

<sup>68</sup> B. A. 1898, Sec. 11.

<sup>69</sup> Taylor v. Taylor (N. J. Chan.), 45 Atlantic Rep. 440, 4 Am. B. R. 211; Continental Nat. Bank v. Katz (Sup. Ct. Cook Co. Ill.), 1 Am. B. R. 19; Reid, Murdock & Co. v. Cross (Sup. Ct. Cook Co., Ill.), 1 Am. B. R. 34; Heath v. Shaffer, 93 Fed. Rep. 647; 2 Am. B. R. 98; *In re Gerdes*, 102 Fed. Rep. 318, 4 Am. B. R. 346; *In re Horton* (C. C. A. 8th Cir.), 102 Fed. Rep. 986, 43 C. C. A. 87, 4 Am. B. R. 486; *In re Scholtz*, 106 Fed. Rep. 834, 5 Am. B. R. 782; Reed v. Equitable Trust, 115 Ga. 780, 8 Am. B. R. 242.

In *Pickens v. Dent* (C. C. A. 4th Cir.), 106 Fed. Rep. 653, 45 C. C. A. 522, 5 Am. B. R. 644, the court said: "The institution of the proceedings in bankruptcy did not divest that [the state] court of its jurisdiction over appellant and his property; and it was clearly not only the right, but the duty, of that court to proceed to final decree in said cause, even if it was advised of the fact that the district court of the United States for the district of West Virginia has adjudicated one

of the defendants thereto to be a bankrupt." Affirmed 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47.

<sup>70</sup> *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *In re Wells*, 114 Fed. Rep. 222, 8 Am. B. R. 75; *In re Lesser*, 100 Fed. Rep. 433, 3 Am. B. R. 815; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107.

<sup>71</sup> *In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1.

In *Eyster v. Gaff*, 91 U. S. 521, 525, 23 L. Ed. 403, Mr. Justice Miller said: "It was the *duty* of that [state] court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. . . . The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention, and received none."

that purpose.<sup>72</sup> Where a state court loses its jurisdiction of the *res* by reason of a lien being annulled by the bankruptcy of the defendant the court of bankruptcy may acquire jurisdiction of it.<sup>73</sup>

Where the subject of a suit relates to matter subsequent to the commencement of bankruptcy proceedings, or to property not properly a part of the bankrupt's estate, the suit is not affected by the bankruptcy proceedings. Thus a debt created after the institution of bankruptcy proceedings may be collected out of property subsequently acquired by the bankrupt. Upon the same principle it would seem that a security on a homestead may be enforced in a state court pending the bankruptcy.<sup>74</sup>

### § 29. The nature of bankruptcy proceedings.

The primary object of proceedings in bankruptcy is to bring all the property of an insolvent debtor into court, and there distribute it equitably among his creditors as speedily as possible, and release the debtor from the unpaid balance of his debts by a discharge.<sup>75</sup>

Proceedings in bankruptcy are in the nature of proceedings in equity, and when authorized by an act of congress become a branch of equity jurisdiction.<sup>76</sup> They are likewise in the

<sup>72</sup> See Sec. 47, *post*.

<sup>73</sup> *First National Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re Tune*, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re Baughman*, 138 Fed. Rep. 742, 15 Am. B. R. 23; *In re Vastbinder*, 132 Fed. Rep. 718, 13 Am. B. R. 148.

<sup>74</sup> See Sec. 427, *post*.

<sup>75</sup> *United States v. Hammond* (C. C. A. 6th Cir.), 104 Fed. Rep. 862, 44 C. C. A. 229, 4 Am. B. R. 738; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *Barton Bros. v. Texas Produce Co.*

(C. C. A. 8th Cir.), 136 Fed. Rep. 355, 69 C. C. A. 181, 14 Am. B. R. 504; *McDonald v. Tefft-Wellar Co.* (C. C. A. 5th Cir.), 128 Fed. Rep. 381, 63 C. C. A. 123, 11 Am. B. R. 806.

<sup>76</sup> *Bardes v. Hawarden Bank*, 178 U. S. 524, 535, 44 L. Ed. 1175, 4 Am. B. R. 163; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 187, 59 C. C. A. 388, 10 Am. B. R. 609; *Dodge v. Norlin* (C. C. A. 8th Cir.), 133 Fed. Rep. 353, 368, 66 C. C. A. 425, 13 Am. B. R. 176; *Siegel v. Swartz* (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 16, 54 C. C. A. 399, 402, 8 Am. B. R. 689.



nature of proceedings *in rem*.<sup>77</sup> They may be styled proceedings *in rem* in equity, although certain features, as the granting or refusing a discharge, are proceedings *in personam*. They are, strictly speaking, proceedings *in rem* against the estate and *in personam* against the bankrupt.<sup>78</sup>

The jurisdiction of the court is invoked in bankruptcy by filing a petition to take the benefit of the act,<sup>79</sup> The debtor in involuntary proceedings is regularly brought before the court by subpoena as in equity.<sup>80</sup> When the debtor files the petition he thereby voluntarily submits to the jurisdiction of the court.

It may be said generally that the bankruptcy jurisdiction may be exercised upon a petition, motion, rule to show cause, or other summary proceeding.<sup>81</sup> In all cases, however, the parties interested in the particular controversy should have notice and an opportunity to be heard.<sup>82</sup> It is sufficient if notice of

<sup>77</sup> *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 192, 46 L. Ed. 1113, 8 Am. B. R. 1; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656, 662, 23 L. Ed. 336; *In re Benedict*, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re Hughes*, 170 Fed. Rep. 809, 22 Am. B. R. 303; *In re Beals*, 116 Fed. Rep. 530, 8 Am. B. R. 644; *In re Reese*, 115 Fed. Rep. 993, 8 Am. B. R. 411.

<sup>78</sup> *Dressell v. North State Lumber Co.*, 107 Fed. Rep. 255, 256, 5 Am. B. R. 544, approved *In re Tylo Min. & Reduction Co.*, 132 Fed. Rep. 697, 699, 13 Am. B. R. 62.

<sup>79</sup> B. A. 1898, Sec. 1, clause 10. *In re Stein* (C. C. A. 2nd Cir.), 105 Fed. Rep. 749, 45 C. C. A. 29, 5 Am. B. R. 288; *Shute v Patterson* (C. C. A. 8th Cir.), 147 Fed. Rep. 509, 17 Am. B. R. 99; *In re Hicks*, 107 Fed. Rep. 910, 6 Am. B. R. 182; *In re Appel*, 103 Fed. Rep. 931, 4 Am. B. R. 722; *In re Lewis*, 91 Fed. Rep. 632, 1 Am. B. R. 458.

<sup>80</sup> B. A. 1898, Sec. 18. *In re Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 80.

<sup>81</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *Clark v. Larremore*, 188 U. S. 486, 47 L. Ed. 555, affirming *In re Kenney* (C. C. A. 2nd Cir.), 105 Fed. Rep. 897, 45 C. C. A. 113, 5 Am. B. R. 355; *Schweer v. Brown*, 195 U. S. 171, 49 L. Ed. 144; *In re Rosser* (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 41 C. C. A. 497, 4 Am. B. R. 153; *In re Sievers*, 91 Fed. 366, 1 Am. B. R. 117; *Samel v. Dodd*, (C. C. A. 5th Cir.), 142 Fed. Rep. 68, 73 C. C. A. 254, 16 Am. B. R. 167; *Bear v. Chase* (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 40 C. C. A. 182, 3 Am. B. R. 746; *In re Eppstein* (C. C. A. 8th Cir.), 156 Fed. Rep. 42, 84 C. C. A. 208, 19 Am. B. R. 89.

<sup>82</sup> B. A. 1898, Sec. 58a. *Files v. Brown* (C. C. A. 8th Cir.), 124 Fed. Rep. 133, 142, 59 C. C. A. 403; *Boyd v. Glucklich* (C. C. A. 8th Cir.), 116 Fed. Rep. 131, 53 C. C. A. 451,



such proceedings is given by mail or otherwise, as the court may direct, so that an opportunity is given to the parties interested to be heard in the matter and if necessary to produce evidence.<sup>83</sup>

The act contemplates a quick and summary disposal of questions arising in the progress of the case without regard to the usual mode of trial, but it requires a due and orderly administration of justice with regard to the fundamental rights of the citizen. It has been said:<sup>84</sup> "The simple forms of bankruptcy practice found in the general orders and forms prescribed by the supreme court should be followed, and there should be no unnecessary departures by falling into a habit of using the more costly, prolix, and far less suitable forms of special pleadings and procedure used in chancery cases."

A court of bankruptcy has no separate terms.<sup>85</sup> A proceeding in bankruptcy, from the time of its commencement, by the filing of a petition, until the final settlement of the estate of the bankrupt, is but one suit. The proceeding is continuous, as in the surrogate and probate courts where estates are administered. Any order made in the progress of the case may be subsequently amended or set aside and vacated upon proper

8 Am. B. R. 393; *Lockman v. Lange* (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 65 C. C. A. 621, 12 Am. B. R. 497; *In re Ruos*, 164 Fed. Rep. 749, 21 Am. B. R. 257; *In re Rosser* (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 41 C. C. A. 497, 4 Am. B. R. 153; *Smith v. Belford* (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 45 C. C. A. 526, 5 Am. B. R. 291.

<sup>83</sup> *In re Wood & Henderson*, 210 U. S. 246, 255, 52 L. Ed. 1046, 20 Am. B. R. 1; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 192, 46 L. Ed. 1113, 8 Am. B. R. 1.

<sup>84</sup> Judge Hammond in *Gage & Co. v. Bell*, 124 Fed. Rep. 371, 380, 10 Am. B. R. 696.

<sup>85</sup> *Sandusky v. National Bank*, 23 Wall, 289, 23 L. Ed. 155; *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *In re Mercur*, 116 Fed. Rep. 655, 8 Am. B. R. 275, affirmed (3rd Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505; *In re Lemmon & Gale Co.* (C. C. A. 6th Cir.), 112 Fed. Rep. 300, 50 C. C. A. 247, 7 Am. B. R. 291; *In re First Nat. Bank* (C. C. A. 6th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265; *Lockman v. Lange* (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 65 C. C. A. 621, 624, 12 Am. B. R. 497; *In re Tucker* (C. C. A. 1st Cir.), 153 Fed. Rep. 91, 82 C. C. A. 225, 18 Am. B. R. 378.

showing made, provided rights have not become vested under it which will be disturbed thereby.<sup>86</sup>

Being a proceeding *in rem* all parties interested in the *res* are regarded as parties to it, including the bankrupt and trustee, as well as the creditors, secured and unsecured.<sup>87</sup> When a judgment is rendered upon questions arising in a bankruptcy proceeding, it is final and conclusive upon all the parties until set aside or reversed. It is not subject to collateral attack.<sup>88</sup>

The court of bankruptcy is not confined, in the exercise of its bankruptcy jurisdiction, to summary proceedings. This jurisdiction may be asserted in actions in the nature of plenary suits, wherein the parties can be fully heard after the due course of procedure in equity or law.<sup>89</sup> A trustee has maintained a bill in equity to settle his title to property in his possession and declare an alleged security on it to be invalid.<sup>90</sup>

<sup>86</sup> *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *In re Lemmon & Gale Co.* (C. C. A. 6th Cir.), 112 Fed. Rep. 300, 50 C. C. A. 247, 7 Am. B. R. 291; *In re Mercur*, 116 Fed. Rep. 655, 8 Am. B. R. 275, affirmed (3rd Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505; *Matter of Henschel*, 114 Fed. Rep. 968, 8 Am. B. R. 201; *Sandusky v. National Bank*, 23 Wall. 289, 23 L. Ed. 155; *In re Keyes*, 160 Fed. Rep. 763, 20 Am. B. R. 183; *In re Morse*, 168 Fed. Rep. 157, 21 Am. B. R. 709.

In *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484, it was held that a decision by a circuit court of appeals on a petition to review did not become "the law of the case," so as to prevent it being revised on a subsequent appeal. See also *Kirwin v. Murphy*, 170 U. S. 205, 42 L. Ed. 1009, when it was held that an affirmance by a circuit court of appeals of an interlocutory order of injunction was not a final de-

cision—the order remained an interlocutory one in the case.

<sup>87</sup> *In re Hanover Nat. Bank*, 186 U. S. 181, 192, 46 L. Ed. 1113, 8 Am. B. R. 1; *In re Beals*, 116 Fed. Rep. 530, 533, 8 Am. B. R. 644; *In re Reynolds*, 127 Fed. Rep. 760, 11 Am. B. R. 758; *In re Kellar*, 109 Fed. Rep. 118, 131, 6 Am. B. R. 334, 350; *In re Reese*, 115 Fed. Rep. 993, 8 Am. B. R. 413.

<sup>88</sup> *Edelstein v. United States* (C. C. A. 8th Cir.), 149 Fed. Rep. 636, 79 C. C. A. 328, 17 Am. B. R. 649; *In re Columbia Real Estate Co.*, 101 Fed. Rep. 960, 4 Am. B. R. 411; *In re Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 86; *In re First Nat. Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 269.

<sup>89</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *Elliott v. Toepfner*, 178 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50.

<sup>90</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45.

Although proceedings in bankruptcy are equitable in their nature, when a jury trial authorized by the statute is demanded as of right, that trial is a trial according to the course of common law and the judgment reviewable on writ of error.<sup>91</sup> But where a jury is not demanded under the provision of Section 19a of the bankrupt law it is deemed to be waived. It is within the discretion of the bankrupt judge to submit issues of fact to a jury, as in the case of a jury called to the assistance of a chancellor in a court of equity. In that case the trial is according to the equity procedure. The verdict of the jury is advisory only and the facts are ultimately determined by the judge.<sup>92</sup>

### § 30. The effect of filing the petition.

The jurisdiction of a court of bankruptcy is invoked by a debtor or his creditors filing a petition to take the benefit of the act. Proceedings in bankruptcy are commenced when the petition is filed and before a subpoena is issued or served.<sup>93</sup>

The effect of filing the petition is to give the court jurisdiction of the case and to bring the estate, in the possession of the bankrupt or held by another as his property, wherever it may be in the United States,<sup>94</sup> immediately within the custody of the court and to subject it to its administration.<sup>95</sup> "It is

<sup>91</sup> *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; *Grant Shoe Co. v. Laird*, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1.

See also R. S. Sec. 566.

<sup>92</sup> *In re Neasmith* (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128; *Oil Well Supply Co. v. Hall* (C. C. A. 4th Cir.), 128 Fed. Rep. 875, 63 C. C. A. 343, 11 Am. B. R. 738.

<sup>93</sup> B. A. 1898, Sec. 1, clause 10. *In re Stein* (C. C. A. 2nd Cir.), 105 Fed. Rep. 749, 45 C. C. A. 29, 5 Am. B. R. 288; *Shute v. Patterson* (C. C. A. 8th Cir.), 147 Fed. Rep. 509, 78 C. C. A. 75, 17 Am.

B. R. 99; *In re Hicks*, 107 Fed. Rep. 910, 6 Am. B. R. 182; *In re Appel*, 103 Fed. Rep. 931, 4 Am. B. R. 722; *In re Lewis*, 91 Fed. Rep. 632, 1 Am. B. R. 458.

<sup>94</sup> *In re Dempster* (C. C. A. 8th Cir.), 172 Fed. Rep. 353, 97 C. C. A. 51, 22 Am. B. R. 751; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132.

<sup>95</sup> *Acme Harvester Co. v. Beekman*, 222 U. S. 300; *In re Weinger-Bergman Co.*, 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re Jersey Island Packing Co.*, 138 Fed. Rep. 625, 14 Am. B.

a *caveat* to all the world and in effect an attachment and injunction."<sup>96</sup>

This means that the moment the petition is filed, the jurisdiction of the court attaches and extends over the estate, with power to restrain any act which will interfere with its administration in bankruptcy.<sup>97</sup> The word attachment, as used in this phrase, does not mean a judicial process in the sense

R. 689; *In re* Briskman, 132 Fed. Rep. 201, 13 Am. B. R. 57; *In re* Wilk, 155 Fed. Rep. 943; *In re* Dempster (C. C. A. 8th Cir.), 172 Fed. Rep. 353, 97 C. C. A. 51, 22 Am. B. R. 751; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re* Kindt, 98 Fed. Rep. 867, 3 Am. B. R. 546; *In re* Schermerhorn (C. C. A. 8th Cir.), 145 Fed. Rep. 341, 76 C. C. A. 215, 16 Am. B. R. 507; *In re* Duncan, 148 Fed. Rep. 464, 17 Am. B. R. 288.

<sup>96</sup> *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re* Weinger-Bergman Co., 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; *Crosby v. Spear*, 98 Me. 542, 11 Am. B. R. 613; *In re* Baughman, 138 Fed. Rep. 742, 15 Am. B. R. 23.

<sup>97</sup> *In Clay v. Waters* (C. C. A. 8th Cir.), 178 Fed. Rep. 385, 101 C. C. A. 645, 24 Am. B. R. 293, Judge Sanborn uses this language:

"But the filing of the petition in bankruptcy and the adjudication which followed it embodied in themselves a commanding injunction of the court against the interference of the defendant with and his concealment and removal from the trustee and the court of any of the property of the bankrupt.

Against the defendant and against all others who had no valid lien upon or interest in that property at the time of the adjudication, the injunction and command of the court against such interference and removal and notice thereof to all the world were embodied in the injunction and issued therewith by the settled law of the land. *Mueller v. Nugent*, 7 Am. B. R. 224, 184 U. S. 1, 22, 46 L. Ed. 405; *In re* Rodgers, 60 C. C. A. 567, 578, 125 Fed. 169, 180, 11 Am. B. R. 79; *In re* Kolin (C. C. A. 7th Cir.), 13 Am. B. R. 531, 134 Fed. 557, 560, 67 C. C. A. 481; *In re* Granite City Bank (C. C. A. 8th Cir.), 14 Am. B. R. 404, 137 Fed. 818, 821, 70 C. C. A. 316, 319; *Wilkenson v. Goodfellow-Brooks Shoe Co.*, 15 Am. B. R. 554, 141 Fed. 218, 220; *State Bank of Chicago v. Cox* (C. C. A. 7th Cir.), 16 Am. B. R. 32, 74 C. C. A. 285, 287, 143 Fed. 91, 93; *In re* Erie Lumber Company, 17 Am. B. R. 689, 150 Fed. 817, 829; *In re* Fleischer, 18 Am. B. R. 194, 151 Fed. 81, 82. The decisions of the supreme court in *York Manufacturing Co. v. Cassell*, 15 Am. B. R. 633, 201 U. S. 344, 353, 50 L. Ed. 782, and *Hiscock v. Varick Bank of New York*, 18 Am. B. R. 1, 206 U. S. 28, 41, 51 L. Ed. 945, cited for the defendant, merely hold that this *caveat* and injunction do not deprive those who have valid titles to or liens upon the property

that it confers on the trustee any greater title than the bankrupt had at the time the petition was filed.<sup>98</sup>

Upon filing a petition in bankruptcy the court acquires custody of the property of the debtor as a matter of law. As observed by Judge Lanning:<sup>99</sup> "The appointment of a receiver does not in any wise perfect the court's custody. It is simply an act by which the court designates a person in whom it has confidence to represent it in guarding and enforcing that custody. In an admiralty suit *in rem*, on the other hand, a vessel is not in the custody of the court until it is actually arrested."<sup>100</sup>

Although the filing of the petition may bring the property of the debtor into the custody of the court, it does not extend the jurisdiction of the court over his person.<sup>1</sup> This is obtained by the service of subpoena or the waiver of it by voluntary appearance. The bankrupt act provides the manner of bringing in a defendant in involuntary proceedings.<sup>2</sup> A voluntary bankrupt submits himself to the jurisdiction of the court by filing his petition.

claimed by the bankrupt at the time the petition is filed of those liens or titles. They do not in any way modify this general rule or diminish its controlling force in all cases like that in hand, wherein the intermeddler had no claim upon or interest in the bankrupt's property at the time of the adjudication."

<sup>98</sup> As to the meaning of the word "attachment," see *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

<sup>99</sup> *In re Hughes*, 170 Fed. Rep. 809, 22 Am. B. R. 303; see also *In re Duble*, 117 Fed. Rep. 794, 9 Am. B. R. 121; *Frazier v. Southern Loan & Trust Co.* (C. C. A. 5th Cir.), 99 Fed. Rep. 707, 40 C. C.

A. 76, 3 Am. B. R. 710; *In re Reynolds*, 127 Fed. Rep. 760, 11 Am. B. R. 758; *In re Schermerhorn* (C. C. A. 8th Cir.), 145 Fed. Rep. 341, 76 C. C. A. 215, 16 Am. B. R. 507. *Contra. In re Wells*, 114 Fed. Rep. 222, 8 Am. B. R. 75.

<sup>100</sup> *Miller v. United States*, 11 Wall. 294, 20 L. Ed. 135; *Brennan v. Steam Tug "Anna P. Dorr,"* 4 Fed. Rep. 459.

<sup>1</sup> *In re Appel*, 103 Fed. Rep. 931, 4 Am. B. R. 722; *Shute v. Patterson* (C. C. A. 8th Cir.), 147 Fed. Rep. 509, 78 C. C. A. 75, 17 Am. B. R. 99.

<sup>2</sup> B. A. 1898, Sec. 18. As to service of subpoena under the act see Sec. —, *post*.

### § 31. Jurisdiction over property in custodia legis.

Where property is in the custody of a court of bankruptcy as a part of the bankrupt's estate, that court has jurisdiction to settle all controversies and claims relating to such property.<sup>3</sup>

This is not because of any express provision of the bankrupt act, but an application of the general principle of law applicable to all courts, federal or state, that the possession of the *res* draws to the court jurisdiction of all questions in respect to title or liens, and in respect to such questions is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them.<sup>4</sup>

This principle is recognized and has frequently been applied by the courts of bankruptcy.<sup>5</sup> After reviewing the cases on the subject of the jurisdiction of a court of bankruptcy, Mr.

<sup>3</sup> *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *Whitney v. Wenman*, 198 U. S. 539, 552, 49 L. Ed. 1175, 14 Am. B. R. 45; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178.

<sup>4</sup> *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54, 52 L. Ed. 379; *Morgan's Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 34 L. Ed. 625; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. Ed. 145; *Toledo, etc., Ry. Co. v. Continental Trust Co.* (C. C. A. 6th Cir.), 95 Fed. Rep. 497, 36 C. C. A. 195.

<sup>5</sup> B. A. 1898, Sec. 2. *Whitney v. Wenman*, 198 U. S. 539, 552, 49 L. Ed. 1157, 14 Am. B. R. 45; *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Whitener* (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44

C. C. A. 434, 5 Am. B. R. 198; *In re Antigo Screen Door Co.* (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 59 C. C. A. 248, 10 Am. B. R. 359; *In re Kellogg* (C. C. A. 2nd Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530, *In re Haddin-Rodee Co.*, 135 Fed. Rep. 886, 13 Am. B. R. 604; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608; *Keegan v. King*, 96 Fed. Rep. 758, 3 Am. B. R. 79; *In re Russell* (C. C. A. 2nd Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658; *In re Chambers, Calder & Co.*, 98 Fed. Rep. 865, 3 Am. B. R. 537; *In re Emslie* (C. C. A. 2nd Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126.

*In re Whitener* (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198, the court said:

"The property being in the custody of the district court sitting in

Justice Day, speaking for the supreme court, said:<sup>6</sup> "We think the result of these cases is, in view of the broad powers conferred in Section 2 of the bankruptcy act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine the controversies in relation to the disposition of the same and the extent and character of the liens thereon or rights therein."

The jurisdiction of a court of bankruptcy is exclusive of all other courts, so far as questions affecting the possession or administration of the property in *custodia legis* is concerned. No other court has power to deal with that property, while it is in the custody of the bankruptcy court.<sup>7</sup> The court may, by process of injunction, protect its jurisdiction against interference.<sup>8</sup>

bankruptcy, that court had jurisdiction to entertain the intervention filed by Ramseur, claiming the property, and to hear and determine the issues presented by the intervention, not only on general principles (see *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 34 L. Ed. 625), but under the specific provisions of Sec. 2 of the bankruptcy act of 1898."

In *Fisher v. Cushman* (C. C. A. 1st Cir.), 103 Fed. Rep. 867, 43 C. C. A. 381, 4 Am. B. R. 654, the court said:

"The rule is settled beyond all doubt that any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf."

<sup>6</sup> *Whitney v. Wenman*, 198 U. S. 539, 552, 49 L. Ed. 1157, 14 Am. B. R. 45.

<sup>7</sup> *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Russell* (C. C. A. 2nd Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 568; *In re Alton Mfg. Co.*, 158 Fed. Rep. 367, 19 Am. B. R. 805; *In re Reynolds*, 127 Fed. Rep. 760, 11 Am. B. R. 758; *In re Eppstein* (C. C. A. 8th Cir.), 156 Fed. Rep. 42, 84 C. C. A. 208, 19 Am. B. R. 89; *In re Rose Shoe Mfg. Co.* (C. C. A. 2nd Cir.), 168 Fed. Rep. 39, 93 C. C. A. 461, 21 Am. B. R. 725; *In re Walsh Bros.*, 159 Fed. Rep. 560, 20 Am. B. R. 472.

<sup>8</sup> *In re Russell* (C. C. A. 2nd Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658; *In re Schwartzman*, 167 Fed. Rep. 399, 21 Am. B. R. 885; *In re Wilk*, 155



Although the filing of this petition brings the property of the bankrupt into the legal custody of the court of bankruptcy so as to prevent interference by other persons or process from other courts, yet where the property is situated in other districts, ancillary proceedings may become necessary in order to establish and maintain judicial control and management over the property in the other districts.<sup>9</sup>

The custody of property does not give a court of bankruptcy exclusive jurisdiction of all controversies between parties interested in it. That court has plenary power to determine all questions affecting the property, if its jurisdiction is invoked for the purpose. Other courts, state or federal, have concurrent jurisdiction of controversies arising out of the settlement of the estate with power to render any judgment which does not invade or disturb the property, while it is in the custody of the bankruptcy court.<sup>10</sup> But those courts can not determine title to, or marshal liens on, or distribute the property among those entitled to it. This is within the exclusive jurisdiction of a court of bankruptcy.

Fed. Rep. 943, 19 Am. B. R. 178; *In re* Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 308; *In re* Gutman, 114 Fed. Rep. 1009, 8 Am. B. R. 252; *Lea v. West Co.*, 91 Fed. Rep. 237, 1 Am. B. R. 261, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re* Gutwillig (C. C. A. 2nd Cir.), 92 Fed. Rep. 337, 34 C. C. A. 377, 1 Am. B. R. 388, affirming 90 Fed. Rep. 475, 1 Am. B. R. 78; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; *In re* Emslie (C. C. A. 2nd Cir.) 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126; *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689.

<sup>9</sup> See Ancillary Proceedings in Other Districts, Sec. 35, *post*.

<sup>10</sup> See Suits By or Against Trustees, Chap. XXVII. *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806; *Davis v. Friedlander*, 104 U. S. 570, 26 L. Ed. 818; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Clafin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833; *In re* Platteville Foundry & Mach. Co., 147 Fed. Rep. 828, 17 Am. B. R. 291; *Guaranty Trust Co. v. North Chicago St. R. Co.* (C. C. A. 7th Cir.), 130 Fed. Rep. 801, 65 C. C. A. 65; *In re* Kanter & Cohen (C. C. A. 2nd Cir.), 121 Fed. Rep. 984, 58 C. C. A. 260, 9 Am. B. R. 372; *In re* Spitzer (C. C. A. 2nd Cir.), 130 Fed. Rep. 879, 66 C. C. A. 35; *Bindsell v. Smith*, 61 N. J. Eq. 645; *Skilton v. Codrington*, 185 N. Y. 80.



**§ 32. Proceedings with respect to property in custodia legis may be summary or plenary.**

Jurisdiction of questions with respect to property in the custody of the court of bankruptcy, may be exercised in a plenary action or a summary proceeding, as the nature of the case demands.<sup>11</sup> In either case the jurisdiction of the court of bankruptcy depends upon the fact that the property in dispute is in the custody of that court. This is true whether it is a proceeding in bankruptcy or a controversy arising in bankruptcy proceedings.<sup>12</sup>

If the proceeding, either summary or plenary, is instituted by the trustee, the adverse claimants may be required to come in and set up their claims or interest or title in the property in the custody of the court,<sup>13</sup> although they may be without the district.<sup>14</sup> This is a proceeding in bankruptcy.

A creditor may appear in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, and prove his claim or debt, or he may assert both a debt and a lien to

<sup>11</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; *Cleminshaw v. International Shirt & Collar Co.*, 165 Fed. Rep. 797, 21 Am. B. R. 616.

<sup>12</sup> As to the distinction between a proceeding in bankruptcy and a controversy arising in bankruptcy proceedings in cases like these, see Sec. 26 *ante*. See also *Suits By or Against Trustees*, Chap. XXVII.

<sup>13</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404.

<sup>14</sup> *In re Wood & Henderson*, 210 U. S. 246, 253, 52 L. Ed. 1046, 20

Am. B. R. 1; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404.

In *Thomas v. Woods*, 173 Fed. Rep. 585, 590, 97 C. C. A. 535, 23 Am. B. R. 132, Judge Amidon, speaking for the circuit court of appeals for the 8th circuit, said:

"The objection of the appellant that the trial court was without jurisdiction of the property, because it was not situated in the district of Kansas, has no merit. Upon the filing of a petition in bankruptcy, all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and, upon adjudication, that court is vested with jurisdiction to determine all liens and interests affecting it. This jurisdiction is co-extensive with the United States."

secure the same.<sup>15</sup> In the latter case the procedure as to the debt or claim governs, with incidental right to consider and determine the validity and priority of the lien asserted against the property in the hands of the trustee.<sup>16</sup> These are clearly proceedings in bankruptcy proper.<sup>17</sup>

An adverse claimant may intervene in the bankruptcy proceeding and assert a superior title to that of the trustee to property in his custody, raising a distinct and separable issue as to the title. The court of bankruptcy has power to decide that issue.<sup>18</sup> This is a controversy arising in bankruptcy.

### **§ 33. Power to compel the return of property unlawfully withdrawn from custody.**

It is well settled that the court has power by summary proceedings to compel persons, who have forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as a part of the bankrupt's estate to restore that property to its custody.<sup>19</sup>

Upon filing the petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt

<sup>15</sup> *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1.

<sup>16</sup> *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1; *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; *Cunningham v. German Ins. Bank* (C. C. A. 6th Cir.), 101 Fed. Rep. 977, 41 C. C. A. 609, 4 Am. B. R. 192.

<sup>17</sup> *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1.

<sup>18</sup> *Hewit v. Berlin Mac. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *In re First Nat. Bank* (C. C. A. 6th Cir.), 135 Fed. Rep. 62,

67 C. C. A. 536, 14 Am. B. R. 180; *In re Soudan Mfg. Co.* (C. C. A. 7th Cir.), 113 Fed. Rep. 804, 51 C. C. A. 476, 8 Am. B. R. 45.

<sup>19</sup> *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Eppstein* (C. C. A. 8th Cir.), 156 Fed. Rep. 42, 84 C. C. A. 208, 19 Am. B. R. 89; *In re Rose Shoe Mfg. Co.* (C. C. A. 2nd Cir.), 168 Fed. Rep. 39, 93 C. C. A. 461, 21 Am. B. R. 725; *In re Graessler & Reichwald* (C. C. A. 9th Cir.), 154 Fed. Rep. 478, 83 C. C. A. 304, 18 Am. B. R. 694; *In re Landis*, 151 Fed. Rep. 896, 18 Am. B. R. 483; *In re Rudnick*, 158 Fed. Rep. 223, 18 Am. B. R. 750; *In re Alton Mfg. Co.*, 158 Fed. Rep. 367, 19 Am. B. R. 805.

or his agent of which he claims the ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction.<sup>20</sup> When it once lawfully attaches its jurisdiction can not be destroyed or impaired by an unauthorized or unlawful withdrawal of property from the judicial custody of that court.<sup>21</sup>

It is immaterial whether the property is taken out of the custody of the court upon process of another court, or by forcible seizure, or by an unauthorized surrender of possession of the property by the officers of the court. The seizure of property in the custody of a court of bankruptcy by an adverse claimant upon a writ of replevin or other judicial process is unlawful.<sup>22</sup> The forcible seizure of property after the filing of the petition in bankruptcy, although taken under and by virtue of the terms and provisions of a mortgage, will not be permitted.<sup>23</sup>

A receiver has no authority to voluntarily redeliver to a claimant property which comes into his possession, except by order of court.<sup>24</sup> The court has power to direct the redelivery of property to which a claimant asserts and the bankrupt dis-

<sup>20</sup> See Effect of Filing the Petition, Sec. 30, *ante*.

<sup>21</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Russell* (C. C. A. 2nd Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 368; *In re Alton Mfg. Co.*, 158 Fed. Rep. 367, 19 Am. B. R. 805; *In re Reynolds*, 127 Fed. Rep. 760, 11 Am. B. R. 758; *In re Eppstein* (C. C. A. 8th Cir.), 156 Fed. Rep. 42, 84 C. C. A. 208, 19 Am. B. R. 89; *In re Rose Shoe Mfg. Co.* (C. C. A. 2nd Cir.), 168 Fed. Rep. 39, 93 C. C. A. 461, 21 Am. B. R. 725.

<sup>22</sup> *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Weinger-Bergman Co.*, 126 Fed. Rep. 875, 11 Am. B. R. 424; *In re Russell* (C. C. A. 2nd Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658; *In re Rudnick*, 158 Fed. Rep. 223, 18 Am. B. R. 750; *In re Alton Mfg. Co.*, 158 Fed. Rep. 367, 19 Am. B. R. 805; *In re Empire Const. & Supply Co.*, 157 Fed. Rep. 495, 19 Am. B. R. 704; *In re Walsh Bros.*, 156 Fed. Rep. 560, 20 Am. B. R. 472.

<sup>23</sup> *In re Reynolds*, 127 Fed. Rep. 760, 11 Am. B. R. 758.

<sup>24</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1175, 14 Am. B. R. 45.

claims title.<sup>25</sup> If a receiver surrenders possession of property and the court of bankruptcy acquiesces in such surrender for a long time, it may be treated as if the receiver had acted under authority of the court.<sup>26</sup>

### § 34. Jurisdiction outside of district.

The bankrupt act confers jurisdiction upon the courts of bankruptcy "within their respective territorial limits, as now established, or as they may be hereafter changed."<sup>27</sup>

The language of this act in this respect is similar to the act of 1867, where the jurisdiction of courts of bankruptcy was limited to "their respective districts." With reference to the meaning of this expression in the act of 1867, Mr. Justice Bradley, in *Lathrop v. Drake*,<sup>28</sup> said: "When the act says that they shall have jurisdiction in their respective districts

<sup>25</sup> *Hinds v. Moore* (C. C. A. 6th Cir.), 134 Fed. Rep. 221, 67 C. C. A. 149, 14 Am. B. R. 1.

<sup>26</sup> In *Hinds v. Moore* (C. C. A. 6th Cir.), 134 Fed. Rep. 221, 67 C. C. A. 149, 14 Am. B. R. 1, Judge Lurton, speaking for the circuit court of appeals for the sixth circuit, said:

"The property in controversy was once technically in possession of the bankruptcy court through its referee, who, under rule of the court, had power to hold the bankrupt's estate, as receiver, until a trustee should be selected. The goods in question were in closed boxes. They had been consigned by appellant to his own address, care of the bankrupt. Appellant claimed that he had never sold or delivered these goods, and the bankrupt disclaimed title. What should the referee do? He had no other possession than such as resulted from having locked the door of the storeroom which had been occupied by the bankrupt. He had

neither the authority nor the purpose to take and hold property which was not the bankrupt's. Thus situated, he allowed appellant to remove these boxes as his own. This was a voluntary surrender of whatever possession the court had had—a surrender by one having much of the judicial authority of the court and the court's custodian. Conceding that he did not have authority—being a mere custodian, without title, to conclude the bankrupt's trustee—does it follow that, after waiting seven months, as the trustee did, and until the goods themselves had been again sold, the trustee may now assert the bankrupt's title by a summary proceeding, not to bring about a restoration of the goods to the court's custody, but to recover, under a rule to show cause, the value of the goods so surrendered voluntarily to the appellant?"

<sup>27</sup> B. A. 1898, Sec. 2.

<sup>28</sup> 91 U. S. 517, 23 L. Ed. 414.

it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy without limitation."

By the act of 1898 the jurisdiction of a court of bankruptcy with respect to proceedings in bankruptcy is restricted to the territorial limits of the district.<sup>29</sup> A writ of subpoena or other process will not run beyond the limits of the district of the court issuing the writ.<sup>30</sup> An exception to this rule exists in subpoenas for witnesses under a special provision applicable to courts of bankruptcy, being courts of the United States.<sup>31</sup>

<sup>29</sup> *In re* Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re* Sutter Bros., 131 Fed. Rep. 654, 11 Am. B. R. 632; *In re* Schrom, 97 Fed. Rep. 760, 3 Am. B. R. 352; *In re* Peiser, 115 Fed. Rep. 199, 7 Am. B. R. 690; *In re* Dunseath & Son Co., 168 Fed. Rep. 973, 22 Am. B. R. 75; *In re* National Mercantile Agency, 128 Fed. Rep. 639, 12 Am. B. R. 189; *In re* United Button Co., 132 Fed. Rep. 378, 12 Am. B. R. 761; *In re* Harris Co., 173 Fed. Rep. 735, 23 Am. B. R. 237; *In re* Giesster, 97 Fed. Rep. 322, 3 Am. B. R. 228; *In re* Owings, 140 Fed. Rep. 739, 15 Am. B. R. 472.

*In re* Wood & Henderson, 210 U. S. 256, 52 L. Ed. 1046, 20 Am. B. R. 1, the supreme court said:

"It is to be noted that in this case, as the statement of the certificate shows, the district court rendered no judgment against the defendant for a recovery of the excess, but directed the trustee to bring an action therefor. It simply assumed and exercised the jurisdiction conferred by Section 60d

to determine the amount of the excessive transfer for a counsel fee provided in view of filing a petition in bankruptcy. It may be that this order, though binding upon the parties, can not be made finally effectual until a judgment is rendered in a jurisdiction where it can be executed."

<sup>30</sup> *In re* Waukesha Water Co., 116 Fed. Rep. 1009, 8 Am. B. R. 715; *Jobbins v. Montague*, No. 7329, Fed. Cas., 5 Ben. 425; *Paine v. Caldwell*, No. 10674, Fed. Cas., 1 Hask. 452; *In re* Hirsch, No. 6529, Fed. Cas., 2 Ben. 493; *In re* Litchfield, 13 Fed. Rep. 868.

<sup>31</sup> R. S. Sec. 867 provides that "subpoenas for witnesses, who are required to attend a court of the United States, in any district, may run into any other district. *Provided*, That in civil cases the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." See also B. A. 1898, Sec. 41.

The court has no power to stay a suit or restrain a person beyond the district, unless the person to be restrained is a party to the bankruptcy proceedings.<sup>32</sup>

Congress manifestly intended that one court of bankruptcy should administer the entire estate in bankruptcy.<sup>33</sup> The title of all property in the possession of the bankrupt wherever situated in the United States, passes by operation of law to the trustee.<sup>34</sup> He is entitled to the possession and management of property outside of the district.<sup>35</sup> The statute provides for the transfer of bankruptcy proceedings begun in several districts against the same debtor to one court with power to

<sup>32</sup> *In re Harris Co.*, 173 Fed. Rep. 735, 23 Am. B. R. 237; *In re Geister*, 97 Fed. Rep. 322, 3 Am. B. R. 228.

<sup>33</sup> *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re Dempster* (C. C. A. 8th Cir.), 172 Fed. Rep. 353, 97 C. C. A. 51, 22 Am. B. R. 751; *In re Tybo Min. & Red. Co.*, 132 Fed. Rep. 978, 13 Am. B. R. 68, and *In Nevada district*, 132 Fed. Rep. 697, 13 Am. B. R. 62; *Ross-Meeham Foundry Co. v. Southern Car & Foundry Co.*, 124 Fed. Rep. 403, 10 Am. B. R. 624; *In re Southwestern Bridge & Iron Co.*, 133 Fed. Rep. 568, 13 Am. B. R. 304; *In re General Metals Co.*, 133 Fed. Rep. 84, 12 Am. B. R. 770; *In re United Button Co.*, 132 Fed. Rep. 378, 12 Am. B. R. 271; and *Delaware district*, 137 Fed. Rep. 668, 13 Am. B. R. 454; *Cruchet v. Red Rover Min. Co.*, 155 Fed. Rep. 486, 18 Am. B. R. 814.

*In re Wood & Henderson*, 210 U. S. 246, 254, 52 L. Ed. 1046, 20 Am.

B. R. 1, Mr. Justice Day, speaking for the majority of the supreme court, said: "Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular district court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

<sup>34</sup> B. A. 1898, Sec. 70.

<sup>35</sup> *In Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519, Mr. Chief Justice Fuller, speaking of property in another district from that in which the bankruptcy proceedings were pending, said:

"We have no doubt that the books and records in question passed, on adjudication, to the trustee, and belong in the custody of the bankruptcy court."

*In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1, speaking of an excessive attorney's fee recovered under Sec. 60d from an attorney in another district, Mr. Justice Day said:

administer the whole estate.<sup>86</sup> In all cases the court exercises its jurisdiction to administer the estate within its territorial limits.

If a party can be brought into the jurisdiction of the court in which the petition was filed, it may act upon him and compel him to do that which should be done. But in all cases either the parties or the property must be within the territorial jurisdiction of the court. Where property of the bankrupt is situated in another district, it may be necessary to institute ancillary proceedings in aid of the original proceedings in order to obtain possession of or to protect that property for the purpose of administration.<sup>87</sup>

There is no objection to a person living without the district entering his appearance voluntarily. In such case the court has complete jurisdiction over him as though he had been legally served with process.<sup>88</sup> So also if a non-resident of the district comes into the case for the purpose of proving a claim, he is subject to the jurisdiction of the court, irrespective of his place of residence,<sup>89</sup> and is bound to take notice of and obey the orders of the court to the same extent as any other party to the proceedings. When a voluntary appearance has been entered it can not be withdrawn without permission of

"To the extent that the provision is unreasonable the transfer is not given the effect to separate the property from the bankrupt's estate. As to this excess, the estate comes within the meaning of the bankruptcy act within the jurisdiction of the court, and will be ordered to be restored and administered for the benefit of creditors."

<sup>86</sup> B. A. 1898, Sec. 32, Gen Ord. 6. Proceedings on petitions filed in several districts, Secs. 196 and 197, *post*. *In re* United Button Co., 132 Fed. Rep. 378, 12 Am. B. R. 761, and Delaware district, 137 Fed. Rep. 668, 13 Am. B. R. 454; *In re* Tybo Min. & Red. Co., 132 Fed. Rep. 978, 13 Am. B. R. 68, and Nevada

district, 132 Fed. Rep. 697, 13 Am. B. R. 62.

<sup>87</sup> See Ancillary Jurisdiction, Sec. 35, *post*. *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519.

<sup>88</sup> *Fisher v. Cushman* (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 867, 43 C. C. A. 381, 4 Am. B. R. 646; *In re* Smith, 117 Fed. Rep. 961, 9 Am. B. R. 98; *In re* Kirtland, No. 7851, Fed. Cas., 10 Blatch. 515; *In re* Ulrich, No. 14327, Fed. Cas., 3 Ben. 355.

<sup>89</sup> *In re* Kyler, No. 7956, Fed. Cas., 2 Ben. 414; *In re* Sabin, No. 12195, Fed. Cas., 18 N. B. R. 151; *In re* Pease, 29 Fed. Rep. 595; *In re* Anderson 23 Fed. Rep. 482; *Clay v. Smith*, 3 Pet. 411.



the court.<sup>40</sup> Jurisdiction can not be conferred by consent or voluntary appearance when otherwise the court is without jurisdiction of the subject-matter.<sup>41</sup>

There are cases in the books to the effect that the jurisdiction of a court of bankruptcy is not limited to its territorial district, but extends throughout the United States.<sup>42</sup> None of these cases point out any statutory authority for the extra territorial jurisdiction.

### § 35. Ancillary proceedings in other districts.

A court of bankruptcy is restricted in the exercise of its authority by the territorial limits of the district.<sup>43</sup> It will, however, be necessary to institute proceedings ancillary to and in aid of the proceedings in bankruptcy in courts without the district in which the principal proceedings are had.<sup>44</sup>

That the courts of bankruptcy for such other districts have jurisdiction to entertain auxilliary proceedings to perfect and accomplish the objects of the act can hardly be considered an open question in view of the decisions of the courts under prior acts and the reasoning upon which these decisions are based.<sup>45</sup> That the courts of such other districts may exercise

<sup>40</sup> *In re* Ulrich, No. 14327, Fed. Cas., 3 Ben. 355.

See also *United States v. Curry*, 6 How. 106, 12 L. Ed. 363; *Eldred v. Michigan Ins. Bank*, 17 Wall. 545, 21 L. Ed. 685.

<sup>41</sup> *Jobbins v. Montague*, No. 7329, 153 Fed. Cas., 5 Ben. 425.

<sup>42</sup> *In re Dempster* (C. C. A. 8th Cir.), 172 Fed. Rep. 353, 97 C. C. A. 51, 22 Am. B. R. 751; *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *Guardian Trust Co. v. Kansas City, etc. R. Co.* (C. C. A. 8th Cir.), 171 Fed. Rep. 43, 96 C. C. A. 285; *In re Von Hartz* (C. C. A. 2d Cir.), 142 Fed. Rep. 726, 74 C. C. A. 58, 15 Am. B. R. 747; *In re Muncie Pulp Co.* (C. C. A. 2d Cir.), 151 Fed.

Rep. 723, 81 C. C. A. 116, 18 Am. B. R. 56; *Hurley v. Devlin*, 151 Fed. Rep. 919, 18 Am. B. R. 627.

<sup>43</sup> See Sec. 34, *ante*.

<sup>44</sup> *Lawrence v. Lowrie*, 133 Fed. Rep. 995, 13 Am. B. R. 297; *In re Benedict*, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re Peiser*, 115 Fed. Rep. 199, 7 Am. B. R. 690; *In re Sutter Bros.*, 131 Fed. Rep. 654, 11 Am. B. R. 632; *In re Schrom*, 97 Fed. Rep. 760, 3 Am. B. R. 352; *In re Nelson Bros.*, 149 Fed. Rep. 590, 18 Am. B. R. 66; *In re Duns-eath & Son Co.*, 168 Fed. Rep. 973, 22 Am. B. R. 75; *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519.

<sup>45</sup> *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542; *Sher-*



jurisdiction in such cases seems to be the necessary result of the general jurisdiction conferred upon them and is in harmony with the scope and design of the act.

Many eminent jurists, however, have held that, under the act of 1898, a court of bankruptcy has no ancillary jurisdiction.<sup>46</sup> When the question finally reached the supreme court, it held that the courts of bankruptcy do have ancillary jurisdiction, under the present act, both of summary proceedings and plenary suits in aid of proceedings pending in a court of bankruptcy of another district.<sup>47</sup> The court may exercise ancillary jurisdiction to make an order or issue process, where the court of original jurisdiction could do so, if the person or property to be effected were within its jurisdiction.<sup>48</sup> Whether the proceeding within the ancillary jurisdiction shall be by plenary suit or summary proceeding is governed by the same rules as if the same proceeding was had in the court of original jurisdiction.<sup>49</sup>

After the supreme court's decision that the courts of bankruptcy had ancillary jurisdiction, under the original act, con-

man v. Bingham, No. 12762, Fed. Cas., 3 Cliff. 552; Moore v. Jones, No. 9768, Fed. Cas., 23 Vt. 739; *Ex parte* Martin, No. 9149, Fed. Cas., 5 Law Rep. 158; Goodall v. Tuttle, No. 5533, Fed. Cas., 3 Biss. 219; *In re* Tift, No. 14034, Fed. Cas., 19 N. B. R. 201; Shainwald v. Lewis, 5 Fed. Rep. 513, Mason v. Hartford P. & F. R. Co., 19 Fed. Rep. 53.

<sup>46</sup> *In re* Dempster (C. C. A. 8th Cir.), 172 Fed. Rep. 353, 97 C. C. A. 51, 22 Am. B. R. 751; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; Hull v. Burr (C. C. A. 5th Cir.), 153 Fed. Rep. 945, 83 C. C. A. 61, 18 Am. B. R. 541; Thomas v. Woods (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132; *In*

*re* Muncie Pulp Co. (C. C. A. 2nd Cir.), 151 Fed. Rep. 732, 81 C. C. A. 116, 18 Am. B. R. 56; Hurley v. Devlin, 151 Fed. Rep. 919, 18 Am. B. R. 627; *In re* Southwestern Bridge & Iron Co. 133 Fed. Rep. 568, 13 Am. B. R. 304; *In re* Tybo Min. & Red. Co., 132 Fed. Rep. 978, 13 Am. B. R. 68; *In re* Williams, 123 Fed. Rep. 321, 10 Am. B. R. 538.

<sup>47</sup> Babbitt v. Dutcher, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519; Abram I. Elkus, Petitioner, 216 U. S. 115, 54 L. Ed. 407, 23 Am. B. R. 614.

<sup>48</sup> Babbitt v. Dutcher, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519.

<sup>49</sup> Babbitt v. Dutcher, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519.

gress amended it by adding a clause expressly conferring this power on those courts.<sup>50</sup>

Where property belonging to the bankrupt's estate is without the territorial jurisdiction of the court of bankruptcy administering the estate, the court of bankruptcy within whose territorial jurisdiction the property is situate may, upon ancillary proceedings, summarily order that property to be transferred to the trustee, if the court of original jurisdiction had power to make such an order,<sup>51</sup> or to appoint a receiver to take charge of the property, whenever it is absolutely necessary for the preservation of the estate.<sup>52</sup>

The several courts of bankruptcy have jurisdiction of plenary suits at law or in equity in aid of the court of bankruptcy, administering the estate, in recovering fraudulent and preferential transfers, or collecting assets for the estate, in the exercise of the jurisdiction conferred upon them by Section 2 as limited by Section 23 of the Act,<sup>53</sup> and may grant an injunction to prevent a transfer of or interference with such

<sup>50</sup> B. A. 1898, Sec. 2, as amended by the act of June 25, 1910, 36, Stat. at L. 838 by adding clause "(20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

<sup>51</sup> *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519.

<sup>52</sup> *In re Nelson & Bros. Co.*, 149 Fed. Rep. 590, 18 Am. B. R. 66; *In re Dunseath & Son Co.*, 168 Fed. Rep. 973, 22 Am. B. R. 75; *In re Benedict*, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re Sutter Bros.*, 131 Fed. Rep. 654, 11 Am. B. R. 632; *In re Schrom*, 97 Fed. Rep. 760, 3 Am. B. R. 353.

But see *Ross-Meehan Foundry Co. v. Southern Car & Foundry Co.*, 124 Fed. Rep. 403, 10 Am. B. R. 624.

<sup>53</sup> *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519; *Lawrence v. Lowrie*, 133 Fed. Rep. 995, 13 Am. B. R. 297; *In re Peiser*, 115 Fed. Rep. 199, 7 Am. B. R. 690; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Sherman v. Bingham*, No. 12762, Fed. Cas., 3 Cliff. 552; *Horskins v. Sanderson*, 132 Fed. Rep. 415, 13 Am. B. R. 101; *Teague v. Anderson Hardware Co.*, 161 Fed. Rep. 765, 20 Am. B. R. 424.

See *Suits by or against Trustees*, Chap. XXVII, *post*.

property.<sup>54</sup> A receiver generally can not maintain an ancillary suit for such purpose.<sup>55</sup>

A court of bankruptcy in the exercise of ancillary jurisdiction may order the examination of witnesses under Section 21a.<sup>56</sup>

The courts of other districts, so far as an ancillary jurisdiction exists, are auxillary, not in any sense implying power to carry out and enforce the judgment and orders of one another, except upon due process in the particular district.<sup>57</sup> In such cases it is necessary to acquire jurisdiction of persons and property by the same means employed in other cases.<sup>58</sup>

**§ 36. Power to compel bankrupt or his agent to deliver his property to trustee.**

Where property, claimed to belong to the estate of the bankrupt, is voluntarily surrendered to the trustee in bankruptcy there can be no controversy.

Where the property is in the possession of the bankrupt or his agent, at the time the petition in bankruptcy was filed, the court of bankruptcy in which the case is pending may summarily order him to deliver to the trustee such property and commit him for contempt if he fails to do so.<sup>59</sup> The court should not make an order of this kind until it is convinced

<sup>54</sup> *Lawrence v. Lowrie*, 133 Fed. Rep. 995, 13 Am. B. R. 297.

<sup>55</sup> *In re National Mercantile Agency*, 128 Fed. Rep. 639, 12 Am. B. R. 189; *In re Dunseath & Son Co.*, 168 Fed. Rep. 973, 22 Am. B. R. 75; *Great Western Min. Co. v. Harris*, 198 U. S. 561, 49 L. Ed. 1163; *Booth v. Clark*, 17 How. 338, 15 L. Ed. 164; *Guarantee Title & T. Co. v. Pearlman*, 144 Fed. Rep. 550, 16 Am. B. R. 461.

That a receiver in bankruptcy is a temporary custodian merely, see *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45; *Boonville Nat. Bank v. Blakey*, 107 Fed. Rep. 891, 6 Am. B. R. 13.

<sup>56</sup> *Abram I. Elkus, Petitioner*, 216 U. S. 115, 54 L. Ed. 407, 23 Am. B. R. 614; *In re Sutter Bros.*, 131 Fed. Rep. 654, 11 Am. B. R. 632; *In re Robinson*, 179 Fed. Rep. 724.

<sup>57</sup> *Shainwald v. Lewis*, 5 Fed. Rep. 513.

<sup>58</sup> *Shainwald v. Lewis*, 5 Fed. Rep. 513.

<sup>59</sup> *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 5 Am. B. R. 176; *Schweer v. Brown* (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 64 C. C. A. 574, 12 Am. B. R. 178; *In re Rosser* (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 41 C. C. A. 497, 4 Am. B. R. 153; *In re Schlesinger* (C. C. A. 2nd Cir.), 102 Fed. Rep. 117, 42 C. C. A. 207, 4 Am. B. R. 177;

that the bankrupt has money or property in his possession or under his control, which he has concealed or withheld from the trustee.<sup>60</sup> He will not be required to do an impossible thing.

Where property claimed as a part of the bankrupt's estate is in the possession of a person other than the bankrupt at the time the petition in bankruptcy is filed, it may be within the power of a court of bankruptcy to deal with it, but not in every instance, as will be pointed out presently.

A court of bankruptcy has power, by means of its receiver or marshal, to summarily take property from the possession of an adverse claimant as well as the bankrupt or his agent in case it finds it necessary for the preservation of the estate.<sup>61</sup> This is a proceeding in bankruptcy as distinguished from a controversy arising in bankruptcy and is not limited by Section 23, which relates only to suits by a trustee.<sup>61</sup>

Where property is held for the bankrupt by a bailee or agent, who does not claim title to or an interest in the property, the court of bankruptcy may, in a summary proceeding, order him to deliver such property to the trustee.<sup>62</sup> An as-

*In re Purvine* (C. C. A. 5th Cir.), 96 Fed. Rep. 192, 37 C. C. A. 446, 2 Am. B. R. 287; *Ripon Knitting Wks. v. Schreiber*, 101 Fed. Rep. 810, 4 Am. B. R. 294, s. c. (C. C. A. 9th Cir.), 104 Fed. Rep. 1006, 43 C. C. A. 682; *In re Greenberg*, 106 Fed. Rep. 496, 5 Am. B. R. 840; *In re Wilson*, 116 Fed. Rep. 419, 8 Am. B. R. 612; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63, 23 Am. B. R. 826.

As to punishment by commitment for contempt for failure to comply with such an order, see Sec. 670, *post*.

<sup>60</sup> *In re Felson*, 124 Fed. Rep. 288, 10 Am. B. R. 716; *In re Wilson*, 116 Fed. Rep. 419, 8 Am. B. R. 612.

*In re Herokovitz*, 152 Fed. Rep. 316, 18 Am. B. R. 247, a petition

for an order to deliver assets was sent to the referee to investigate the matter.

<sup>61</sup> B. A. 1898, Sec. 2, clause 3. *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432, and 146 Fed. Rep. 109, 17 Am. B. R. 48; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608; *In re Moody*, 131 Fed. Rep. 525, 12 Am. B. R. 718, and 134 Fed. Rep. 628, 14 Am. B. R. 472; *In re Muncie Pulp Co.* (C. C. A. 2nd Cir.), 139 Fed. Rep. 546, 71 C. C. A. 530, 14 Am. B. R. 70.

<sup>62</sup> *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re Feldser*, 134 Fed. Rep. 307, 14 Am. B. R. 216; *In re Moore*, 104 Fed. Rep. 896, 5 Am. B. R. 151;

signee for the benefit of creditors does not hold his title for value but is simply an agent for the distribution of the proceeds of the debtor's property among his creditors and may be required by summary order to transfer to the trustee in bankruptcy all the property which comes into his hands under the assignment.<sup>63</sup>

A court of bankruptcy has no power in a summary proceeding to compel a third person claiming title to or an interest in property in his possession to transfer it to the trustee.<sup>64</sup> The trustee can not sell such property under the direction of the court, requiring the claimant to assert his interest in the property and have it determined by the court of bankruptcy.<sup>65</sup> A secured creditor or other claimant may bring property in controversy into the court of bankruptcy and submit to its jurisdiction. In such case the trustee has power to sell the property, preserving the rights of the adverse claimant in the fund resulting from the sale. But a court can not by a summary proceeding compel an adverse claimant, having possession of the property, to yield possession to the trustee.

In a summary proceeding by a trustee to recover property in the possession of an adverse claimant the court of bankruptcy may enter upon an inquiry as to whether the claim is real or merely colorable. If real, it must decline to finally

*In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re* Muncie Pulp Co. (C. C. A. 2nd Cir.), 139 Fed. Rep. 546, 71 C. C. A. 530, 14 Am. B. R. 70.

<sup>63</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *In re* Stokes, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re* Smith, 92 Fed. Rep. 135, 2 Am. B. R. 9; *In re* Thompson (C. C. A. 2nd Cir.), 128 Fed. Rep. 575, 63 C. C. A. 217,

11 Am. B. R. 719, affirming 122 Fed. Rep. 174, 10 Am. B. R. 242.

<sup>64</sup> *Louisville Trust Co. v. Com-ingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *Jaquith v. Rowley*, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; *First Nat. Bank v. Title & Trust Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; *In re* New York Car Wheel Works, 132 Fed. Rep. 203, 13 Am. B. R. 60; *In re* Adams, 130 Fed. Rep. 788, 12 Am. B. R. 367.

<sup>65</sup> *First Nat. Bank v. Title & Trust Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102.

adjudicate on the merits in a summary proceeding.<sup>66</sup> Should it appear that the claim is fictitious or colorable, the court may retain jurisdiction on the theory that the property is then constructively in the possession of the court.<sup>67</sup>

The summary jurisdiction of a court of bankruptcy, invoked by a trustee to recover property in the possession of a person other than the bankrupt, is limited to such property as is held by the bankrupt or for him by a bailee or agent, who does not in good faith claim title to or interest in the property. These cases are within the jurisdiction in bankruptcy proper. Cases involving the title as well as possession of property present a controversy arising in bankruptcy proceedings, which requires the exercise of that jurisdiction at law and in equity conferred upon these courts as ordinary courts, by the bankrupt act.

### §37. Jurisdiction of suits to recover property held by adverse claimants.

All property owned by the bankrupt in the possession of other persons, claiming title or interest in it, passes to the

<sup>66</sup> *Schweer v. Brown*, 195 U. S. 171, 49 L. Ed. 144, 12 Am. B. R. 673; *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 244; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *In re La Plume Condensed Milk Co.*, 145 Fed. Rep. 1013, 15 Am. B. R. 413; *In re Walsh Bros.*, 163 Fed. Rep. 352, 20 Am. B. R. 472; *In re Hersey*, 171 Fed. Rep. 998, 22 Am. B. R. 863.

*In Coder v. Arts*, 213 U. S. 223, 234, 53 L. Ed. 772, 22 Am. B. R. 1. speaking of the decision of the supreme court in *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 104, Mr. Justice Day said: "In that case there was an attempt on the part of the trustee to invoke an ad-

judication as to the title to property which the district court found not to be in the possession of the trustee, notwithstanding the petition of the trustee had averred possession, and it was held that when this fact appeared the district court had no longer jurisdiction of the case under the doctrine laid down in *Bardes v. Hawarden Bank*, and ought to have dismissed the case."

<sup>67</sup> *In re Tune*, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re Michie*, 116 Fed. Rep. 749, 8 Am. B. R. 734; *In re Kane*, 131 Fed. Rep. 386, 12 Am. B. R. 444; *In re Muncie Pulp Co.* (C. C. A. 2nd Cir.), 139 Fed. Rep. 546, 71 C. C. A. 530, 14 Am. B. R. 70.

trustee. But property belonging to other persons does not pass to the trustee.

Before the trustee is entitled to the actual possession of the property in dispute the interest or title of the bankrupt must be determined. When the trustee seeks to recover property in the possession of a third person, claiming title to or an interest in it, a controversy arising in bankruptcy proceedings is presented.<sup>68</sup> Such suits call for the exercise of that jurisdiction at law and in equity conferred upon the courts of bankruptcy, as ordinary courts, and not jurisdiction in bankruptcy proper.

The trustee must bring a plenary suit at law or in equity to recover such property or the value of the bankrupt's interest in it.<sup>69</sup> It is well settled that summary proceedings on motion and notice or rule to show cause can not be substituted for plenary suits at law or in equity to recover property in the possession of third persons who claim to own it.<sup>69</sup> This applies with equal force to controversies arising before and since the amendment of 1903.

The reason for this rule is that in such cases the court is not exercising jurisdiction in bankruptcy, but the jurisdiction of an ordinary court of law or equity,<sup>70</sup> and the parties would be deprived of the usual processes of law in defense of their rights in summary proceeding. The defendant in such cases

<sup>68</sup> First Nat. Bank v. Title & T. Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Delta Nat. Bank v. Easterbrook (C. C. A. 5th Cir.), 133 Fed. Rep. 521, 67 C. C. A. 236, 13 Am. B. R. 338; Stelling v. Jones Lumber Co. (C. C. A. 7th Cir.), 116 Fed. Rep. 261, 53 C. C. A. 81, 8 Am. B. R. 521, Boonville Nat. Bank v. Blakely (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 43, 6 Am. B. R. 13; McNulty v. Feingold, 129 Fed. Rep. 1001, 12 Am. B. R. 338; *In re* Bailey, 156 Fed. Rep. 691, 19 Am. B. R. 470; Rathman v. Booth (C. C. A. 8th Cir.), 183 Fed. Rep. 913.

<sup>69</sup> Louisville Trust Co. v. Comin-gor, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; Jaquith v. Rowley, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; *In re* Young (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 49 C. C. A. 283, 7 Am. B. R. 14; *In re* Adams, 130 Fed. Rep. 788, 12 Am. B. R. 367; *In re* Scherber 131 Fed. Rep. 121, 12 Am. B. R. 616; *In re* Walsh Bros., 163 Fed. Rep. 352, 20 Am. B. R. 472; *In re* Hersey, 171 Fed. Rep. 998, 22 Am. B. R. 863; Rathman v. Booth (C. C. A. 8th Cir.), 183 Fed. Rep. 913.

<sup>70</sup> See Sec. 25, *ante*.



may be entitled to a trial by jury, or to put in evidence upon an issue regularly made by pleadings, or to have the decree or judgment reviewed upon an appeal or writ of error, or to have the judgment or decree enforced by execution and not by process for contempt for disobeying a summary order of court.<sup>71</sup>

The state courts under the bankrupt act as it stood before the amendment of February, 1903, had jurisdiction to entertain suits by a trustee to recover preferences, fraudulent conveyances, and to collect debts owing the bankrupt to the exclusion of the bankruptcy courts, unless the defendant consented to be sued in the federal court.<sup>72</sup> The courts of bankruptcy were given jurisdiction to entertain such suits if the defendant consented.<sup>73</sup> If the defendant appeared and pleaded to the merits he was presumed to consent to the jurisdiction and could not thereafter object.<sup>74</sup>

<sup>71</sup> *Ex parte Comingor* (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 47 C. A. 51, 5 Am. B. R. 537, affirmed 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, Judge Severens, speaking for the circuit court of appeals, said:

"The judgment would not be enforced by execution, but by process for contempt. The proceeding when employed for such a purpose is in the nature of a civil remedy for the recovery of money. Quite generally, if not universally, state statutes founded on public policy forbid imprisonment as a remedy to compel the satisfaction of debts or other obligations not founded on wilful wrong, and this policy may not be countervailed by the consent of parties to a proceeding which results in defeating it. And such statutes are given effect in the courts of the United States by Rev. Stat., Secs. 990, 991."

See also *Mallory Mfg. Co. v. Fox*, 20 Fed. 409, per Wallace, C. J. *Low v. Durfee*, 5 Fed. Rep. 256,

per Lowell, C. J.; *Ex parte Hooson*, Law Rep. 8 Ch. App. 251.

<sup>72</sup> *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *Mitchell v. McClure*, 178 U. S. 539, 44 L. Ed. 1182; 4 Am. B. R. 177; *Hicks v. Knost*, 178 U. S. 541, 44 L. Ed. 1183, 4 Am. B. R. 178; *Jacquith v. Rowley*, 188 U. S. 620, 47 L. Ed. 256, 9 Am. B. R. 525; *Wall v. Cox*, 181 U. S. 244, 45 L. Ed. 845, 5 Am. B. R. 727; *Real Estate Trust Co. v. Thompson*, 112 Fed. Rep. 945, 7 Am. B. R. 520.

<sup>73</sup> *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163; *In re Durham*, 114 Fed. Rep. 750, 8 Am. B. R. 115; *Philips v. Turner* (C. C. A., 5th Cir.), 114 Fed. Rep. 726, 52 C. C. A. 358, 8 Am. B. R. 171.

<sup>74</sup> *In re Connolly*, 100 Fed. Rep. 620, 3 Am. B. R. 842; *In re Steuer*, 104 Fed. Rep. 976, 5 Am. B. R. 209; *In re Durham*, 114 Fed. Rep. 750, 8 Am. B. R. 115; *Ryttenberg v. Schefer*, 131 Fed. Rep. 313, 11 Am. B. R. 652.



By the amendment of February 5, 1903,<sup>75</sup> the jurisdiction of the court of bankruptcy was extended to suits for the recovery of property, which is claimed to be avoidable preference under Section 60*b*, or a fraudulent transfer under Section 67*e* without the consent of the defendant.<sup>76</sup> In such cases at present the trustee has the option to bring his suit in the state or federal court.

Suits by the trustee to collect debts owing the bankrupt<sup>79</sup> or to set aside fraudulent conveyances under Section 70*e* must be brought in the state court unless the defendant consents to be sued in the federal court.<sup>80</sup> Section 23 was amended by the act of June 25, 1910, to give the court of bankruptcy jurisdiction of cases under Section 70*e* of the act.<sup>81</sup>

In *Ex parte Comingor*, 107 Fed. Rep. 898, 5 Am. B. R. 537, affirmed in 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421, the circuit court of appeals for the sixth circuit said:

"It should be observed in this connection that the consent mentioned in Sec. 23*b*, means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of law unless other provision is made. . . . We are, therefore inclined to think that this petitioner was not precluded from his right to raise the objection to the mode of proceeding at the time he did, which was before the making of the final order, and that the court erred in refusing to entertain it."

<sup>75</sup> B. A. 1898, Sec. 23*b*, as amended by the Act of Feb. 5, 1903, 32 Stat. at L. 797.

<sup>76</sup> *Johnston v. Forsyth*, 127 Fed. Rep. 845, 11 Am. B. Rep. 669; *Lawrence v. Lowrie*, 133 Fed. Rep. 995, 13 Am. B. R. 297; *McNulty v.*

*Feingold*, 129 Fed. Rep. 1001, 12 Am. B. R. 338; *Horskins v. Sanderson*, 132 Fed. Rep. 415; *Off v. Hakes* (C. C. A. 7th Cir.), 142 Fed. Rep. 364, 77 C. C. A. 464, 15 Am. B. R. 696; *Linch v. Bronson*, 160 Fed. Rep. 139, 20 Am. B. R. 409; *Cleminshaw v. International Shirt & Collar Co.*, 165 Fed. Rep. 797, 21 Am. B. R. 616.

<sup>79</sup> *Harris v. First Nat. Bank*, 216 U. S. 382, 54 L. Ed. 528, 23 Am. B. R. 632.

<sup>80</sup> *Gregory v. Atkinson*, 127 Fed. Rep. 183, 11 Am. B. R. 495; *Hull v. Burr* (C. C. A. 5th Cir.), 153 Fed. Rep. 945, 83 C. C. A. 61, 18 Am. B. R. 541; *In re Grissler* (C. C. A. 2nd Cir.), 136 Fed. Rep. 754, 69 C. C. A. 406, 13 Am. B. R. 508; *Skewis v. Barthell*, 152 Fed. Rep. 534, 18 Am. B. R. 429.

But see *Hurley v. Devlin*, 149 Fed. Rep. 268, 17 Am. B. R. 793.

See also, *Harris v. First Nat. Bank*, 216 U. S. 382, 23 Am. B. R. 632.

<sup>81</sup> 36 Stat. at L. 838.

### § 38. Jurisdiction of property assigned for the benefit of creditors.

The jurisdiction of the court of bankruptcy of property conveyed to an assignee for the benefit of creditors depends upon whether bankruptcy proceedings are seasonably commenced against the assignor.

It is well settled that a general assignment for the benefit of creditors is not rendered unlawful or void by the bankrupt act.<sup>82</sup> The state court may proceed to administer the estate of the assignor in accordance with the deed of trust until it is compelled to yield to a court of bankruptcy. Such proceedings in the state court have been uniformly recognized as valid and binding on the parties.<sup>83</sup>

If no proceedings in bankruptcy are instituted within four months, the state court may proceed to administer the estate and the proceedings can not be assailed by a trustee in bankruptcy subsequently appointed, or by creditors.<sup>84</sup> The reason for this is that the bankrupt act makes a general assignment

<sup>82</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Boese v. King*, 108 U. S. 375, 27 L. Ed. 760; *In re Sievers*, 91 Fed. Rep. 366, 1 Am. B. R. 117; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461; *Cook v. Rogers*, 31 Mich. 391; *Pogue v. Rowe*, 236 Ill. 157; *Downer v. Porter*, 116 Ky. 422; *Thompson v. Shaw*, 104 Me. 85; *Pleasant Hill Cemetery v. Davis*, 76 Me. 289; *Beck v. Parker*, 65 Pa. St. 262; *Peckham's Assigned Estate*, 35 Pa. Super. Ct. 332.

<sup>83</sup> *Louisville Trust Co. v. Com. ingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re Chase* (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 59 C. C. A. 629, 13 Am. B. R.

677; *Summers v. Abbott* (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 58 C. C. A. 352, 10 Am. B. R. 254; *In re Pattee*, 143 Fed. Rep. 994, 16 Am. B. R. 450; *In re Scholtz*, 106 Fed. Rep. 834, 5 Am. B. R. 782; *In re Carver*, 113 Fed. Rep. 138, 7 Am. B. R. 539; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63, 23 Am. B. R. 826.

<sup>84</sup> *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63, 23 Am. B. R. 826; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760; *Patty-Joiner, etc., Co. v. Cummins*, 93 Tex. Sup. Ct. 603, 4 Am. B. R. 269; *In re Carver*, 113 Fed. Rep. 138, 7 Am. B. R. 539.

an act of bankruptcy.<sup>85</sup> Upon a petition of creditors filed within four months the assignor may be adjudged a bankrupt and the property wrested from his assignee for administration in the bankruptcy court. If this is not done the creditors are presumed to have acquiesced in having the estate distributed by the assignee.<sup>86</sup>

If proceedings in bankruptcy are instituted within four months after the general assignment and followed by an adjudication, the court of bankruptcy is entitled to administer the estate and the jurisdiction of the state court must yield to the paramount authority of the bankruptcy court.<sup>87</sup>

That court has authority as soon as the petition is filed to enjoin the voluntary assignee from disposing of the property confided to him or from proceeding any farther with the administration of the assigned estate.<sup>88</sup> It may appoint a receiver or direct the marshal to take charge of the assigned estate pending the adjudication in bankruptcy.<sup>89</sup>

<sup>85</sup> B. A. 1898, Sec. 3, clause 4. *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>86</sup> *Mayer v. Hellman*, 91 U. S. 496, 501, 23 L. Ed. 377; *In re Carver*, 113 Fed. Rep. 138, 7 Am. B. R. 539; *In re Farrell*, 176 Fed. Rep. 505, 100 C. C. A. 63, 23 Am. B. R. 826.

<sup>87</sup> *In re Gutwillig* (C. C. A. 2nd Cir.), 92 Fed. Rep. 337, 34 C. C. A. 377, affirmed, 90 Fed. Rep. 475, 1 Am. B. R. 78; *In re Sievers*, 91 Fed. Rep. 366, 1 Am. B. R. 117; *Davis v. Bohle* (C. C. A. 8th Cir.), 92 Fed. Rep. 325, 34 C. C. A. 372, 1 Am. B. R. 12; *In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9; *In re Curtis*, 91 Fed. Rep. 737, 1 Am. B. R. 440.

*In Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1, Mr. Justice Holmes observed: "It is admitted that a general assignment for the benefit of creditors, made within four months

from the filing of a petition in bankruptcy, is void as against the trustees in bankruptcy, so far as it interferes with his administering the property assigned. This could not be denied."

<sup>88</sup> *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *Davis v. Bohle* (C. C. A. 8th Cir.), 92 Fed. Rep. 325, 34 C. C. A. 372, 1 Am. B. R. 12; *In re Gutwillig* (C. C. A. 2nd Cir.), 92 Fed. Rep. 337, 34 C. C. A. 377, affirmed, 90 Fed. Rep. 475, 1 Am. B. R. 78; *In re Sievers*, 91 Fed. Rep. 366, 1 Am. B. R. 117; *In re Krinsky*, 112 Fed. Rep. 972, 7 Am. B. R. 535.

<sup>89</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; *In re Etheridge Furniture Co.*, 92 Fed. Rep. 329, 1 Am. B. R. 112; *In re Sievers*, 91 Fed. Rep. 366, 1 Am. B. R. 117.

The trustee in bankruptcy, upon his appointment and qualification, is entitled to take the property from the possession of the assignee for the purpose of administering it in the court of bankruptcy.<sup>90</sup> The summary jurisdiction of the court of bankruptcy extends only to property of the debtor in the possession of the assignee at the time he is required to surrender it to the trustee. Where he has, in the execution of his trust, distributed a part of the estate in good faith and under the direction of the state court, he can not be held personally liable to the trustee in bankruptcy for the value of the property or its proceeds. The court, can not by a summary order, require him to account for such property, including fees paid to himself and his attorney.<sup>91</sup> The trustee in bankruptcy must seek his remedy against those who have received payments from the assignee by a plenary suit at law or in equity.<sup>92</sup>

It has been held that an assignee of an individual partner may be required by a summary order to surrender the individual assets to the trustee of the firm subsequently adjudged to be bankrupt,<sup>93</sup> but that the assignee of a firm can not be required to surrender the firm property in his possession to the trustee in bankruptcy of the individual partners.<sup>94</sup>

The power of the bankruptcy court to take possession of and administer property assigned for the benefit of creditors is because it is the property of the bankrupt. The jurisdiction of a court of bankruptcy reaches all the property owned by the bankrupt, whether held by him or for him by a bailee or agent.<sup>95</sup> The assignee does not hold his title for value, but

<sup>90</sup> *In re Thompson* (C. C. A. 2nd Cir.), 128 Fed. Rep. 575, 63 C. C. A. 217, 11 Am. B. R. 719, affirmed 112 Fed. Rep. 174, 10 Am. B. R. 242; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9.

<sup>91</sup> *Louisville Trust Co. v. Com-ingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *In re Klein*, 116 Fed. Rep. 523, 8 Am. B. R. 559; *In re Carver*, 113 Fed. Rep. 138, 7 Am. B. R. 539; *In re Scholtz*, 106

Fed. Rep. 834, 5 Am. B. R. 782; *In re Hersey*, 171 Fed. Rep. 998, 22 Am. B. R. 863.

<sup>92</sup> *Louisville Trust Co. v. Com-ingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

<sup>93</sup> *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262.

<sup>94</sup> *In re Mercur* (C. C. A. 3rd Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505.

<sup>95</sup> See Sec. 36, *ante*.

simply as an agent of the assignor for the distribution of the proceeds of the property among the creditors.<sup>96</sup> By making a general assignment an act of bankruptcy, congress clearly intended the estate of the assignor to be administered in bankruptcy, like that of any debtor who has committed any other act of bankruptcy, if proceedings were begun for that purpose within the four months' period.<sup>97</sup> If this were not so, the creditors would not obtain any benefit of the bankrupt act in case a debtor made a general assignment. The debtor's discharge would be the sole result of the bankruptcy proceedings. The power to wrest property from a receiver is based upon a different principle.<sup>98</sup>

It has been suggested that the jurisdiction of the property assigned is to be found in the power of the court to set aside preferential and fraudulent conveyances.<sup>99</sup> It is clear that a general assignment can not be avoided as a preference under Section 60*b*, because the very object of it is to make an equitable distribution of the debtor's property among his creditors. It can not be set aside as a conveyance made to hinder, delay or defraud creditors under Section 67*e* because it lacks the essential element of actual fraud.<sup>100</sup> Such interference was

<sup>96</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63, 23 Am. B. R. 826.

<sup>97</sup> *In Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1, Mr. Justice Holmes said: "It is admitted that a general assignment for the benefit of creditors, made within four months from the filing of a petition in bankruptcy, is void as against the trustee in bankruptcy, so far as it interferes with his administering the property assigned. This could not be denied. \* \* \* \* \*

One ground for such a construction would be that making the assignment is declared an act of bankruptcy by Sec. 3. As it could not

have been intended that the very conveyance which warranted putting the grantor into bankruptcy should withdraw all his property from distribution there, it seems sufficient to rely upon the necessarily implied effect of Sec. 3.

<sup>98</sup> See Sec. 39, *post*.

<sup>99</sup> *Davis v. Bohle* (C. C. A. 8th Cir.), 92 Fed. Rep. 325, 34 C. C. A. 372, 1 Am. B. R. 402; *In re Gutwillig*, 90 Fed. Rep. 475, 1 Am. B. R. 78; *In re Gray*, 47 App. Div. (N. Y.), 554, 3 Am. B. R. 647; *In re Slomka* (C. C. A. 2nd Cir.), 122 Fed. Rep. 630, 58 C. C. A. 322, 9 Am. B. R. 635.

<sup>100</sup> *Lansing Boiler & Engine Co. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558; *Githens v. Shiffler*,

not regarded as hindrance and delay within the meaning of the statutes against fraudulent conveyances at common law.<sup>1</sup> It can not be avoided as a judicial lien within four months, because there is no lien fastened upon the property in such cases.

**§ 39. Proceedings to recover property from an assignee for the benefit of creditors.**

The court of bankruptcy may require the assignee for the benefit of creditors to transfer to the trustee in bankruptcy all the property in his possession under the assignment.<sup>2</sup> It may require a purchaser from the assignee having notice of the bankruptcy proceedings, to transfer property so purchased to the trustee.<sup>3</sup>

This may be accomplished by a summary proceeding. It is not necessary for the trustee to bring a separate, independent and plenary action against the assignee or the purchaser. He may file a petition in the court of bankruptcy as a part of the bankruptcy proceedings, and obtain an order to show cause why the property should not be surrendered to the trustee in bankruptcy. Notice should be given the assignee before an order is made.<sup>4</sup> If it is made to appear that the trustee is entitled to the property the court may forthwith order the assignee to yield up the property as demanded.<sup>5</sup>

The reason that this may be done by summary proceedings in bankruptcy, without resort to a plenary suit, is that the as-

112 Fed. Rep. 505, 7 Am. B. R. 453;  
*In re Belknap*, 129 Fed. Rep. 646,  
12 Am. B. R. 326.

<sup>1</sup> *Pickstock v. Lyster*, 3 Mau. & Sel., 371.

See also observations of Mr. Justice Harlan in *Reed v. McIntyre*, 98 U. S. 507, 510, 25 L. Ed. 171.

<sup>2</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re Thompson* (C. C. A. 2nd Cir.), 128 Fed. Rep. 575, 63 C. C. A. 217, 11 Am. B. R. 719; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In*

*re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9.

<sup>3</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523.

<sup>4</sup> *Smith v. Belford* (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 45 C. C. A. 526, 5 Am. B. R. 291.

<sup>5</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re Thompson* (C. C. A. 2nd Cir.), 128 Fed. Rep. 575, 63 C. C. A. 217, 11 Am. B. R. 719; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9.

signee is not an adverse claimant. The assignee for the benefit of creditors does not hold his title for value but is simply an agent selected by the debtor for the distribution of the proceeds of his property among his creditors.<sup>6</sup>

Where property is in the custody of the state court, through a receiver or other officer, the application is regularly made first to the state court for an order to transfer that property to the trustee in bankruptcy. The assignee for the benefit of creditors is not in possession of the assigned property for the state court, but holds under the deed appointing him. He is not an officer of the state court in the sense that the property in his possession is within the custody of that court.<sup>7</sup> The rule of comity with respect to property in the custody of the state court does not apply to property in the possession of an assignee. The application for an order requiring the assignee to deliver property to the trustee is regularly made in the bankruptcy court in the first instance.

The application may be, and frequently is, made to the state court in the first instance for an order requiring the assignee to surrender property in his possession to the receiver or trustee in bankruptcy. An assignee is subject to the orders of the state court. The laws of the United States are equally binding on both the federal and state courts. It is proper to apply to either court to require the assignee to turn over this property. If the state court refuses to make the order it will not bar the court of bankruptcy from subsequently directing a surrender of the property by the assignee.

#### **§ 40. Power to fix compensation of an assignee for the benefit of creditors.**

Where an assignee for the benefit of creditors has been compelled to turn over the property in his charge to a trustee in

<sup>6</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *Davis v. Bohle* (C. C. A. 8th Cir.), 92 Fed. Rep. 325, 34 C. C. A. 372, 1 Am. B. R. 12; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re Farrell* (C. C. A. 6th Cir.), 176

Fed. Rep. 505, 100 C. C. A. 63, 23 Am. B. R. 826.

<sup>7</sup> *Powers v. Blue Grass Bldg & Loan Ass'n*, 86 Fed. Rep. 705, and cases collated at page 709; *Kohn v. Ryan*, 31 Fed. Rep. 636.



bankruptcy, appointed after the assignment but before the application of the trustee thereunder, will be allowed a reasonable compensation for his services as assignee, and for the services of his attorney, so far as the services rendered, either before or after the filing of the petition, were beneficial to the estate.<sup>8</sup>

The court of bankruptcy is the proper court to fix the amount of compensation and expenses to be allowed the assignee. But if, in the execution of his trust, the assignee, or his attorney, has been paid for his services and expenses, it is necessary for the trustee to bring a plenary suit in any court of competent jurisdiction to recover such payments if unreasonable or fraudulent.<sup>9</sup>

#### § 41. When property is in the custody of the state court.

Property may be brought into the custody of a state court by seizure under process of the court or some equivalent act. The court of bankruptcy will not disturb the possession of the state court unless it interferes with the administration of the estate of the debtor in bankruptcy.<sup>10</sup>

Property may be seized by an officer of the state court under a variety of writs, orders, or processes of the court. The *res* may be brought before the court for its action by a writ of replevin,<sup>11</sup> or by a writ of sequestration,<sup>12</sup> or by an order

<sup>8</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re Stewart* (C. C. A. 6th Cir.), 179 Fed. Rep. 222, 102 C. C. A. 348, 24 Am. B. R. 691; *Summers v. Abbott* (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 58 C. C. A. 352, 10 Am. B. R. 254; *In re Chase* (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 59 C. C. A. 629, 13 Am. B. R. 677; *In re Pattee*, 143 Fed. Rep. 994, 16 Am. B. R. 450; *In re Scholtz*, 106 Fed. Rep. 834, 5782; *In re Klein*, 116 Fed. Rep. 523, 8 Am. B. R. 559; *In re Condon*, 129 Fed. Rep. 478, 11 Am. B. R. 219; *In re Levitt*, 126 Fed. Rep. 889, 11 Am. B. R. 411.

<sup>9</sup> *Louisville Trust Co. v. Com-ingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421; *In re Hersey*, 171 Fed. Rep. 998, 22 Am. B. R. 863.

<sup>10</sup> See *Jurisdiction of Property in the Custody of a State Court*, Sec. 42, *post*.

<sup>11</sup> *In re Rudnick & Co.* (C. C. A. 2nd Cir.), 160 Fed. Rep. 903, 88 C. C. A. 85, 20 Am. B. R. 33; *In re Wells*, 114 Fed. Rep. 222, 8 Am. B. R. 75; *In re Neely*, 113 Fed. Rep. 210, 7 Am. B. R. 312.

<sup>12</sup> *Linstroth Wagon Co. v. Ballew* (C. C. A. 5th Cir.), 149 Fed. Rep. 960, 79 C. C. A. 470, 18 Am. B. R. 28.



placing it in the custody of a receiver.<sup>13</sup> The property may be seized under a writ of attachment, or other mesne process, by which property is seized before judgment to answer such judgment when rendered,<sup>14</sup> or under a final process of execution, *elegit*, or other writ by which an ordinary judgment is carried into effect.<sup>15</sup> All such property in the possession of an officer of the court by virtue of process of the court is in the custody of the law.<sup>16</sup> It is thereby withdrawn from the jurisdiction of every other court for the purposes of the suit in the state court.

An administrator or executor is an officer of the court and his possession of property places it in *custodia legis*.<sup>17</sup>

<sup>13</sup> *In re Price*, 92 Fed. Rep. 987, 1 Am. B. R. 606; *In re English* (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *In re Heckman* (C. C. A. 9th Cir.), 140 Fed. Rep. 859, 72 C. C. A. 8, 15 Am. B. R. 500.

In *Frazier v. Southern Loan & T. Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710, the court held that an order appointing a receiver, without actual possession by him, was sufficient to bring property within the custody of the court.

<sup>14</sup> *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *In re Beaver Coal Co.*, 110 Fed. Rep. 630, 6 Am. B. R. 404, affirmed (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 7 Am. B. R. 542; *In re Blair*, 108 Fed. Rep. 529, 6 Am. B. R. 206; *Tennessee Producer Marble Co. v. Grant* (C. C. A. 3rd Cir.), 135 Fed. Rep. 322, 67 C. C. A. 676, 14 Am. B. R. 288; *In re Walsh Bros.*, 159 Fed. Rep. 560, 20 Am. B. R. 472.

<sup>15</sup> *Orr v. Trimble*, 158 Fed. Rep. 897, 19 Am. B. R. 849; *In re Seebold* (C. C. A. 5th Cir.), 105 Fed. Rep. 910, 45 C. C. A. 117, 5 Am. B. R. 358; *In re Shoemaker*, 112 Fed. Rep.

648, 7 Am. B. R. 437; *White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 869, 56 C. C. A. 398, 9 Am. B. R. 653.

<sup>16</sup> *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Covell v. Hyman*, 111 U. S. 176, 28 L. Ed. 390, *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. Ed. 145; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. Ed. 374; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *In re Rudnick & Co.* (C. C. A. 2nd Cir.), 160 Fed. Rep. 903, 88 C. C. A. 85, 20 Am. B. R. 33; *Frazier v. Southern Loan & T. Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710; *In re Heckman* (C. C. A. 9th Cir.), 140 Fed. Rep. 859, 72 C. C. A. 8, 15 Am. B. R. 500; *In re English* (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *Orr v. Trimble*, 158 Fed. Rep. 897, 19 Am. B. R. 849.

<sup>17</sup> *Byers v. McAuley*, 149 U. S. 608, 37 L. Ed. 867; *Wickham v. Hull*, 60 Fed. Rep. 326; *In re Pierce*, 102 Fed. Rep. 907, 4 Am. B. R. 489; *White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 56 C. C. A. 398, 9 Am. B. R. 653.

Garnishment has the effect of placing the property in the garnishee's hands in the custody of the law so that an officer has no right after the garnishment to take the property from the garnishee.<sup>18</sup> In some states property in the custody of a garnishee is not considered in *custodia legis*.<sup>19</sup> The bankruptcy courts will follow the state rule in this respect.

An assignee for the benefit of creditors is not in possession of the property assigned for any court, but holds under the deed appointing him. He is not an officer of the state court in the sense that the property in his possession is within the custody of that court.<sup>20</sup>

Property seized by an officer of a state court without process or warrant is not thereby brought within the custody of the state court,<sup>21</sup> but a levy under color of process, although illegal, places the property in *custodia legis*.<sup>22</sup>

The mere beginning of an action does not ordinarily bring the assets of the debtor into the custody of a state court. But the commencement of a suit to foreclose a mortgage or to enforce liens against specific property thereby brings the property to be affected into the control of the court and withdraws it from the jurisdiction of every other court.<sup>23</sup> That court is entitled to retain the control of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal.<sup>24</sup> A suit to foreclose a mortgage is not commenced in some states until service of some kind is made

<sup>18</sup>Brashear v. West, 7 Pet. 608, 621, 8 L. Ed. 801; Mattingly v. Boyd, 20 How. 128; Matthews v. Smith, 13 Neb. 178, 190; Reed v. Fletcher, 24 Neb. 435, 458; *In re Kane*, 152 Fed. Rep. 587, 18 Am. B. R. 654.

<sup>19</sup>Bigelow v. Andress, 31 Ill. 322.

<sup>20</sup>Powers v. Blue Grass Bldg. & L. Ass'n, 86 Fed. Rep. 705 and cases collated at page 709; Kohn v. Ryan, 31 Fed. Rep. 636.

<sup>21</sup>Jervey v. The Carolina, 66 Fed. Rep. 1013; *In re Tyler*, 104 Fed. Rep. 778, 5 Am. B. R. 152.

As to the effect of collusive proceedings to get property out of the custody of a court, see *Daniels v. Lazarus*, 65 Fed. Rep. 718.

<sup>22</sup>Gumbel v. Pitkin, 124 U. S. 131, 31 L. Ed. 374.

<sup>23</sup>Farmers Loan & T. Co. v. Lake St. Ry. Co., 177 U. S. 51, 61, 44 L. Ed. 667.

<sup>24</sup>Westerfeldt v. North Carolina Min. Co. (C. C. A. 4th Cir.), 166 Fed. Rep. 706, 92 C. C. A. 378, and cases cited by Mr. Chief Justice Fuller in the opinion.

upon the party.<sup>25</sup> Filing a judgment creditors' bill and service of process is an equitable levy, which brings the property of the debtor into the custody of the law.<sup>26</sup> The bankruptcy court will not disturb the possession of a state court or interfere with the prosecution of a suit to enforce a mortgage or other lien, including the equitable lien of a creditor's suit, unless the lien is voidable or invalid under the bankrupt act.<sup>27</sup>

The custody of the state court may be ended by a receiver or other officer returning the property to the debtor,<sup>28</sup> or by surrendering it to a trustee in bankruptcy.<sup>29</sup> In an early case Lord Ellenborough observed:<sup>30</sup> "I am not aware of any case where, upon abandonment of possession by the sheriff, the goods have still been holden to remain in the custody of the law."

The return of an execution *nulla bona* by a sheriff terminates the equitable lien of a judgment creditor under the New York statute.<sup>31</sup>

#### § 42. Jurisdiction of property in the custody of a state court.

The general rule of comity between courts with respect to property in *custodia legis* regulates the relations between the courts of bankruptcy and the state courts.<sup>32</sup>

<sup>25</sup> Sec. 416, N. Y. Civ. Code Proc.; Sec. 4987 Ohio Civ. Code Proc.; *In re Kellogg* (C. C. A. 2nd Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7.

<sup>26</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 39; *Patten v. Carley*, 69 App. Div. 425, 74 N. Y. Supp. 994, 8 Am. B. R. 482; *Ninth Nat. Bank v. Moses*, 80 N. Y. Supp. 617, 39 Misc. Rep. 664, 11 Am. B. R. 772.

<sup>27</sup> See Foreclosure suits in the State Court. Sec. 57, *post*.

<sup>28</sup> *In re Brown*, 91 Fed. Rep. 358, 1 Am. B. R. 107; *In re Rogers & Stefani*, 156 Fed. Rep. 267, 19 Am. B. R. 566.

<sup>29</sup> *Hansen v. Stephans*, 116 Ga. 722, 11 Am. B. R. 172; *In re Hymmes Buggy and Imp. Co.*, 130 Fed. Rep. 577, 12 Am. B. R. 477.

<sup>30</sup> *Rhodes v. Crundale*, 1 Mau. & Sel., 711.

<sup>31</sup> *In re Matthews & Sons*, 163 Fed. Rep. 127, 20 Am. B. R. 570.

<sup>32</sup> *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *Frazier v. Southern Loan & T. Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710; *In re Price*, 92 Fed. Rep. 987, 1 Am.

That principle is, as stated by Mr. Justice Miller,<sup>83</sup> "that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."

1. The courts of bankruptcy and the state courts have concurrent jurisdiction of controversies arising in bankruptcy proceedings.<sup>34</sup> In those cases they exercise an equal and co-ordinate jurisdiction. Where the state court, by its officer acting under color of its order or process, has taken into its custody property of the debtor before bankruptcy, the court of bankruptcy will not be permitted either to oust the possession of the state court or in any way to interfere with its complete control or distribution of the property for the purpose of the case for which its action has been invoked.<sup>35</sup> Nor will a state

B. R. 606; *In re* Heckman (C. C. A. 9th Cir.), 140 Fed. Rep. 859, 72 C. C. A. 8, 15 Am. B. R. 500; *In re* English (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *In re* Rohrer (C. C. A. 6th Cir.), 177 Fed. Rep. 381, 100 C. C. A. 613, 24 Am. B. R. 52.

In *Pickens v. Roy*, *Supra*, the court, in referring to the rules governing cases of priority of jurisdiction, quotes with approval the following language from the opinion of Judge Goff in the court below:

"The bankruptcy act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its details, provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the

bankruptcy of the party entitled to or interested in the subject-matter of such controversy."

<sup>83</sup> *Buck v. Colbath*, 3 Wall. 351, 18 L. Ed. 257.

See also *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Frazier v. Southern Loan & T. Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710; *Peck v. Jenness*, 7 How 612, 12 L. Ed. 841.

<sup>84</sup> See *Bankruptcy Proceedings and suits at Law and Equity*, Sec. 25, *ante*.

<sup>85</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *In re Price*, 92 Fed. Rep. 987, 1 Am. B.

court be permitted to disturb the possession of a court of bankruptcy, which has first acquired possession of the property.<sup>36</sup> Hence it is that the court which first takes jurisdiction and assumes control of the property retains it all for the purposes of a final order or decree in cases in which rights of the parties would be the same whether presented to a state court or to a court of bankruptcy.

Illustrations of cases of this character may be found in judgment creditors' suits begun in a state court four months prior to the bankruptcy proceedings,<sup>37</sup> and a suit to enforce a mortgage or other specific lien, where the property to be affected is brought into the custody of the law before the bankruptcy proceedings are instituted,<sup>38</sup> and a suit in replevin where the property in controversy is seized before bankruptcy,<sup>39</sup> and where property has been seized before bankruptcy under a writ of execution or attachment or other process of the state court to answer a judgment of that court

R. 606; *In re English* (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *In re Heckman* (C. C. A. 9th Cir.), 140 Fed. Rep. 859, 72 C. C. A. 8, 15 Am. B. R. 500; *Frazier v. Southern Loan & T. Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710; *In re Rudnick & Co.* (C. C. A. 2nd Cir.), 160 Fed. Rep. 903, 88 C. C. A. 85, 20 Am. B. R. 33; *Tennessee Producer Marble Co.* (C. C. A. 3rd Cir.), 135 Fed. Rep. 322, 67 C. C. A. 676, 14 Am. B. R. 288; *In re Kavanaugh*, 99 Fed. Rep. 928, 3 Am. B. R. 833.

<sup>36</sup> *Murphy v. Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *White v. Schlöerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178.

See also Sec. 31, *ante*.

<sup>37</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 39; *Pickens v. Roy*, 187 U. S. 177, 47

L. Ed. 128, 9 Am. B. R. 47; *Hiller v. Le Roy*, 179 N. Y. 369, 12 Am. B. R. 733; *Patten v. Carley*, 69 App. Div. 425, 75 N. Y. Supp. 994, 8 Am. B. R. 482; *Ninth Nat. Bank v. Moses*, 80 N. Y. Supp. 617, 39 Misc. Rep. 664, 11 Am. B. R. 772.

In *Nat. Bank v. Hobbs*, 118 Fed. Rep. 626, 9 Am. B. R. 190, the creditors' bill was filed in the circuit court of the United States and the conflict was between that court and the bankruptcy court in that case.

<sup>38</sup> See Power to take mortgaged property from the custody of a state court, Sec. 43 and Sec. 57, *post*.

<sup>39</sup> *In re Rudnick* (C. C. A. 2nd Cir.), 160 Fed. Rep. 903, 88 C. C. A. 85, 20, 33; *In re Wells*, 114 Fed. Rep. 222, 8 Am. B. R. 75; *Linstroth Wagon Co. v. Ballew* (C. C. A. 5th Cir.), 149 Fed. Rep. 960, 79 C. C. A. 470, 18 Am. B. R. 28.

which is no nullified by the bankrupt act,<sup>40</sup> and where the state court has taken actual possession of property through its receiver appointed more than four months before the petition in bankruptcy was filed.<sup>41</sup>

In all these cases the state court is entitled to proceed to a judgment or decree and enforce the same. If there is property remaining after the satisfaction of such judgment or decree the state court is not entitled to administer it. It belongs to the bankrupt and should be surrendered to his trustee to be administered in bankruptcy.<sup>42</sup>

2. The bankrupt law places the administration of the affairs of insolvents exclusively under the jurisdiction of the bankruptcy court. In this respect the state courts do not have concurrent or co-ordinate jurisdiction with the courts of bankruptcy. The bankrupt law, under the constitutional grant of power to congress on the subject of bankruptcies, is paramount and can not be defeated by proceedings in a state court. The jurisdiction of the bankruptcy court is superior to that of the state court in such matters.<sup>43</sup> By reason of this "superior jurisdiction in the premises" the court of bankruptcy has a right under the general rule of comity to interfere with the possession of the state court.

<sup>40</sup> *In re Seebold* (C. C. A. 5th Cir.), 105 Fed. Rep. 910, 45 C. C. A. 117, 5 Am. B. R. 358; *In re Shoemaker*, 112 Fed. Rep. 648, 7 Am. B. R. 437; *White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 869, 56 C. C. A. 398, 9 Am. B. R. 653; *In re Kavanaugh*, 99 Fed. Rep. 928, 3 Am. B. R. 833; *Orr v. Trimble*, 158 Fed. Rep. 897, 19 Am. B. R. 849.

<sup>41</sup> See Power to take property from the custody of a receiver of a state court, Sec. 43, *post*.

<sup>42</sup> *In re English* (C. C. A. 2nd Cir.) 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *Carling v. Seymour Lumber Co.* (C. C. A. 5th

Cir.) 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66.

<sup>43</sup> *In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 786, Mr. Justice Fuller said: "The operation of the bankruptcy laws of the United States can not be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

Where the possession of the state court has the effect of defeating the operation of the bankrupt law, the courts of bankruptcy may take property from the custody of the state court for the purpose of administering it in accordance with that law. This occurs where property is in the possession of a receiver of a state court, the appointment of which receiver constituted an act of bankruptcy upon which the adjudication is made,<sup>44</sup> or where the judgment appointing a receiver within four months of bankruptcy creates an equitable judicial lien void under Section 67f,<sup>45</sup> or where property is in the possession of a sheriff or other officer of a state court by virtue of an execution on a judgment,<sup>46</sup> or an attachment,<sup>47</sup> void under Section 67f of the act, or where the state court has taken possession of specific property for the purpose of enforcing a mortgage or other lien on it, when the lien is invalidated by the bankrupt act.<sup>48</sup>

In all of these cases it will be observed that there is a direct conflict between the jurisdiction sought to be exercised by the state court and the power of congress has conferred upon the bankruptcy court to administer the estate of the insolvent. For this reason the state court must yield to the paramount jurisdiction of the state court.

<sup>44</sup> *In re* Watts & Sachs, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 786; *Hooks v. Aldrich* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 76 C. C. A. 409, 16 Am. B. R. 654; *In re* Knight, 125 Fed. Rep. 35, 11 Am. B. R. 1; *In re* Lengert Wagon Co., 110 Fed. Rep. 927, 6 Am. B. R. 535; *In re* Matthews & Bros., 163 Fed. Rep. 127, 20 Am. B. R. 570; *In re* Brown, 91 Fed. Rep. 358, 1 Am. B. R. 107.

See also Power to take property from the custody of a receiver of the state court, Sec. 43, *post*.

<sup>45</sup> *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559,

21 Am. B. R. 474; *In re* Matthews & Bros., 163 Fed. Rep. 127, 20 Am. B. R. 570; *Merry v. Jones*, 119 Ga. 643, 11 Am. B. R. 625; *Wilson v. Parr*, 115 Ga. 629, 8 Am. B. R. 230; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 734.

<sup>46</sup> *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 559, 9 Am. B. R. 476, *aff.*; *In re* Kenney (C. C. A. 2nd Cir.), 105 Fed. Rep. 897, 45 C. C. A. 113, 5 Am. B. R. 355, *aff.* 95 Fed. Rep. 427, 8 Am. B. R. 294.

<sup>47</sup> *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285.

<sup>48</sup> See Foreclose suits in a State Court, Sec. 57, *post*.



**§ 43. Power to take property from the custody of a receiver of a state court.**

The power of a court of bankruptcy to deal with property in the possession of a receiver appointed by a state court is regulated by the general rule of comity, which has already been explained.<sup>49</sup>

The power of a court of bankruptcy to administer property in the custody of a receiver, appointed by a state court, depends upon whether the possession of the receiver has the effect of defeating the operation of the bankruptcy law. If it has that effect, the state court must yield to the superior jurisdiction of the bankruptcy court and surrender the property.<sup>50</sup> If the proceedings in the state court do not interfere with the administration of the estate of the debtor in bankruptcy under the national act, the receiver of the state court will not be required to surrender the property to a trustee or receiver in bankruptcy.<sup>51</sup>

It is immaterial that the distribution of the property among creditors may be as equitable and just by a receiver in a state court as in bankruptcy. Congress has placed the administration of the affairs of insolvents, to the extent prescribed by the statute, exclusively under the jurisdiction of the bankruptcy

<sup>49</sup> See Section 42, *ante*.

<sup>50</sup> *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1.; *Hooks v. Alldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 79 C. C. A. 409, 16 Am. B. R. 664; *In re Lengert Wagon Co.*, 110 Fed. Rep. 927, 6 Am. B. R. 535.

*In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113, Mr. Chief Justice Fuller said: "The operation of the bankruptcy laws of the United States can not be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly in-

voked in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

<sup>51</sup> *In re Heckman* (C. C. A. 9th Cir.), 140 Fed. Rep. 859, 72 C. C. A. 8, 15 Am. B. R. 500; *Frazier v. Southern Loan & T. Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710; *In re English*, (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *In re Sterlingworth Ry. Supply Co.*, 165 Fed. Rep. 267, 21 Am. B. R. 342; *Carlising v. Seymour Lumber Co.* (C. C. A. 5th Cir.) 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66; *In re McKane*, 152 Fed. Rep. 733, 18 Am. B. R. 594.



court. If the bankrupt law reaches that property, the jurisdiction of the court of bankruptcy over it is superior to that of the state court. For this reason the bankruptcy court has power, under the general rule of comity<sup>52</sup> to administer the property from the receiver of the state court.<sup>53</sup> If the jurisdiction of the court of bankruptcy of the controversy with respect to the property in custody is concurrent with the state court no such power exists, where the state court obtains possession of the property before the petition in bankruptcy is filed. In that case the bankrupt law does not reach the property administered in bankruptcy. It gives the court jurisdiction as an ordinary court and not as a court of bankruptcy.<sup>54</sup> The solution of the question, whether the possession of a receiver of a state court defeats the operation of the bankrupt law, depends upon whether that law reaches the property in custody or not.

#### **§ 44. Cannot take property from a receiver after four months**

The power of a state court, in the exercise of its ordinary jurisdiction, to appoint a receiver to take charge of property in litigation in that court can not be denied. This is not prohibited by the bankrupt act absolutely, in every event, whether proceedings in bankruptcy are begun or not.

If no proceedings in bankruptcy are instituted within four months after the appointment of a receiver by the state court the proceedings can not be successfully assailed by a trustee in bankruptcy, subsequently appointed, or by creditors.<sup>55</sup> The bankrupt act does not contemplate interference with any action of the state court with respect to property taken into custody more than four months before the petition in bankruptcy

<sup>52</sup> See Sec. 42, *ante*.

<sup>53</sup> As to the mode of procedure for this purpose, see Sec. 44, *post*.

<sup>54</sup> See Sec. 25, *ante*.

<sup>55</sup> *In re* Heckman (C. C. A. 9th Cir.), 140 Fed. Rep. 859, 72 C. C. A. 8, 15 Am. B. R. 500; *Frazier v. Southern Loan & Trust Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40

C. C. A. 76, 3 Am. B. R. 710; *In re* English (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *In re* Price, 92 Fed. Rep. 987, 1 Am. B. R. 606; *In re* Sterlingworth Ry. Supply Co., 165 Fed. Rep. 267, 21 Am. B. R. 342; *State, Ex rel., Heckman v. Superior Court*, 28 Wash. 35.

is filed.<sup>56</sup> The state court may proceed to determine the controversy about the property in the custody of its receiver and enforce its decree concerning that property.<sup>57</sup> The court of bankruptcy can not deal with that property in any way until the state court yields its jurisdiction over it.

**§ 45. When proceedings in bankruptcy are begun within four months after the receiver is appointed.**

If proceedings in bankruptcy are commenced within four months after a receiver is appointed by a state court, the receiver may be required to surrender the property in such cases only as the bankrupt law places it in the exclusive jurisdiction of the court of bankruptcy.

In case a state court appoints a receiver in the administration of an insolvent's estate it may be an act of bankruptcy.<sup>58</sup> If a petition in bankruptcy is filed within four months after the appointment of the receiver by a state court and the debtor is adjudicated a bankrupt on that account, the state court must yield the possession of the property of the debtor to the bankruptcy court.<sup>59</sup> By making the appointment of a receiver an act of bankruptcy, congress clearly intended the estate of the

<sup>56</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Pickens v. Roy*, 187 U. S. 117, 47 L. Ed. 128, 9 Am. B. R. 47.

<sup>57</sup> *In re English* (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66.

<sup>58</sup> B. A. 1898, Sec. 3, clause 4, as amended by the act of Feb. 5, 1903, 32 Stat. at L. 797.

<sup>59</sup> *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1; *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 79 C. C. A. 409, 16 Am. B. R. 664; *In re Lengert Wagon Co.*, 110 Fed. Rep. 927, 6 Am. B. R. 535;

*In re Matthews & Bros.*, 163 Fed. Rep. 127, 20 Am. B. R. 570; *In re Brown*, 91 Fed. Rep. 358, 1 Am. B. R. 107; *In re Hercules*, 133 Fed. Rep. 813, 13 Am. B. R. 369.

*In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113, Mr. Justice Fuller said: "The operation of the bankruptcy laws of the United States can not be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

debtor, acquired by the receiver, to be administered in bankruptcy, if proceedings were begun for that purpose within the four months' period. If this were not so, the estate of the debtor, who has committed an act of bankruptcy, would be administered in a different way from that provided by the bankrupt law. Such property is reached by the statute and the state court must surrender it to the court of bankruptcy.

If a receiver is appointed by a state court to distribute the property of an insolvent debtor among his creditors and within four months thereafter a petition in bankruptcy is filed and the debtor adjudicated a bankrupt on a ground other than the appointment of a receiver, the state court may be required to surrender the property.<sup>60</sup> This includes proceedings in a state court to wind up the affairs of corporations and to settle the affairs of partnerships and all proceedings for the purpose of applying the assets of an insolvent debtor to the payment of his debts. The reason for this is that the object to be obtained by the proceedings in the state court is the same as in bankruptcy. The bankrupt act has prescribed a different method and a different tribunal for administering insolvent estates. The bankrupt law is paramount and supersedes proceedings in conflict with it. The judgment of the state court, appointing the receiver, creates an equitable judicial lien void under Sec. 67*f* of the bankrupt act.<sup>61</sup> In this way the statute reaches such property. This rule does not apply to cases in which a receiver is appointed to take charge of specific prop-

<sup>60</sup> *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *In re Matthews & Bros.*, 163 Fed. Rep. 127, 20 Am. B. R. 570; *Merry v. Jones*, 119 Ga. 643, 11 Am. B. R. 625; *Wilson v. Parr*, 115 Ga. 629, 8 Am. B. R. 230; *Mauran v. Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 734; *In re Lenger Wagon Co.*, 110 Fed. Rep. 927, 6 Am. B. R. 535; *In re Storck Lumber Co.*, 114 Fed. Rep. 360, 8 Am.

B. R. 86; *Singer v. National Bedstead Co.*, 66 N. J. Eq. 290, 11 Am. B. R. 276.

<sup>61</sup> *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *In re Matthews & Bros.* 163 Fed. Rep. 127, 20 Am. B. R. 474; *Merry v. Jones*, 119 Ga. 643, 11 Am. B. R. 625; *Wilson v. Parr*, 115 Ga. 629, 8 Am. B. R. 230; *Mauran v. Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 734.

erty, pending a suit in the state court to enforce a valid mortgage or other lien on it.<sup>62</sup> In such cases the right to enforce the lien became fixed more than four months before bankruptcy and a judgment rendered thereafter is not such a judicial lien as is nullified by Sec. 67f.<sup>63</sup>

Where a state court takes possession of specific property of a debtor at any time before the petition in bankruptcy is filed for the purpose of trying his right, title or interest in or to that property, the state court may proceed to decide the controversy after the bankruptcy proceedings are instituted.<sup>64</sup> If the court of bankruptcy had acquired possession of the property before the state court did, it might decide the same controversy. In such matters the jurisdiction of the state and federal court is concurrent. The bankrupt act does not reach such property in the possession of the receiver of a state court but only the interest of the bankrupt in it. This may be determined by a state court as well as by a court of bankruptcy. The receiver of the state court will not be required to surrender the property to a trustee or receiver in bankruptcy.

<sup>62</sup> *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66; *In re English* (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674.

<sup>63</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 39.

See Jurisdiction of property on which a mortgage or other lien is being foreclosed in a state court, Sec. 46, *post*.

<sup>64</sup> This principle is well illustrated in *re Cameron, Currie & Co.* (Eastern District of Michigan, January, 1910, not reported). A petition in bankruptcy was filed within four months after a receiver had been appointed by a state court to administer the estate of a debtor. Judge Knappen permitted the trustee to apply to be substituted as plaintiff in a suit begun by the re-

ceiver of the state court, having the custody of the funds arising from the sale of securities which had been pledged. Although the proceedings in bankruptcy superseded the state jurisdiction to administer the estate, and with respect to all questions of preference, priority or security other than those based on ownership, it was held proper for the state court to determine the ownership of the various securities set up by intervening claimants, and their rights in the fund based upon such ownership. The special fund derived from the sale of the pledged securities was held by the state court pending its decision. The trustee was held entitled to receive from the receiver of the state court all the general funds and property other than this special fund.

If a receiver is appointed by a state court within the four months' period to take charge of the property of a solvent debtor, either an individual, a partnership or a corporation, his possession can not be disturbed by process from the court of bankruptcy. The bankrupt act does not reach the property of solvents or contemplate the administration of such estates in bankruptcy. The power of the court of bankruptcy is limited to the administration of estates of insolvents.

**§ 46. Power of the state court when it retains jurisdiction.**

In all the cases in which a receiver of the state court is not required to surrender property to be administered in the bankruptcy court, the state court may proceed to decide the case and enforce its decision out of the property in the custody of the receiver.<sup>65</sup> The bankruptcy court can not deal with that property in any way until the state court yields its jurisdiction over it.

Any property remaining after the satisfaction of the decree of the state court, with respect to the controversy before it, belongs to the bankrupt or his trustee in bankruptcy as a part of his estate. The state court has no power to proceed to distribute this residue among the creditors. The receiver holds it only as a custodian temporarily until he can turn it over to the bankrupt. The trustee in bankruptcy, if one has been elected, stands in his shoes and it is to him that the property should be delivered.<sup>66</sup>

<sup>65</sup> *Frazier v. Southern Loan & Trust Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710; *In re English* (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 672; *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66; *In re Price*, 92 Fed. Rep. 987, 1 Am. B. R. 606.

See also *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 122, 9 Am. B. R. 47.

<sup>66</sup> *In re English* (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674; *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66.

**§ 47. Proceedings to require a state court to surrender the possession of property.**

Where property of a bankrupt is in the actual custody of a state court at the time the petition is filed, an application to surrender it to the trustee or receiver in bankruptcy should be made to the state court in the first instance.<sup>67</sup> This should be done whether the property is held by the state court through its receiver, to sheriff or other officer of that court.

The reason for this practice is found in the principles of comity which exist between the federal and state courts, and the fact that the receiver or other officer of the state court is acting under its immediate direction. The laws of the United States are equally binding on the state and the federal courts. It is the duty of the state court, in a proper case, to order its officer to surrender the property in his custody to the receiver or trustee in bankruptcy.

The application to the state court is regularly made by the receiver or trustee in bankruptcy filing an intervening petition. The petition should be entitled in the state proceedings and should state the date the petition in bankruptcy was filed, the order of adjudication if one has been made, facts to show that the court of bankruptcy is entitled to administer the property in the custody of the state court and pray for an order upon the officer having possession of the property to surrender it to the trustee or receiver in bankruptcy. It should be signed and verified. A certified copy of the petition in bankruptcy and the order of adjudication may be exhibited to the state court.

If it is made to appear to the state court that the court of bankruptcy is entitled to administer the property, it is the duty

<sup>67</sup> *In re Watts v. Sachs*, 190 U. S. 1, 47 L. Ed. 953, 10 Am. B. R. 113; *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66; *In re Lengert Wagon Co.*, 110 Fed. Rep. 927, 6 Am. B. R. 535; *In re Price*, 92 Fed. Rep. 987, 1 Am. B. R. 606; *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 79 C. C. A. 409, 16 Am. B. R. 664; *In re Lesser*, 100 Fed. Rep. 433, 3 Am. B. R. 815; *Mauran v. Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 734.

of that court to direct its officer to surrender the property in his possession to the trustee or receiver in bankruptcy.<sup>68</sup>

In practice the state courts have regularly passed such orders, so that there has been very little conflict. Although the court of bankruptcy will decline to make an order requiring an officer of the state court to surrender property until an application has been made to the state court,<sup>69</sup> it has frequently been called upon to decide whether it is entitled to administer the property. The opinion of the court of bankruptcy may be filed in the state court for the purpose of showing the views of the federal judge.<sup>70</sup> In such cases the state court will ordinarily adopt his conclusion, although not binding upon it, and act accordingly.

<sup>68</sup> *In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113; *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1; *Hooks v. Aldridge*, (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 79 C. C. A. 409, 16 Am. B. R. 664; *Wilson v. Parr*, 115 Ga. 629, 8 Am. B. R. 230; *In re Rogers*, 116 Fed. Rep. 435, 8 Am. B. R. 723; *Hanson v. Stephens*, 116 Ga. 722, 11 Am. B. R. 172; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 734; *Loveless v. Southern Grocery Co.*, 159 Fed. Rep. 415, 86 Am. B. R. 395; *In re Rogers & Stefani*, 156 Fed. Rep. 267, 19 Am. B. R. 565.

<sup>69</sup> *In re Price*, 92 Fed. Rep. 987, 1 Am. B. R. 606.

<sup>70</sup> *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1, Judge Evans said: "It seems so clear, from the bankruptcy law, as construed by the highest courts, that the rights of the receiver, acquired under the circumstances shown by the testimony, are subordinate to those of the trustee and to those of the bankruptcy court, that it is not

doubted that the Fulton Circuit court will acquiesce in that view, and, upon proper application made to it, will order the receiver to turn over to the trustee the property in his hands. To the end that an application for that purpose may be made, further proceedings upon the rule will for the present be held in abeyance. It would not only be unseemly, but altogether disagreeable to this court, to pursue any course which would be wanting in the utmost respect and courtesy to the state tribunal, and orders will be made directing the trustee to apply to that court for leave to enter a special appearance in the case there pending, styled 'First National Bank of Fulton v. Henry Knight and others,' for the purpose of filing a copy of this opinion, the orders made in pursuance thereof, a copy of the adjudication in bankruptcy, and an accompanying application for an order of that court directing its receiver to turn over to the trustee in bankruptcy the property of the bankrupt held



If the state court refuses to direct a surrender of the property and the federal court is of the opinion that it should be surrendered, the court of bankruptcy may make an order requiring the officer of the state court to surrender the property. The federal courts are the final arbiters to settle questions arising under the bankrupt law. In this respect the authority of the bankruptcy court is paramount. The officer of the state court should comply with this order. If he will not do so and the state court resists the enforcement of the order, it may precipitate an unseemly conflict, which both courts should exercise the greatest caution to avoid. Such conflict was averted in one case,<sup>71</sup> by the parties agreeing, with the approval of

by the receiver. For the purpose of giving ample opportunity for doing this, the rule will be respited until the 12th day of October, 1903, at which time the trustee will report what has been done in the premises."

(The state court took the same view of the law, and on October 1st ordered its receiver to turn over to the trustee in bankruptcy all the property in his hands.)

<sup>71</sup> *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 79 C. A. 409, 16 Am. B. R. 664.

In that case Judge Shelby, speaking of what may be done in case of a conflict of opinion, uses this language:

"In such cases it is said that, under the rules of comity, the possession of the property by the state court should not be interfered with without its consent; that the decision of the state court not to surrender the property is controlling till it is reversed; that parties objecting to it should reserve the federal question, and obtain relief by appeal or writ of error, and finally by application to the United States Su-

preme Court if necessary. It is true that relief from an erroneous ruling on a federal question of even the highest state court could be finally corrected in that way, and in the meantime that process of injunction might be used to restrain the parties from a distribution of the assets in the state court (Rev. St. U. S. Sec. 720), till the final decision was obtained in the Supreme Court. On the other hand, we must not forget that the proceeding suggested would result in great delay, and that the jurisdiction and authority of the bankruptcy court is paramount, the bankruptcy law superseding all state insolvency laws; that its purpose to obtain a speedy and equal distribution of the bankrupt's assets will be defeated if the supremacy of the federal court's orders be not promptly recognized and enforced.

"While it is unquestionable that the federal courts are the final arbiters to settle questions arising under the bankruptcy laws, there are questions relating to comity and procedure, in the event of conflict of opinion between the state



the state court and the bankruptcy court, that the property involved should be sold by both the receiver and the trustee and the proceeds placed in bank to await the decision of the United States circuit court of appeals as to who was entitled to the custody and control of the property.

**§ 48. Order of state court transferring assets and settling accounts of its receiver.**

Where it is made to appear to the state court that the court of bankruptcy is entitled to administer the property in its custody, it remains "for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter."<sup>72</sup>

courts and the bankruptcy courts as to the possession of the bankrupt's assets, which remain unsettled by decision of the supreme court. Whether the bankruptcy court should make such orders as will preserve the estate, and await the final result of the litigation in the state court, or should act on its own opinion of the want of jurisdiction of the state court, and enforce its order to secure the possession of the property, is one of the questions left unsettled, so far as we are advised, by the decision of the supreme court. At a proper time the federal courts, of course, may decree the enforcement of the supremacy of the Constitution and laws of the United States, for it is an 'incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil, the powers and functions that belong to it.' *Ex parte Siebold*, 100 U. S. 371, 395, 25 L. Ed. 717. But it is without doubt the duty of both the state and federal

courts to exercise the greatest caution to avoid this necessity where it is possible. The orders of the state court and of the federal court in this case are in conflict, and, if each court were attempting to enforce its own order as to the possession of the property, it would lead to a resort to physical force on the part of the executive officers of the respective courts."

<sup>72</sup> *Wilson v. Parr*, 115 Ga. 629, 8 Am. B. R. 230; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 740; *Loveless v. Southern Grocery Co.* (C. C. A. 5th Cir.), 159 Fed. Rep. 415, 86 C. C. A. 395, 20 Am. B. R. 180; *In re Kersten*, 110 Fed. Rep. 929, 6 Am. B. R. 516.

*In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113, the supreme court says at p. 35: "It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvents' estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its re-

The property to be transferred is the balance in the possession of the receiver of the state court, after deducting the amounts distributed under order of the court and the costs and expenses of the receivership.<sup>73</sup> The court of bankruptcy is entitled to administer all the assets in the possession of the receiver at the date of the adjudication. But where a receiver of the state court has taken charge of the debtor's property, sold it, and distributed the proceeds to creditors, acting in all respects in entire good faith and in conformity to the state law and the orders of the state court, a trustee in bankruptcy, subsequently appointed for the same debtor, can not hold the receiver personally liable for the value of the property or its proceeds. In such cases the trustee in bankruptcy must seek his remedy against those who have received payments from the defendant in contravention of the bankrupt act.

Fees and expenses of receivership may be allowed by a state court and paid from the funds in the possession of the receiver, obtained from the disposition of property by direction of the state court.<sup>74</sup> The court of bankruptcy will not ordinarily review a finding of the state court in respect to fees and expenses.

ceiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way."

In *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 140, the supreme court of Rhode Island said: "By the terms of the bankrupt law the trustee is vested only with the title of the bankrupt, as of the date he was adjudicated a bankrupt." In the case before us the receiver's charges had been incurred before that time. It is true that the court had not, before that time, passed upon or allowed the receiver's charges; but that is a matter incidental to the adminis-

tration of the estate. It is a step towards ascertaining the amount of the estate to be turned over. It can be done after the adjudication in bankruptcy as well as before."

<sup>73</sup> *Loveless v. Southern Grocery Co.* (C. C. A. 5th Cir.), 159 Fed. Rep. 415, 86 C. C. A. 395, 20 Am. B. R. 180; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 740; *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66; *In re English* (C. C. A. 2nd Cir.), 127 Fed. Rep. 940, 62 C. C. A. 572, 11 Am. B. R. 674.

<sup>74</sup> *Wilson v. Parr*, 116 Ga. 629, 8 Am. B. R. 230; *Mauran v. Crown Carpet Lining Co.*, 23 R. I. 344, 6 Am. B. R. 740; *Hanson v. Stephens*,

Where there is no fund in the possession of the receiver, the state court is not entitled to refuse to order its receiver to turn over the assets until the costs and expense are paid,<sup>75</sup> or to order a sale of property for the purpose of paying costs and expense.<sup>76</sup> There is a marked difference in charging a fund already raised by the sale of the property of the debtor, with the expense of its conversion into cash, and subjecting the property to sale for the purpose of raising funds to pay costs and expenses after he has been adjudicated a bankrupt. Where the surplus assets have been returned to the debtor by the receiver and subsequently come into the custody of the court of bankruptcy as a part of the estate of the bankrupt, the state court can not then by an order fix the amount of fees or expenses, which shall be binding upon the bankruptcy court.<sup>77</sup>

If there are no funds in the state court available for this purpose, the receiver may apply to the court of bankruptcy for the allowance of fees and expense.<sup>78</sup> The court of bankruptcy may allow fees for services rendered in the state court prior to the adjudication<sup>79</sup> or for services rendered thereafter in the preservation of the estate.<sup>80</sup>

116 Ga. 722, 11 Am. B. R. 172; *Loveless v. Southern Grocery Co.* (C. C. A. 5th Cir.), 159 Fed. Rep. 415, 86 C. C. A. 395, 20 Am. B. R. 180; *In re Rogers & Stefani*, 156 Fed. Rep. 267, 19 Am. B. R. 566.

<sup>75</sup> *In re Rogers*, 116 Fed. Rep. 435, 8 Am. B. R. 723.

<sup>76</sup> *Hanson v. Stephens*, 116 Ga. 722, 11 Am. B. R. 172; *In re Rogers & Stefani*, 156 Fed. Rep. 267, 19 Am. B. R. 566.

<sup>77</sup> *In re Rogers & Stefani*, 156 Fed. Rep. 267, 19 Am. B. R. 566.

<sup>78</sup> *In re Rogers*, 116 Fed. Rep. 435, 8 Am. B. R. 723; *Loveless v. Southern Grocery Co.* (C. C. A. 5th Cir.), 159 Fed. Rep. 415, 86 C. C.

A. 395, 20 Am. B. R. 180; *In re Alison Lumber Co.*, 137 Fed. Rep. 643, 14 Am. B. R. 78.

*In re Lengert Wagon Co.*, 110 Fed. Rep. 927, 6 Am. B. R. 535, Judge Adams said: "When the property is delivered to the receiver of this court, the sheriff may apply here for the allowance of his reasonable disbursements."

<sup>79</sup> *Loveless v. Southern Grocery Co.* (C. C. A. 5th Cir.), 159 Fed. Rep. 415, 86 C. C. A. 395, 20 Am. B. R. 180; *In re Alison Lumber Co.*, 137 Fed. Rep. 743, 14 Am. B. R. 78.

<sup>80</sup> *In re Alison Lumber Co.*, 137 Fed. Rep. 643, 14 Am. B. R. 78.

## CHAPTER V.

## STAYING SUITS.

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| <p><b>SEC.</b><br/> 49. Power to stay suits in the state court.<br/> 50. Power to stay suits outside of the district.<br/> 51. Power to stay suits founded upon a provable claim.<br/> 52. Permitting special judgment of the state court to fix liability of sureties.<br/> 53. Staying suits when necessary to the enforcement of the bankrupt act.<br/> 54. Restraining orders against persons to protect assets.<br/> 55. The enforcement of judgment liens, executions, etc., in the state court.<br/> 56. Attachment suits in the state court.<br/> 57. Foreclosure suits in a state court.</p> | <p><b>SEC.</b><br/> 58. Suits to foreclose a mechanic's lien in the state court.<br/> 59. Judgment creditors' suits.<br/> 60. Actions for damages against an officer of a court of bankruptcy.<br/> 61. Staying suits in other federal courts.<br/> 62. Where to apply to stay a suit.<br/> 63. Application to the state court to stay a suit.<br/> 64. Application to the court of bankruptcy to stay a suit.<br/> 65. Discretion to grant or to refuse to stay a suit.<br/> 66. The order granting or refusing a stay.<br/> 67. The effect of an order staying a suit.<br/> 68. Dissolving an injunction or stay.</p> |
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## § 49. Power to stay suits in the state court.

A court of the United States has no power to grant a writ of injunction to stay proceedings in any court of the state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.<sup>1</sup>

The bankrupt act of 1898 confers power upon the courts of bankruptcy to issue injunctions to stay proceedings within this exception.<sup>2</sup> It authorizes a stay in two classes of cases. *First*, where the suit is founded upon a claim from which a

<sup>1</sup> R. S. Sec. 720; *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345; *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Peck v. Jenness*, 7 How. 625, 12 L. Ed. 841.

<sup>2</sup> B. A. 1898, Sec. 11a and Sec. 2, clause 15; *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476, affirming *in re Kenney*, 105 Fed. Rep. 897, 5 Am. B. R. 355; *Wagner v. United States* (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596; *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.),

165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 374; *In re Adler* (C. C. A. 2d Cir.), 144 Fed. Rep. 659, 75 C. C. A. 461, 16 Am. B. R. 414; *In re Gutwillig*, 90 Fed. Rep. 475, 1 Am. B. R. 78, on re-hearing, p. 481, and (C. C. A. 2d Cir.), 92 Fed. Rep. 337, 34 C. C. A. 377, 1 Am. B. R. 388.

<sup>3</sup> See Sec. 51, *post.* B. A. 1898, Sec. 11a; *In re Adler* (C. C. A. 2d Cir.), 144 Fed. Rep. 659, 75 C. C. A. 461, 16 Am. B. R. 414; *Wagner v.*

discharge would be a release.<sup>3</sup> *Second*, where it has the effect to defeat the operation of the bankrupt law by interfering with the administration of the debtor's property in bankruptcy.<sup>4</sup>

*First.* Section 11a of the act provides that a suit, founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of the petition against him, may be stayed until twelve months after the date of adjudication, or if an application is made for a discharge, then until the question of such discharge is determined.<sup>5</sup>

This provision applies to cases in which it is sought to stay a proceeding in the state court, to the end that the bankrupt himself may have the benefit of the stay.<sup>6</sup> The stay, if granted, protects him from being harassed by process issuing from the state court in civil actions, and it affords him an opportunity after his discharge to go into the state court and set it up as a defense in the action.

*Second.* Section 2, clause 15, of the act confers power on the courts of bankruptcy to "make such orders, issue such process and enter such judgments in addition to those specifically provided as may be necessary for the enforcement of this act."

The power conferred by this provision is very comprehensive. It authorizes the court of bankruptcy to stay proceedings in a state court within the exception in Section 720 of the Revised Statutes.<sup>7</sup> It also authorizes that court to restrain not only the debtor, but any other person, from making any transfer or disposition of any part of the debtor's property,

United States (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 43 C. C. A. 445, 4 Am. B. R. 596.

<sup>4</sup> See Secs. 53 to 60, *post*. B. A. Sec. 2, clause 15; *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476, affirming *in re Kenney* (C. C. A. 2nd Cir.), 105 Fed. Rep. 897, C. C. A. 5 Am. B. R. 355, affirming 95 Fed. Rep. 427, 2 Am.

B. R. 294; *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 374.

<sup>5</sup> See Sec. 51, *post*.

<sup>6</sup> *In re Adler* (C. C. A. 2d Cir.), 144 Fed. Rep. 659, 75 C. C. A. 461, 16 Am. B. R. 414; *In re Hilton*, 104 Fed. Rep. 987, 4 Am. B. R. 774.

<sup>7</sup> See Sec. 53, *post*.

or from any interference with it, or from doing any act that will prevent the due administration of the bankrupt law.<sup>8</sup>

The stay under this provision is not limited, as in Section 11a, to any definite period of time or to suits pending at the time of bankruptcy. The stay or restraining order under this provision is for the benefit of creditors and the protection of the jurisdiction of the court of bankruptcy over matters confided to it by the bankrupt act.

The power to stay a suit in the state court, either by the state court or by the court of bankruptcy, can not be exercised until a petition in bankruptcy is filed by or against the debtor, whose rights or property are involved in the suit in the state court.<sup>9</sup> The right to stay such suits arises upon filing a voluntary as well as an involuntary petition.<sup>10</sup>

The commencement of proceedings in bankruptcy does not have the effect to stay suits in the state court. It requires an order of court for this purpose. The court of bankruptcy may grant a writ of injunction to restrain parties from proceeding further in the state court, or the state court may order a stay in the suit pending before it.<sup>11</sup> The bankrupt law is equally binding on the state and the federal courts. The referee has no power to stay a suit in a state court.<sup>12</sup>

The order staying the suit is not a dismissal. It merely suspends the proceedings in the state court so long as the order is in force.<sup>13</sup> Future action in the state court depends upon the action of the court of bankruptcy.

<sup>8</sup> See Sec. 54, *post*.

<sup>9</sup> *Ellis v. Hays Saddlery & Leather Co.*, 65 Kan. 174, 8 Am. B. R. 109; *Clothing Co. v. Hazle*, 126 Mich. 262, 6 Am. B. R. 265; *Victor v. Lewis*, 57 N. Y. Supp. 16, 1 Am. B. R. 667.

But see *Blake, Moffitt & Towne v. Francis-Valentine Co.*, 89 Fed. Rep. 691, 1 Am. B. R. 372.

<sup>10</sup> *In re Geister*, 97 Fed. Rep. 322, 3 Am. B. R. 228.

<sup>11</sup> *In re Siebert*, 133 Fed. Rep. 781, 13 Am. B. R. 348; *In re Geister*, 97 Fed. Rep. 322, 3 Am. B. R. 228;

*Continental Nat. Bk. v. Katz* (Supr. Ct. Cook Co., Ill.), 1 Am. B. R. 19; *Reid v. Cross* (Supr. Ct. Cook Co., Ill.), 1 Am. B. R. 34; *Victor v. Lewis* (N. Y. Supr. Ct. App. Div.), 1 Am. B. R. 667; *Reed v. Equitable Trust*, 115 Ga. 780, 8 Am. B. R. 242; *National Bank v. Taylor*, 120 Mass. 124.

<sup>12</sup> *In re Berkowitz*, 143 Fed. Rep. 598, 16 Am. B. R. 251; *In re Siebert*, 133 Fed. Rep. 781, 13 Am. B. R. 348; Gen. Ord. 12, clause 3.

<sup>13</sup> See effect of order staying a suit, Sec. 67, *post*.

**§ 50. Power to stay suits outside of the district.**

A court of bankruptcy had no power to stay a suit or restrain a person beyond the district, unless the person to be restrained is a party to the bankruptcy proceedings.<sup>14</sup>

If a party can be brought into the jurisdiction of the court or voluntarily makes himself a party to the proceedings, the court may act upon him and compel him to do that which ought to be done. Such person may be enjoined from further prosecuting a suit pending in any court. Where the suit is pending in another district ancillary proceedings should be commenced in the district within which the suit to be stayed is pending. The bankruptcy court of that district has ancillary jurisdiction to stay proceedings.<sup>15</sup>

**§ 51. Power to stay suits founded upon a provable claim.**

Section 11a of the act provides that a suit, founded upon a claim from which a discharge would be a release and which is pending against a person at the time of the filing of the petition against him, may be stayed until twelve months after the date of adjudication, or if an application is made for a discharge, then until the question of such discharge is determined.

This provision applies to any proceeding which constitutes "a suit." The term suit, observed Mr. Justice Marshall,<sup>16</sup> "is certainly a very comprehensive one, and is said to apply to any proceeding in a court of justice by which an individual pursues that remedy in the court of justice which the law affords him. The modes of proceeding may be various, but if the right is litigated between parties in a court of justice, the proceeding by which the decision is sought is a suit."

A suit is pending within the meaning of this provision from the time it is commenced until it is disposed of by a final

<sup>14</sup> *In re Harris Co.*, 173 Fed. Rep. 735, 23 Am. B. R. 237; *In re Geister*, 97 Fed. Rep. 322, 3 Am. B. R. 228.

<sup>15</sup> See ancillary proceedings in other districts, Sec. 34, *ante*; *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519;

*Abram I. Elkus, Petitioner*, 216 U. S. 115, 54 L. Ed. 407, 23 Am. B. R. 614. B. A. 1898, Sec. 2, clause 20, added by the act of June 25, 1910, 36 Stat. at L. 836.

<sup>16</sup> *In Weston v. City of Charleston*, 2 Pet. 449, 464.



judgment or decree, which has been fully executed. It is pending within the meaning of this provision during proceedings supplementary to execution of the judgment,<sup>17</sup> or while a sheriff has money in his possession collected upon execution for a judgment creditor.<sup>18</sup>

An action on a provable debt begun after bankruptcy proceedings were commenced may be stayed under Section 2, clause 15, of the act, if not under Section 11a.<sup>19</sup>

If a suit in a state court is founded upon a provable claim, which will be released by a discharge, if granted, it may be stayed.<sup>20</sup> In order that a suit may be stayed, it must be founded on a claim which is both provable in bankruptcy and also released by a discharge. If the claim is not provable, the stay must be denied. No stay can be granted where the claim sued on is not released by a discharge, irrespective of whether it may be proved against the estate of the bankrupt.<sup>21</sup>

A stay may be granted, although the claim is not liquidated, provided that it may be liquidated and proved in bankruptcy,<sup>22</sup> or where the plaintiff's name is omitted from the schedules, provided he has notice of the bankruptcy proceedings in time

<sup>17</sup>*In re* William E. DeLaney & Co., 124 Fed. Rep. 280, 10 Am. B. R. 634; *In re* Fortunato, 123 Fed. Rep. 622, 9 Am. B. R. 630; *In re* Kletchka, 92 Fed. Rep. 901, 1 Am. B. R. 479.

<sup>18</sup>*Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

<sup>19</sup>*In re* Beach, 97 Fed. Rep. 761, 3 Am. B. R. 236; *In re* Hicks, 133 Fed. Rep. 739, 13 Am. B. R. 654.

<sup>20</sup>*Wagner v. United States* (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 43 C. C. A. 445, 4 Am. B. R. 596; *In re* Adler (C. C. A. 2nd Cir.), 144 Fed. Rep. 654, 75 C. C. A. 461, 16 Am. B. R. 414; *In re* Hilton, 104 Fed. Rep. 981, 4 Am. B. R. 774; *Knott v. Putnam*, 107 Fed. Rep. 907, 6 Am. B. R. 80; *In re* Butts,

120 Fed. Rep. 966, 10 Am. B. R. 16; *In re* Lines, 133 Fed. Rep. 803, 13 Am. B. R. 318; *In re* Hicks, 133 Fed. Rep. 739, 13 Am. B. R. 654; *In re* Beerman, 112 Fed. Rep. 662, 7 Am. B. R. 434.

<sup>21</sup>*In re* Koronsky (C. C. A. 2nd Cir.), 170 Fed. Rep. 719, 96 C. C. A. 39, 21 Am. B. R. 851; *White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 56 C. C. A. 398, 9 Am. B. R. 653; *Mackel v. Rochester*, 135 Fed. Rep. 904, 14 Am. B. R. 429; *In re* Cole, 106 Fed. Rep. 837, 5 Am. B. R. 780; *Roden Grocery Co. v. Bacon*, 133 Fed. Rep. 515, 13 Am. B. R. 251; *In re* Hall, 170 Fed. Rep. 721, 22 Am. B. R. 498.

<sup>22</sup>*In re* Hilton, 104 Fed. Rep. 981, 4 Am. B. R. 774.



to prove his claim.<sup>23</sup> Staying his suit in the state court is such notice.

The character of the claim sued on is determined by the pleadings in the case in the state court and not by allegations or proof outside of them.<sup>24</sup>

Illustrations of suits, founded upon a provable claim, which may be stayed, may be found in nearly all suits *in personam* by a creditor against his debtor, by or against whom a petition in bankruptcy is subsequently filed.<sup>25</sup> Thus a stay has been granted in an action to collect a debt,<sup>26</sup> an action of ejectment by a landlord,<sup>27</sup> distress by a landlord when the tenant is afterwards adjudicated bankrupt,<sup>28</sup> an action upon an unliquidated claim, which may be liquidated and proved in bankruptcy,<sup>29</sup> an action for conversion against an agent, broker, factor, commission man, auctioneer, and the like, subsequently adjudicated a bankrupt,<sup>30</sup> proceedings supplementary to the execution of a judgment,<sup>31</sup> an action by a creditor whose name was omitted from the schedules of the bankrupt,<sup>32</sup>

<sup>23</sup> *In re* Beerman, 112 Fed. Rep. 662, 7 Am. B. R. 434.

<sup>24</sup> *In re* Adler (C. C. A. 2nd Cir.), 152 Fed. Rep. 422, 81 C. C. A. 564, 8 Am. B. R. 240; *Barrett v. Prince* (C. C. A. 7th Cir.), 143 Fed. Rep. 302, 74 C. C. A. 440, 16 Am. B. R. 64; *Barnes Mfg. Co. v. Norden*, 67 N. J. Law 493, 7 Am. B. R. 553.

<sup>25</sup> As to "What debts are provable," see Chap. XIX, *post*. As to "What claims are released by a discharge," see Chap. XXXVI, *post*.

<sup>26</sup> *In re* Butts, 120 Fed. Rep. 966, 10 Am. B. R. 16; *In re* Van Buren, 164 Fed. Rep. 883, 20 Am. B. R. 896; *In re* Martin, 105 Fed. Rep. 753, 5 Am. B. R. 423.

<sup>27</sup> *In re* Chambers, *Calder & Co.*, 98 Fed. Rep. 865, 3 Am. B. R. 537.

<sup>28</sup> *In re* Lines, 133 Fed. Rep. 803, 13 Am. B. R. 318.

<sup>29</sup> *In re* Hilton, 104 Fed. Rep. 981, 4 Am. B. R. 774.

<sup>30</sup> *In re* Adler (C. C. A. 2d Cir.), 152 Fed. Rep. 422, 81 C. C. A. 564, 18 Am. B. R. 240; *Barrett v. Prince* (C. C. A. 7th Cir.), 143 Fed. Rep. 302, 77 C. C. A. 440, 16 Am. B. R. 64; *Knott v. Putnam*, 107 Fed. Rep. 907, 6 Am. B. R. 80; *In re* Basch, 97 Fed. Rep. 761, 3 Am. B. R. 235; *In re* Benedict, 75 N. Y. Supp. 165, 8 Am. B. R. 463; *In re* Ennis & Stoppani, 171 Fed. Rep. 755, 22 Am. B. R. 679; *In re* Hall, 161 Fed. Rep. 387, 20 Am. B. R. 633.

<sup>31</sup> *In re* Delaney & Co., 124 Fed. Rep. 280, 10 Am. B. R. 634; *In re* Fortunato, 123 Fed. Rep. 622, 9 Am. B. R. 630; *In re* Kletchka, 92 Fed. Rep. 901, 1 Am. B. R. 479; *In re* Burke, 155 Fed. Rep. 703, 19 Am. B. R. 51.

<sup>32</sup> *In re* Beerman, 112 Fed. Rep. 662, 7 Am. B. R. 434.

contempt proceedings in a state court in a civil action founded on a provable debt.<sup>33</sup>

Illustrations of suits, which can not be stayed, because founded on claims not provable or not released by a discharge, may be found in a suit to foreclose a mortgage,<sup>34</sup> a suit to enforce a mechanic's lien or other valid lien on specific property of the bankrupt debtor,<sup>35</sup> an attachment suit in which the lien is not nullified by the bankrupt act,<sup>36</sup> or a creditor's suit begun more than four months prior to the commencement of bankruptcy proceedings.<sup>37</sup> The reason for denying a stay in this class of cases is that the lien, being valid under the bankrupt law, is not released by a discharge, and does not interfere with the administration of the estate in bankruptcy. A stay may be granted in cases where the lien is nullified by the bankrupt act.<sup>38</sup> In such cases there is no lien and the debt is released by a discharge, and the proceedings in the state court have the effect to prevent the enforcement of the bankrupt law.<sup>39</sup>

Further illustrations of suits, founded upon claims not released by a discharge, are: A suit to enforce alimony,<sup>40</sup> an

<sup>33</sup> *In re Adler* (C. C. A. 2nd Cir.), 144 Fed. Rep. 659, 75 C. C. A. 461, 16 Am. B. R. 414.

<sup>34</sup> See Sec. 57, *post*.

<sup>35</sup> *In re Grissler* (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 69 C. C. A. 406, 13 Am. B. R. 508; *In re Horton* (C. C. A. 8th Cir.), 102 Fed. Rep. 986, 43 C. C. A. 87, 4 Am. B. R. 486; *In re Van Alstyne*, 100 Fed. Rep. 929, 4 Am. B. R. 42; *Reed v. Equitable Trust*, 115 Ga. 780, 8 Am. B. R. 242.

See Sec. 58, *post*.

<sup>36</sup> *Tennessee Producer Marble Co. v. Grant* (C. C. A. 3rd Cir.), 135 Fed. Rep. 322, 67 C. C. A. 676, 14 Am. B. R. 288; *In re Beaver Coal Co.* (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 51 C. C. A. 519, 7 Am. B. R. 542; *In re Snell*, 125 Fed. Rep. 154, 11 Am. B. R. 35; *In re*

*Ogles*, 93 Fed. Rep. 426, 1 Am. B. R. 671; *In re Kane*, 152 Fed. Rep. 587, 18 Am. B. R. 654.

But see *In re Baughman*, 138 Fed. Rep. 742, 15 Am. B. R. 23; *In re Vastbinder*, 132 Fed. Rep. 718, 13 Am. B. R. 148.

<sup>37</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; reversing *In re Lesser*, 100 Fed. Rep. 433, 3 Am. B. R. 815.

<sup>38</sup> *Bear v. Chase* (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746; *In re Goldberg*, 117 Fed. Rep. 692, 9 Am. B. R. 106; *In re Tune*, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re Eastern Commission & Importing Co.*, 129 Fed. Rep. 847, 12 Am. B. R. 305.

<sup>39</sup> See Sec. 53, *post*.

<sup>40</sup> *In re Shepard*, 97 Fed. Rep. 187, 5 Am. B. R. 857; *Turner v.*

action founded in fraud or deceit,<sup>41</sup> controversies relating to exempt property,<sup>42</sup> the execution of a judgment in a suit upon a bail bond,<sup>43</sup> the enforcement of a judgment of the state court, imposing a fine,<sup>44</sup> a valid order of the state court giving an attorney a lien for fees upon the judgment of that court.<sup>45</sup>

**§ 52. Permitting special judgment of the state court to fix liability of sureties.**

A suit founded on a provable debt may be stayed, although the defendant gives a bond with sureties to answer any judgment against him.<sup>46</sup>

Where a bond has been given to dissolve an attachment or garnishment, a stay has been refused for the purpose of permitting a special judgment of the state court with stay of execution to enable the creditor to recover against the sureties.<sup>47</sup> A stay has been vacated for this purpose.<sup>48</sup> A state court has refused leave to a bankrupt defendant to file a plea, setting up his discharge, until after such formal judgment was entered, fixing the liability of the sureties.<sup>49</sup>

Turner, 108 Fed. Rep. 785, 6 Am. B. R. 289.

See also *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>41</sup> *In re Cole*, 106 Fed. Rep. 837, 5 Am. B. R. 780; *In re Wollock*, 120 Fed. Rep. 516, 9 Am. B. R. 685; *In re Lawrence*, 163 Fed. Rep. 131, 20 Am. B. R. 698.

<sup>42</sup> *White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 56 C. C. A. 398, 9 Am. B. R. 653; *Roden Grocery Co. v. Bacon*, 133 Fed. Rep. 515, 13 Am. B. R. 251.

See also *Lockwood v. Exch. Bk.*, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 709.

<sup>43</sup> *In re Franklin*, 106 Fed. Rep. 666; *Jacquith v. Rowley*, 188 U. S.

620, 47 L. Ed. 256, 9 Am. B. R. 525.

<sup>44</sup> *In re Koronsky* (C. C. A. 2nd Cir.), 170 Fed. Rep. 719, 96 C. C. A. 39, 21 Am. B. R. 851; *In re Hall*, 170 Fed. Rep. 721, 22 Am. B. R. 498.

<sup>45</sup> *In re Pennell*, 159 Fed. Rep. 500, 18 Am. B. R. 909.

<sup>46</sup> B. A. 1898, Sec. 11a; *In re Martin*, 105 Fed. Rep. 753, 5 Am. B. R. 423; *In re Rosenthal*, 108 Fed. Rep. 368, 5 Am. B. R. 799; *Hill v. Harding*, 107 U. S. 631, 32 L. Ed. 1083.

<sup>47</sup> *In re Mercedes Import Co.* (C. C. A. 2nd Cir.), 166 Fed. Rep. 427, 92 C. C. A. 179, 21 Am. B. R. 590.

<sup>48</sup> *In re Rosenthal*, 108 Fed. Rep. 368, 5 Am. B. R. 799.

<sup>49</sup> *Hill v. Harding*, 130 U. S. 699, 32 L. Ed. 1083; *King v. Block Co.*,

The court of bankruptcy has postponed granting a discharge for the same purpose.<sup>50</sup> Whether a state court can render a formal judgment against the debtor for the single purpose of charging sureties depends upon the authority of the state court under local law.<sup>51</sup>

A court of bankruptcy may refuse to stay a suit against a corporation, but may permit a judgment to be entered with stay of execution for the purpose of fixing the liability of the stockholders and officers, when such judgment is required as a condition precedent to maintaining a suit to enforce the statutory liability of its officers and stockholders.<sup>52</sup>

**§ 53. Staying suits when necessary to the enforcement of the bankrupt act.**

Among the powers specifically conferred upon the court of bankruptcy are "to make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provision of this act."<sup>53</sup>

This provision confers power on the court of bankruptcy to stay a suit in a state court, which interferes with its possession or administration of property in its custody.

It may stay a suit in a state court to foreclose a mortgage,<sup>54</sup> or a mechanic's lien,<sup>55</sup> or to enforce any other lien or claim,<sup>56</sup>

125 App. Liv. 922, 109 N. Y. Supp. 1151, and 126 App. Div. 48, 111 N. Y. Supp. 102.

<sup>50</sup> *In re Maher*, 169 Fed. Rep. 997, 22 Am. B. R. 290. See Sec. 741, *post*.

<sup>51</sup> *In re Mercedes Import Co.* (C. C. A. 2nd Cir.), 166 Fed. Rep. 427, 92 C. C. A. 179, 21 Am. B. R. 590; *Klipstein & Co. v. Allen Miles Co.* (C. C. A. 5th Cir.), 136 Fed. Rep. 385, 14 Am. B. R. 15; *Hill v. Harding*, 130 U. S. 699, 32 L. Ed. 1083.

<sup>52</sup> *In re Remington Auto & Motor Co.*, 119 Fed. Rep. 441, 9 Am. B. R. 533; *In re Marshall Paper Co.* (C. C. A. 2nd Cir.), 102 Fed. Rep. 872, 43 C. C. A. 38, 4 Am. B. R. 468.

<sup>53</sup> B. A. 1898, Sec. 2, clause 15.

<sup>54</sup> *Carter v. Hobbs*, 92 Fed. Rep. 594, 1 Am. B. R. 215; *In re Pittelkow*, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re Nathan*, 92 Fed. Rep. 590; *In re Dana* (C. C. A. 8th Cir.), 167 Fed. Rep. 529, 93 C. C. A. 238, 21 Am. B. R. 683; *In re Kaplan*, 144 Fed. Rep. 159, 16 Am. B. R. 267; *In re Brooks*, 91 Fed. Rep. 508, 1 Am. B. R. 531.

<sup>55</sup> *In re Emslie* (C. C. A. 2nd Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126.

<sup>56</sup> *O'Dell v. Boyden* (C. C. A. 6th Cir.), 150 Fed. Rep. 731, 80 C. C. A. 397, 17 Am. B. R. 755; *Kee-*

on property in its custody without its consent. It may stay a suit in a state court, where the property in its custody has been seized on a writ of replevin or other process,<sup>57</sup> although it may, and usually does, resort to the simpler practice of summarily ordering it to be returned.<sup>58</sup> It may stay an action of ejectment in the state court to recover possession of real estate leased to the bankrupt, who was in possession at the date of the adjudication of bankruptcy, because the property had passed into the custody of the court of bankruptcy.<sup>59</sup> It may stay an action in a state court to determine a widow's dower in property of which her husband died seized, when the property is in the custody of the court of bankruptcy.<sup>60</sup>

The court of bankruptcy may enjoin the enforcement in the state court of a lien obtained by a judgment or a levy of execution,<sup>61</sup> or by an attachment or garnishment,<sup>62</sup> or proceedings to enforce a spendthrift trust under a state law,<sup>63</sup> when such liens are discharged and released by Section 67*f* of the act, but not otherwise. The reason for this is that the court of bankruptcy is entitled to administer the property from which the lien has been released by the bankrupt act. Any attempt to enforce the invalidated lien is a clear interference with the enforcement of the bankrupt act and should be stayed.

For the same reason, when a state court, through its receiver, takes possession of an insolvent's property within four months of bankruptcy to distribute it among his creditors, it interferes with the distribution of that estate in the manner contemplated by the bankrupt act. Such proceedings may

gan v. King, 96 Fed. Rep. 758, 3 Am. B. R. 79.

As to the power of the court of bankruptcy over such claims, see Sec. 31, *ante*.

<sup>57</sup> *In re Russell* (C. C. A. 2nd Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658.

<sup>58</sup> See Power to compel return of property unlawfully withdrawn from custody, Sec. 33, *ante*.

<sup>59</sup> *In re Chambers, Calder & Co.*,

98 Fed. Rep. 865, 3 Am. B. R. 537; *In re Kleinhans*, 113 Fed. Rep. 107, 7 Am. B. R. 604.

<sup>60</sup> *Hurley v. Devlin*, 151 Fed. Rep. 919, 18 Am. B. R. 627.

<sup>61</sup> As to the enforcement of judgment liens, executions, etc., in the state court, see Sec. —, *post*.

<sup>62</sup> As to attachments in the state court, see Sec. 55, *post*.

<sup>63</sup> *In re Tiffany*, 133 Fed. Rep. 799, 13 Am. B. R. 310.

conflict with the bankruptcy proceedings, because the appointment of the receiver constituted an act of bankruptcy, or the judgment appointing the receiver created an equitable lien void under Section 67*f*. In either case the court of bankruptcy is entitled to administer the property and may stay the suit and take over the assets for that purpose.<sup>64</sup>

An action founded on a provable debt begun after bankruptcy proceedings have been commenced may be stayed under this provision.<sup>65</sup>

A stay has been granted for the purpose of enabling creditors to appoint a trustee and to give such trustee time within which to intervene in a suit in the state court to protect the rights of the general creditors in such suits.<sup>66</sup>

The power of the court of bankruptcy to stay suits under this provision is limited to cases in which such orders are necessary for the enforcement of the act.

It may be said generally that the court of bankruptcy will not interfere with any suit in the state court, where the property in controversy is in the possession of the state court having jurisdiction to administer the same.<sup>67</sup> No suit in a state court will be stayed unless it has the effect to prevent or interfere with the carrying out of the provisions of the bankrupt act.<sup>68</sup> The court of bankruptcy has refused to stay a sale ordered by a state court, where the court of bankruptcy is not entitled to administer the property under the control of the

<sup>64</sup> See Sec. 43, *ante*.

<sup>65</sup> *In re Beach*, 97 Fed. Rep. 761, 3 Am. B. R. 236; *In re Hicks*, 133 Fed. Rep. 739, 13 Am. B. R. 654.

<sup>66</sup> *In re Klein*, 97 Fed. Rep. 31, 3 Am. B. R. 174.

<sup>67</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36, reversing *Pickins v. Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *In re Lesser*, 100 Fed. Rep. 433, 3 Am. B. R. 815; *In re Beaver Coal Co.* (C. C. A. 9th Cir.), 113 Fed. Rep. 889, 51 C. C. A. 519, 7 Am. B.

R. 542; *In re Snell*, 125 Fed. Rep. 154, 11 Am. B. R. 35; *Reed v. Equitable Trust*, 115 Ga. 780, 8 Am. B. R. 242; *Frazier v. Southern L. & T. Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710; *Tennessee Marble Producer Co. v. Grant*, 135 Fed. Rep. 322, 14 Am. B. R. 288.

<sup>68</sup> Consult Secs. 55 to 60, *post*, where the cases which conflict and those which do not conflict with the bankrupt act are considered.

state court.<sup>69</sup> The court has declined to stay a suit to recover property from a person, claiming to be a purchaser from a trustee in bankruptcy, when the court of bankruptcy had not assumed to administer the property in controversy.<sup>70</sup> A sale of property of a surety under a forthcoming bond will not be stayed, because the seizure of a stranger's property to satisfy an admitted debt of a bankrupt does not harm the bankrupt or his creditors.<sup>71</sup>

#### § 54. Restraining orders against persons to protect assets.

The court of bankruptcy may restrain not only the debtor, but any other persons, from disposing of or encumbering property in his possession for the purpose of preserving the status of the assets, claimed to belong to the bankrupt's estate.<sup>72</sup> This may be done although the court of bankruptcy can not order the property brought into custody for the purpose of administration.<sup>73</sup>

The power of the court to make such orders does not depend upon whether the controversy may be finally decided in favor

<sup>69</sup> *In re* Sterlingworth Ry. Supply Co., 165 Fed. Rep. 267, 21 Am. B. R. 342; *Sample v. Beasley* (C. C. A. 5th Cir.), 158 Fed. Rep. 607, 85 C. C. A. 429, 20 Am. B. R. 164; *In re McKane*, 158 Fed. Rep. 647, 18 Am. B. R. 594.

<sup>70</sup> *In re* Bluestone Bros., 174 Fed. Rep. 53, 23 Am. B. R. 264.

<sup>71</sup> *Ferry v. Johnson* (C. C. A. 5th Cir.), 129 Fed. Rep. 354, 64 C. C. A. 24, 12 Am. B. R. 17.

<sup>72</sup> B. A. 1898, Sec. 2, clause 15. *In re* Gutwillig (C. C. A. 2nd Cir.), 92 Fed. Rep. 337, 34 C. C. A. 377, 1 Am. B. R. 388; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14

Am. B. R. 689; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 755; *In re* Adams, 134 Fed. Rep. 142, 14 Am. B. R. 23; *Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. Rep. 295, 17 Am. B. R. 257.

<sup>73</sup> *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 755; *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689; *In re* Smith, 113 Fed. Rep. 993, 8 Am. B. R. 55; *In re* Miller, 118 Fed. Rep. 360, 9 Am. B. R. 274; *Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. Rep. 295, 17 Am. B. R. 257.

But see *In re* Ward, 104 Fed. Rep. 985, 5 Am. B. R. 215.



of the claimant or the estate. The object of the restraining order in such cases is to protect and guard the bankrupt's estate for the benefit of creditors, as may be proper and right under the facts presented. If it is made to appear to the court of bankruptcy that the existing status ought to be preserved until some action may be taken by the trustee or other person on behalf of the general creditors to determine the bankrupt's interest in the property in contest, the injunction should be granted.

Thus the court of bankruptcy has enjoined an assignee from disposing of or interfering with property, transferred to him under the assignment,<sup>74</sup> a grantee from selling the assets of a debtor under a deed of trust,<sup>75</sup> a creditor from transferring property claimed to have been received as a preference voidable under the act,<sup>76</sup> an adverse claimant from selling or encumbering property the title or possession of which is in controversy between such claimants and the bankrupt's estate,<sup>77</sup> a person, claiming to own them, from removing fixtures from the bankrupt's place of business,<sup>78</sup> a subsequent lessee or the landlord from interfering with the possession of the trustee or his assigns of property leased to the bankrupt,<sup>79</sup> a mortgagee from selling property under his mortgage until the

<sup>74</sup> *In re* Gutwillig (C. C. A. 2nd Cir.), 92 Fed. Rep. 337, 34 C. C. A. 377, 1 Am. B. R. 388; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383.

<sup>75</sup> *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689.

<sup>76</sup> *In re* Steuer, 104 Fed. Rep. 976, 5 Am. B. R. 209; *In re* Ball, 118 Fed. Rep. 672, 9 Am. B. R. 276; *In re* Kerski, 2 Am. B. R. 79 (ref. op.); *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep.

625, 71 C. C. A. 75, 14 Am. B. R. 689.

<sup>77</sup> *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 755; *In re* Jersey Island Packing Co. (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689; *In re* Smith, 113 Fed. Rep. 993, 8 Am. B. R. 55.

<sup>78</sup> *In re* Smith, 113 Fed. Rep. 993, 8 Am. B. R. 55.

<sup>79</sup> *In re* Adams, 134 Fed. Rep. 142, 14 Am. B. R. 23; *In re* Schwartzman, 167 Fed. Rep. 399, 21 Am. B. R. 885.



question of usury was settled,<sup>80</sup> a holder of a note of a bankrupt from endorsing the same.<sup>81</sup>

The court should not unduly interfere with property claimed by strangers who have possession of it. It will not enjoin a pledgee from exercising his right to sell or dispose of the pledge under the terms of his contract,<sup>82</sup> or an adverse claimant from dealing with property in his possession to which the bankrupt makes no claim of title, or a mortgagee from selling property under his mortgage if there is not likely to be any surplus for the general creditors after paying the mortgage debt, or any person from doing any act which does not interfere with the due administration of the estate in bankruptcy.

**§ 55. The enforcement of judgment liens, executors, etc., in the state court.**

Where a lien is created within four months of bankruptcy by a judgment or a levy of execution on a judgment in a state court, the proceedings may be stayed at any time before the sheriff pays the money to the plaintiff creditor.<sup>1</sup>

A judgment appointing a receiver within four months of bankruptcy creates an equitable judicial lien void under Section 67*f*, and the proceedings may be stayed or the receiver compelled to transfer the property in his custody to an officer of the court of bankruptcy to be there administered.<sup>2</sup>

<sup>80</sup> *In re Miller*, 118 Fed. Rep. 360, 9 Am. B. R. 274.

<sup>81</sup> *In re Jackson*, 94 Fed. Rep. 797, 2 Am. B. R. 505.

<sup>82</sup> *In re Mayer* (C. C. A. 2nd Cir.), 157 Fed. Rep. 836, 85 C. C. A. 200, 19 Am. B. R. 356; *In re Browne*, 104 Fed. Rep. 762, 5 Am. B. R. 220, approved and explained *In re Jersey Island Packing Co.* (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 628, 71 C. C. A. 75, 14 Am. B. R. 689.

See also *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945.

<sup>1</sup> *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 559, 9 Am. B. R. 476, affirming *In re Kenney* (C. C. A.

2nd Cir.), 105 Fed. Rep. 897, 45 C. C. A. 113, 5 Am. B. R. 355, affirming 95 Fed. Rep. 427, 8 Am. B. R. 294; *In re Driggs*, 171 Fed. Rep. 897, 22 Am. B. R. 621; *In re Kimball*, 97 Fed. Rep. 29, 3 Am. B. R. 161.

<sup>2</sup> *New River Coal Land Company v. Ruffner Bros.*, (C. C. A. 4th Cir.), 165 Fed. Rep. 887, 91 C. C. A. 559, 21 Am. B. R. 474; *In re Matthews & Sons*, 163 Fed. Rep. 127, 20 Am. B. R. 570; *Merry v. Jones*, 119 Ga. 643, 11 Am. B. R. 625; *Wilson v. Parr*, 115 Ga. 629, 8 Am. B. R. 230; *Mauran v. Crown Carpet Lining Co.* 23 R. I. 344, 6 Am. B. R. 734.

Where the lien was created by a judgment or the levy of an execution more than four months before bankruptcy, proceedings in the state court will not be stayed, but that court is entitled to sell the property to satisfy the judgment.<sup>3</sup> If any surplus remains after paying the debt, it should be turned over to the trustee as a part of the bankrupt's estate.

No valid lien can be obtained by a judgment or levy of execution on property of a bankrupt in the custody of the court of bankruptcy.

The right to have the enforcement of a lien created by a judgment or execution stayed depends upon whether these liens are discharged and released by Section 67*f* of the bankrupt act. If the lien is created within the four months' period, it is nullified by that action and there is no lien. The property, previously affected by the lien, passes to the trustee unencumbered and the court of bankruptcy is entitled to administer it. If the lien is preserved for the benefit of the general creditors, as it may be under Section 67*f* of the act, the court of bankruptcy is clearly entitled to administer it. In all such cases the enforcement of the lien in the state court would have the effect to prevent the enforcement of the bankrupt act, and for this reason should be stayed.<sup>4</sup> If the lien was created more than four months before bankruptcy, it is not affected by the bankrupt law. It may be enforced by the state court. The proceedings in the state court to enforce a valid lien of this kind do not conflict with the administration of the debtor's estate in bankruptcy.

No stay will be granted to prevent a creditor from proceeding with his levy on property of a bankrupt which has been

<sup>3</sup> *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *In re Seebold* (C. C. A. 5th Cir.), 105 Fed. Rep. 910, 45 C. C. A. 117, 5 Am. B. R. 358; *In re White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 869, 56 C. C. A. 398, 9 Am. B. R. 653; *In re Shoemaker*, 112 Fed. Rep. 648, 7 Am. B. R. 437;

*In re Kavanaugh*, 99 Fed. Rep. 928, 3 Am. B. R. 833; *Orr v. Trimble*, 158 Fed. Rep. 897, 19 Am. B. R. 849; *Hiller v. Le Roy*, 179 N. Y. 369, 12 Am. B. R. 733.

But see *In re Vastbinder*, 132 Fed. Rep. 718, 13 Am. B. R. 148.

<sup>4</sup> See Sec. 53, *ante*.

set apart as exempt,<sup>5</sup> because the court of bankruptcy has yielded all jurisdiction over such property. The state courts are the proper tribunals to determine controversies relating to such property.

### § 56. Attachment suits in the state court.

Where a lien has been created by reason of an attachment or a garnishment within four months of bankruptcy, the suit in the state court to enforce the attachment may be stayed because the lien is invalidated by Section 67*f* of the bankrupt act.<sup>1</sup>

Such a suit will not be stayed where the lien had been created more than four months prior to the filing of the petition in bankruptcy, but the state court will be permitted to enforce the attachment or garnishment by a judgment rendered within the four months' period or even after bankruptcy.<sup>2</sup>

The reason for this rule is that attachment liens "are wholly discharged and released" by Section 67*f* of the act, if created within the four months' period. In case the lien is nullified by the bankrupt act, there is no lien. The debt is ordinarily provable and released by a discharge. A stay may be granted under the authority of Section 11*a* of the act. If the lien is nullified by the bankrupt act, the property passes to the trustee unencumbered, and the court of bankruptcy is entitled to administer it. If the lien is preserved for the benefit

<sup>5</sup> *In re* Jackson, 116 Fed. Rep. 46, 8 Am. B. R. 594.

As to liens on exempt property, see Sec. 427, *post*.

See also *White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 56 C. C. A. 398, 9 Am. B. R. 653.

<sup>1</sup> *Bear v. Chase* (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 40 C. C. A. 182, 3 Am. B. R. 746; *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156; *In re* Eastern Commission & Importing Co., 129 Fed. Rep. 847, 12 Am. B. R. 305; *In re*

Hornstein, 122 Fed. Rep. 266, 10 Am. B. R. 308; *In re* Wilkes, 112 Fed. Rep. 975, 7 Am. B. R. 574.

<sup>2</sup> *Tennessee Producer Marble Co. v. Grant* (C. C. A. 3d Cir.), 135 Fed. Rep. 322, 67 C. C. A. 676, 14 Am. B. R. 288; *In re* Beaver Coal Co. (C. C. A. 9th Cir.), 113 Fed. Rep. 889, C. C. A. 7 Am. B. R. 542; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re* Snell, 125 Fed. Rep. 154, 11 Am. B. R. 35; *In re* Ogles, 93 Fed. Rep. 426, 1 Am. B. R. 671; *In re* Kane, 152 Fed. Rep. 587, 18 Am. B. R. 654.

of the general creditors, as it may be under Section 67*f*, the court of bankruptcy is clearly entitled to administer it. In all such cases the enforcement of the attachment in the state court would have the effect to prevent the enforcement of the bankrupt act, and for this reason should be stayed.<sup>3</sup> If the attachment lien was created prior to the four months' period, it is not affected by the bankrupt act. The proceedings in the state court do not conflict with the administration of the debtor's estate in bankruptcy. The state court may proceed to final judgment in the case.

A stay has been granted in some cases, where the lien of attachment or garnishment was valid under the bankrupt act, on the theory that the bankruptcy court was entitled to administer all the property in which the bankrupt had an interest, and enforce valid liens for the benefit of the lienors in that court.<sup>4</sup> It should be observed that the bankruptcy court has power to do this, provided the state court had not first obtained control of the property, which entitled it to retain it for the purposes of the suit.<sup>5</sup> The sheriff of the state court, by the levy of an attachment or a garnishment regularly acquires custody of the property levied upon, which entitles the state court to proceed with the suit, unless there is a conflict with the bankrupt act.

#### § 57. Foreclosure suits in a state court.

Where a suit to foreclose a mortgage is begun in a state court before a petition in bankruptcy is filed against the mortgagor, the state court may proceed to a decree of foreclosure and sale and pay the debt secured by the mortgage from the proceeds of such sale, without interference from the court of bankruptcy.<sup>1</sup>

<sup>3</sup> See Sec. 53, *ante*.

<sup>4</sup> *In re* United States Graphite Co., 161 Fed. Rep. 583, 20 Am. B. R. 573; *In re* Baughman, 138 Fed. Rep. 742, 15 Am. B. R. 23; *In re* Johnson, 108 Fed. Rep. 372, 6 Am.

B. R. 202; *In re* Lesser, 108 Fed. Rep. 201, 5 Am. B. R. 326.

<sup>5</sup> See Sec. 42, *ante*.

<sup>1</sup> *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1;

The reason for this rule is that the court of bankruptcy can stay suits founded upon a claim from which a discharge will be a release and none other.<sup>3</sup> If the mortgage is valid under the state law, the lien is expressly preserved by the bankrupt act.<sup>8</sup> It is not affected by bankruptcy, nor released by a discharge. A mortgage may be enforced by the state court or the court of bankruptcy. The jurisdiction of these courts is concurrent in such cases. The court to first obtain custody of the mortgaged property is entitled, under the general rule of comity,<sup>4</sup> to retain it for the purpose of enforcing the security.

*Sample v. Beasley* (C. C. A. 5th Cir.), 158 Fed. Rep. 607, 85 C. C. A. 429, 20 Am. B. R. 164; *In re San Gabriel Sanatorium Co.* (C. C. A. 9th Cir.), 111 Fed. Rep. 892, 50 C. C. A. 56, 7 Am. B. R. 206; *Heath v. Shaffer*, 93 Fed. Rep. 647, 2 Am. B. R. 98; *In re McKane*, 152 Fed. Rep. 733, 18 Am. B. R. 594, and on motion to stay sale, 158 Fed. Rep. 647, 18 Am. B. R. 594; *In re Kavanaugh*, 99 Fed. Rep. 928, 3 Am. B. R. 833; *In re Gerdes*, 102 Fed. Rep. 318, 4 Am. B. R. 346; *Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Ia. 932, 12 Am. B. R. 781; *In re Rohrer* (C. C. A. 6th Cir.), 177 Fed. Rep. 381, 100 C. C. A. 613, 24 Am. B. R. 52.

*In re Ball*, 118 Fed. Rep. 672, 9 Am. B. R. 276, Judge Wheeler granted a stay on the theory that the court had power in its discretion to do so, provided there was likely to be a surplus after paying the mortgage debt. This principle was recognized, although the stay was denied, by Judge Evans *In re Porter*, 109 Fed. Rep. 111, 6 Am. B. R. 259, and *In re Holloway*, 93 Fed. Rep. 638, 1 Am. B. R. 659.

*In re Dana* (C. C. A. 8th Cir.), 167 Fed. Rep. 529, 93 C. C. A. 238,

21 Am. B. R. 683, the circuit court of appeals, for the eighth circuit, sustained an order staying a foreclosure suit in the state court on the theory that the property "was in the actual possession of the district court of the United States," notwithstanding the state court had apparently first obtained the custody of that property by the commencement of a foreclosure suit in the state court before bankruptcy.

<sup>3</sup> B. A. 1898, Sec. 11a; *White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 56 C. C. A. 398, 9 Am. B. R. 653; *In re Butts*, 120 Fed. Rep. 966, 10 Am. B. R. 16; *In re Cole*, 106 Fed. Rep. 837, 5 Am. B. R. 780; *Continental National Bank v. Katz* (Supr. Ct. Cook Co., Ill.), 1 Am. B. R. 19; *In re Rohrer* (C. C. A. 6th Cir.), 177 Fed. Rep. 381, 100 C. C. A. 613, 24 Am. B. R. 52.

<sup>8</sup> B. A. 1898, Sec. 67d; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; See *Mortgages*, Sec. 469, *et seq.*, *post*.

<sup>4</sup> Sec. 42, *ante*.

If the mortgaged property is in the possession of the bankrupt at the time the petition in bankruptcy is filed, it is brought into the custody of the court of bankruptcy and that court has the exclusive right to enforce the security.<sup>5</sup> The court of bankruptcy, having thus acquired custody of the property, may stay any suit begun thereafter in the state court to foreclose a mortgage on it.<sup>6</sup> But the court of bankruptcy may, in its discretion, permit the mortgagee to foreclose his mortgage in the state court, and surrender possession of the property for that purpose.<sup>7</sup> This usually occurs where there is likely to be no surplus for the general creditors after paying the mortgage debt and costs of foreclosure.

If the state court first obtains custody of the mortgaged property, it has the exclusive right to enforce the security on that property.<sup>8</sup> The commencement of a suit to foreclose a mortgage brings the mortgaged property into the control of the court and withdraws it from the jurisdiction of every other court.<sup>9</sup> That court is entitled to retain the control

<sup>5</sup> See Jurisdiction over property in *custodia legis*, Sec. 31, *ante*.

<sup>6</sup> *Carter v. Hobbs*, 92 Fed. Rep. 594, 1 Am. B. R. 215; *In re Pittelkow*, 92 Fed. Rep. 901, 1 Am. B. R. 472; *In re Nathan*, 92 Fed. Rep. 590; *In re Dana* (C. C. A. 8th Cir.), 167 Fed. Rep. 529, 93 C. C. A. 238, 21 Am. B. R. 683; *In re Kaplan*, 144 Fed. Rep. 159, 16 Am. B. R. 267; *In re Brooks*, 91 Fed. Rep. 508, 1 Am. B. R. 531.

<sup>7</sup> *In re Johnson*, 127 Fed. Rep. 618, 11 Am. B. R. 544; *Equitable Loan, etc., Co. v. Moss & Co.* (C. C. A. 5th Cir.), 125 Fed. Rep. 609, 60 C. C. A. 345, 11 Am. B. R. 111; *In re Porter*, 109 Fed. Rep. 111, 6 Am. B. R. 259; *In re Holloway*, 93 Fed. Rep. 638, 1 Am. B. R. 659.

<sup>8</sup> *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *In re Rohrer* (C. C. A. 6th Cir.), 177 Fed. Rep. 381, 100 C. C. A. 613, 24 Am. B. R. 52; *Carling*

*v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 8 Am. B. R. 29; *Sample v. Beasley* (C. C. A. 5th Cir.), 158 Fed. Rep. 607, 85 C. C. A. 429, 20 Am. B. R. 164; *In re San Gabriel Sanatorium Co.* (C. C. A. 9th Cir.), 111 Fed. Rep. 892, 50 C. C. A. 56, 7 Am. B. R. 206; *Heath v. Shaffer*, 93 Fed. Rep. 647, 2 Am. B. R. 98, 20 Am. B. R. 164; *In re McKane*, 152 Fed. Rep. 733, 18 Am. B. R. 594; and on motion to stay sale, 158 Fed. Rep. 647, 18 Am. B. R. 594; *In re Kavanaugh*, 99 Fed. Rep. 928, 3 Am. B. R. 833; *In re Gerdes*, 102 Fed. Rep. 318, 4 Am. B. R. 346; *Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Ia. 932, 12 Am. B. R. 781.

<sup>9</sup> *Farmers Loan & Trust Co. v. Lake St. R. R. Co.*, 177 U. S. 51, 61, 44 L. Ed. 667.

of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal.<sup>10</sup> A suit to foreclose a mortgage is commenced in some states by filing a bill of complaint.<sup>11</sup> In other states it is not commenced until service of some kind is made upon the party.<sup>12</sup> The court of bankruptcy will recognize the state rule in this respect. When the suit to foreclose mortgage is commenced in the state court, the property to be affected is brought into the custody of the court whether a receiver is put in charge of it or not. But this custody does not extend to any property not covered by the mortgage.<sup>13</sup>

The court of bankruptcy has no power to stay a suit in the state court to foreclose a mortgage, executed more than four months prior to the bankruptcy of the mortgagor, whether the suit is begun in the state court prior to the four months'

<sup>10</sup> *Westerfeldt v. North Carolina Mining Co.* (C. C. A. 4th Cir.), 166 Fed. Rep. 706, 92 C. C. A. 378, and the case cited by Mr. Chief Justice Fuller in the opinion; *In re Gerdes*, 102 Fed. Rep. 318, 4 Am. B. R. 346; *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 8 Am. B. R. 29; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403.

<sup>11</sup> *Farmers Loan & Trust Co. v. Lake St. R. R. Co.*, 177 U. S. 51-61, 44 L. Ed. 667; Revised Statutes Ill. 1874, c. 32; *Hogden v. Guttery*, 51 Ill. 431.

<sup>12</sup> Sec. 416 N. Y. Civ. Code Proc.; Sec. 4987 Ohio Civ. Code Proc. *In re Kellogg* (C. C. A. 2nd Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7.

<sup>13</sup> *Scott v. Farmers Loan & Trust Co.* (C. C. A. 8th Cir.), 69 Fed. Rep. 17, 16 C. C. A. 358; *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 114 Fed. Rep. 659.

In *Smith v. McCullough*, 104 U. S. 25, 26 L. Ed. 637, in a mortgage foreclosure suit, where a receiver was appointed, the supreme court,

speaking through Mr. Justice Harlan, said: "Notwithstanding the broad terms of the order appointing him (the receiver), we are satisfied that the court had no purpose to appoint him receiver of any property except that covered by the mortgage."

In *Scott v. Farmers Loan & Trust Co.*, *supra*, Judge Caldwell, speaking for the circuit court of appeals for the eighth circuit, said: "The jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the court in such a suit rightfully make any order that will prevent, hinder or delay the other creditors of the mortgagor from subjecting the property not included in the mortgage to the payment of their debts."

period,<sup>14</sup> or within four months of bankruptcy.<sup>15</sup> It is clear that such proceedings in the state court do not have the effect in any way to defeat the operation of the bankrupt law. The mortgage became a valid lien more than four months before the petition in bankruptcy was filed. Proceedings begun in the state court before bankruptcy to enforce liens, created more than four months before the petition in bankruptcy is filed, are not prohibited by the bankrupt act.<sup>16</sup>

The court of bankruptcy has no power to stay a suit to foreclose a mortgage, executed within the four months' period, where the suit was begun in the state court prior to filing the petition in bankruptcy, although giving the mortgage is charged as an act of bankruptcy.<sup>17</sup> If the mortgagor is adjudicated a bankrupt on the ground that the mortgage constituted a preferential or fraudulent transfer, the court of bankruptcy does not hereby become entitled to administer the property. It is not as if the property was in the custody of the state court to be equitably distributed among creditors.<sup>18</sup>

<sup>14</sup> *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; *In re Rohrer* (C. C. A. 6th Cir.), 177 Fed. Rep. 381, 100 C. C. A. 613, 24 Am. B. R. 52; *Sample v. Beasley* (C. C. A. 5th Cir.), 158 Fed. Rep. 607, 85 C. C. A. 429, 20 Am. B. R. 164; *Heath v. Shaffer*, 93 Fed. Rep. 647, 2 Am. B. R. 98; *In re McKane*, 152 Fed. Rep. 733, 18 Am. B. R. 594, and on motion to stay sale, 158 Fed. Rep. 647, 18 Am. B. R. 594; *In re Kavanaugh*, 99 Fed. Rep. 928, 3 Am. B. R. 833; *In re Gerdes*, 102 Fed. Rep. 318, 4 Am. B. R. 346; *Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Ia. 932, 12 Am. B. R. 781.

<sup>15</sup> *Carling v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 8 Am. B. R. 29; *In re San Gabriel Sanatorium Co.* (C. C. A. 9th Cir.), 111

Fed. Rep. 892, 50 C. C. A. 56, 7 Am. B. R. 206.

<sup>16</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 147; *In re Rohrer* (C. C. A. 6th Cir.), 177 Fed. Rep. 381, 100 C. C. A. 613, 24 Am. B. R. 52.

<sup>17</sup> *In re San Gabriel Sanatorium Co.* (C. C. A. 9th Cir.), 111 Fed. Rep. 892, 50 C. C. A. 56, 7 Am. B. R. 206, reversing on rehearing, 102 Fed. Rep. 310, 4 Am. B. R. 197. This case was decided before the amendment of 1903, which gave the court of bankruptcy power to set aside preferences, but which did not take away any jurisdiction of the state court in this respect.

<sup>18</sup> See *Power to take property from the custody of a receiver of a state court*, Sec. 43, *ante*.



Here the mortgagee asserts a claim superior to the general creditors. He is entitled to have the validity of his security determined in a proceeding to which he is a party. This may be done in a suit to foreclose it in the state court or in the bankruptcy court, whichever court first obtained jurisdiction of the controversy. The fact that the suit was begun in the state court prior to the commencement of bankruptcy proceedings does not in any way defeat the operation of the bankrupt act. If the mortgage lien can not be enforced, because it is in conflict with the bankrupt act or the state law, it is the duty of the state court or the court of bankruptcy to so decide. The judgment of either court is conclusive and binding.

If a suit is begun in the state court to foreclose a mortgage before bankruptcy proceedings are instituted, the trustee in bankruptcy may appear in the state court and by pleading the adjudication in bankruptcy and his appointment as trustee make such defense, as he may be permitted, to defeat the mortgage or protect the interests of the general creditors.<sup>19</sup> The trustee is not a necessary party to the suit in the state court and the judgment is binding on him whether he intervenes or not.<sup>20</sup>

If the state court holds the mortgage invalid, the entire property passes to the trustee in bankruptcy and it is the duty of state court to direct the property to be surrendered to him for administration in bankruptcy. Any surplus, after the payment of the mortgage and cost of foreclosure, should be surrendered to the trustee in like manner.<sup>21</sup>

<sup>19</sup> Heath v. Shaffer, 92 Fed. Rep. 647, 2 Am. B. R. 98; *In re* San Gabriel Sanatorium Co. (C. C. A. 9th Cir.), 111 Fed. Rep. 892, 50 C. C. A. 56, 7 Am. B. R. 206; Des Moines Savings Bank v. Morgan Jewelry Co., 123 Ia. 432, 12 Am. B. R. 781; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; *In re* Van Alstyne, 100 Fed. Rep. 929, 4 Am. B. R. 42.

<sup>20</sup> Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Griffin v. Mutual

Life Ins. Co., 119 Ga. 664, 11 Am. B. R. 622; Bank of Commerce v. Elliott, 109 Wis. 648, 6 Am. B. R. 409; Kimberling v. Hartly, 1 Fed. Rep. 571; Carr v. Farmington, 63 N. C. 560; Furth v. Stahl, 205 Pa. 439, 10 Am. B. R. 442. See Sec. 533, *post*.

<sup>21</sup> Carling v. Seymour Lumber Co. (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 8 Am. B. R. 29.

**§ 58. Suits to enforce a mechanic's lien in the state court.**

A suit in a state court to enforce a mechanic's lien upon specific property, not in the custody of the court of bankruptcy, will not be stayed, without regard to whether the suit is begun before or after bankruptcy.<sup>1</sup>

The trustee may intervene in such suits in the state court to protect the interests of the bankrupt or creditors.<sup>2</sup>

If the property, on which it is sought to enforce a mechanic's lien, has passed into the custody of the court of bankruptcy, a suit thereafter begun in the state court to enforce it will be stayed.<sup>3</sup> The reason for this is that the action in the state court constitutes an interference with the assets of the bankrupt in the custody of the court of bankruptcy.

A mechanic's lien is not within that class of liens invalidated by Section 67f.<sup>4</sup> The jurisdiction of the state court and a court of bankruptcy to foreclose a mechanic's lien is concurrent. Whichever court first obtains jurisdiction retains it for the purpose of the foreclosure of the lien.

**§ 59. Judgment creditors' suits.**

The filing of a judgment creditors' bill and service of process creates a lien in equity on the judgment debtor's equitable assets.<sup>1</sup>

A stay may be granted to enjoin the prosecution of judgment creditors' suit begun in a state court within four months of bankruptcy.<sup>2</sup> The reason for this is that the lien, being created by an equitable levy within the four months' period,

<sup>1</sup>*In re Grissler* (C. C. A. 2nd Cir.), 136 Fed. Rep. 754, 69 C. C. A. 406, 13 Am. B. R. 508; *In re Horton* (C. C. A. 8th Cir.), 102 Fed. Rep. 986, 43 C. C. A. 87, 4 Am. B. R. 486; *In re Van Alstyne*, 100 Fed. Rep. 929, 4 Am. B. R. 42.

<sup>2</sup>*In re Van Alstyne*, 100 Fed. Rep. 929, 4 Am. B. R. 42. See also Sec. 533, *post*.

<sup>3</sup>*In re Emslie* (C. C. A. 2nd Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126.

<sup>4</sup>*In re Emslie* (C. C. A. 2nd Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126; *In re Grissler* (C. C. A. 2nd Cir.), 136 Fed. Rep. 754, 69 C. C. A. 406, 13 Am. B. R. 508.

<sup>1</sup>*Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36, and cases cited.

<sup>2</sup>*In re Pitts*, 9 Fed. Rep. 542; *In re Riker*, 107 Fed. Rep. 96, 5 Am. B. R. 720.

is discharged by Section 67f of the act. The suit, having for its object the distribution of the debtor's property among his creditors, has the effect to prevent the enforcement of the bankrupt act. The court of bankruptcy is entitled to administer the property of the debtor in such cases, and may enjoin the administration of it by the state court.

Where the judgment creditors' suit is begun more than four months prior to bankruptcy there is no conflict between it and proceedings in bankruptcy. The state court is entitled to proceed to a final judgment. The court of bankruptcy is without power to enjoin the enforcement of such lien, although the judgment may be rendered within the four months of bankruptcy or even after an adjudication.<sup>3</sup>

**§ 60. Actions for damages against an officer of a court of bankruptcy.**

A court of bankruptcy may protect its officer from suits for damages for acts committed in carrying out orders of the court. It may enjoin the prosecution of a suit in the state court to recover damages, provided the marshal, trustee or receiver was acting within the scope of the order of court.<sup>1</sup>

It has no power to protect such an officer against an action for damages for a personal tort committed by him in carrying out an order of court. It will not stay an action for trespass, trover or conversion against a receiver or trustee in bankruptcy or a United States marshal, where he exceeds his authority as such officer and is guilty of conduct which is actionable in its character.<sup>2</sup> Suits of this nature, which do

<sup>3</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *National Bank v. Hoffs*, 118 Fed. Rep. 626, 9 Am. B. R. 190.

<sup>1</sup> *In re Mertens*, 131 Fed. Rep. 507, 12 Am. B. R. 698; *In re Gutman*, 114 Fed. Rep. 1009, 8 Am. B. R. 252; *Berman v. Smith*, 171 Fed. Rep. 735, 22 Am. B. R. 662; *In re Empire Construction & Supply Co.*,

157 Fed. Rep. 495, 19 Am. B. R. 704.

<sup>2</sup> *In re Spitzer* (C. C. A. 2nd Cir.), 130 Fed. Rep. 879, 66 C. C. A. 35, 12 Am. B. R. 346; *In re Mertens & Co.* (C. C. A. 2nd Cir.) 147 Fed. Rep. 182, 77 C. C. A. 478, 16 Am. B. R. 831; *In re Kanter & Cohen* (C. C. A. 2nd Cir.), 121 Fed. Rep. 984, 58 C. C. A. 266, 9 Am.

not affect the possession of the property in the custody of a court of bankruptcy, may be maintained in a state court.

### § 61. Staying suits in other federal courts.

The court of bankruptcy has power to stay a suit pending in another federal court.

The power conferred by Section 11*a* and Section 2, clause 15, of the act is not limited to suits pending in a state court. Suits in a federal court may be stayed, when the same suit would be stayed if pending in a state court.<sup>1</sup> This power has been exercised in a few cases.<sup>2</sup> In practice it is not usually necessary to resort to an order of a court of bankruptcy for this purpose.<sup>3</sup>

### § 62. Where to apply to stay a suit.

The application to stay a suit may be made to the state court in which the suit is pending or to the court of bankruptcy.<sup>1</sup>

The provisions of the bankrupt act relating to staying suits is equally binding upon the state and federal courts. It is the duty of the court, state or federal, to grant a stay according to the provisions of the bankrupt act.<sup>2</sup>

It has been said that the application for the stay should be made, in the first instance, to the court in which the suit

B. R. 372; *McLean v. Mayo*, 113 Fed. Rep. 106, 7 Am. B. R. 115; *Berman v. Smith*, 171 Fed. Rep. 735, 22 Am. B. R. 662; *In re Kalb & Berger Mfg. Co.* (C. C. A. 2nd Cir.), 165 Fed. Rep. 895, 91 C. C. A. 573, 21 Am. B. R. 393; *In re Roberts* (C. C. A. 2nd Cir.), 169 Fed. Rep. 1022, 94 C. C. A. 668, 22 Am. B. R. 908.

<sup>1</sup> See Secs. 49 to 60, *ante*.

<sup>2</sup> *In re People's Mail Steamship Co.*, No. 10970 Fed. Cas., 3 Ben. 226.

<sup>3</sup> As to conflict of jurisdiction between the court of bankruptcy and

other federal courts, see Sec. 77 *post*.

<sup>1</sup> *In re Geister*, 97 Fed. Rep. 322, 3 Am. B. R. 228; *In re Siebert*, 133 Fed. Rep. 781, 13 Am. B. R. 348.

<sup>2</sup> *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *In re Geister*, 97 Fed. Rep. 322, 3 Am. B. R. 228; *Carter v. People's Nat. Bank*, 35 S. E. Rep. 61, 4 Am. B. R. 211 (note); *Reed v. Equitable Trust*, 115 Ga. 780, 8 Am. B. R. 242; *Delavergue v. Farrand*, 1 Mich. (N. P.) 90; *Carpenter Bros. v. O'Connor*, 16 O. C. C. 526.

sought to be stayed is pending.<sup>3</sup> Comity does not seem to require this. The court of bankruptcy is the final arbiter of whether a suit pending in the state court should be stayed or not.<sup>4</sup> If the state court refuses to stay the proceedings an application may then be made to the court of bankruptcy for a stay.<sup>5</sup>

An application to stay a suit under section 2, clause 15, on the ground that it is necessary for the enforcement of the bankrupt act, is regularly made to the court of bankruptcy in the first instance. It is peculiarly in the province of that court to determine when its jurisdiction to administer property in bankruptcy is being interfered with.

### § 63. Application to the state court to stay a suit.

The application to stay a suit pending in the state court may be made to that court.<sup>1</sup>

The application to the state court may be made by the bankrupt, the petitioning creditors, or the trustee, if one has been appointed. He may file in that court a petition, or a proper pleading or motion according to the state practice, setting forth the pendency of the proceedings in bankruptcy and the grounds upon which it is proper to stay the suit. If the application for a stay is based upon Section 11a of the act he should allege that the claim upon which the suit is founded is provable in the bankruptcy proceedings and will be released

<sup>3</sup> *In re Geister*, 97 Fed. Rep. 322, 3 Am. B. R. 228; *In re Siebert*, 133 Fed. Rep. 781, 13 Am. B. R. 348.

<sup>4</sup> *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *Wagner v. United States* (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 4 Am. B. R. 596, 43 C. C. A. 445.

*In re Hornstein*, 122 Fed. Rep. 266, 271, 10 Am. B. R. 308, Judge Ray said: "In the face of a stat-

ute conferring the power, comity does not require the courts of the United States to compel persons whose rights are seriously jeopardized by proceedings in a state court to resort thereto for protection."

<sup>5</sup> *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 474.

<sup>1</sup> *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *In re Geister*, 97 Fed. Rep. 322, 3 Am. B. R. 228.

if a discharge is granted. If the application for the stay is sought because the suit in the state court interferes with the enforcement of the bankrupt act, he should state in what respect it does so. The pleading regularly concludes with a prayer for the suit to be stayed. The application is regularly made under oath. The affidavit may be sworn to by the attorney for the petitioner.<sup>2</sup>

A copy of the petition in bankruptcy and order of adjudication, if one has been made, should be exhibited to the state court. Notice of a hearing should be served on the plaintiff and the matter be brought to the attention of the state court for action according to the practice in that court. It is the duty of that court to grant a stay according to the provisions of the bankrupt act.<sup>3</sup>

#### **§ 64. Application to the court of bankruptcy to stay a suit.**

The application to stay a suit in a state court may be made to the court of bankruptcy administering the estate.

The application is regularly made by a petition filed in the bankruptcy proceedings. It may be filed by the bankrupt, the petitioning creditors or receiver, or the trustee if one has been appointed. It should be filed in the clerk's office and not in that of the referee.<sup>1</sup>

The petition should be entitled in the bankruptcy proceedings and state the title of the suit sought to be stayed, the court in which it is pending, the cause of the action upon which it is founded, and set forth the ground upon which a stay is sought.<sup>2</sup>

<sup>2</sup> *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156.

<sup>3</sup> *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *In re* Geister, 97 Fed. Rep. 322, 3 Am. B. R. 228; *Carter v. People's Nat. Bank*, 35 S. E. Rep. 61, 4 Am. B. R. 211 (note); *Reed v. Equitable Trust*, 115 Ga. 780, 8 Am. B. R. 242; *Delavergue v. Farrand*, 1 Mich. (N. P.) 90; *Carpenter Bros. v. O'Connor*, 16 O. C. C. 526.

<sup>1</sup> *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346.

<sup>2</sup> *In re* Goldberg, 117 Fed. Rep. 692, 9 Am. B. R. 156; *In re* Klein, 97 Fed. Rep. 31, 3 Am. B. R. 174; *In re* Gerdes, 102 Fed. Rep. 318, 4 Am. B. R. 346; *In re* Emslie (C. C. A. 2nd Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126; *Bear v. Chase* (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 3 Am. B. R. 746.

The petition should also state the names of the persons to be enjoined. The power of a court of bankruptcy to stay proceedings in a state court should be exercised over the parties to the suit in the state court and not by an order or process directed to the state court or the judges.<sup>3</sup> If the persons to be enjoined are not already before the court of bankruptcy they may be brought in by notice or summons.<sup>4</sup>

The court will regularly require notice to be given the opposing party and an opportunity afforded him to be heard before finally granting an injunction or staying a suit. A temporary stay or restraining order may be granted *ex parte* pending such hearing. The restraining order and the subpoena to new parties may be served at the same time.<sup>5</sup>

The application to stay a suit in a state court must be heard and decided by the judge and not by the referee.<sup>6</sup> The judge may refer such an application or any specific issue arising thereon to a referee to ascertain and report the facts,<sup>6</sup> but the judge must make the order granting or refusing to stay the suit.

<sup>3</sup> *Ex parte* Christy, 3 How. 292, 11 L. Ed. 603; *Samson v. Burton*, No. 12285 Fed. Cas. 5 Ben. 343; *In re Dana* (C. C. A. 8th Cir.), 167 Fed. Rep. 529, 93 C. C. A. 238, 21 Am. B. R. 683.

<sup>4</sup> See *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523.

Sec. 2, clause 6, of the act authorizes the court of bankruptcy "to bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary in the complete determination of the matter in controversy."

As to the power of a court of bankruptcy to bring in parties from beyond the district, see Sec. 50, *ante*.

<sup>5</sup> In *Stengel v. The Leidigh Carriage Co.*, in the district court for the southern district of Ohio (not

reported), the Leidigh Carriage Co. of Dayton, on July 13, 1898, made an assignment with preferences in the form of confessed judgments to the amount of something like \$50,000. Attachments were issued and levies made under these judgments prior to the assignment, and some or all of the property had been sold, but the funds arising therefrom had not been distributed. Upon an application for an injunction Judge Thompson enjoined the assignee, the sheriff and the preferred creditors from taking any further proceedings in the state court. The injunction and subpoena were served at the same time.

<sup>6</sup> Gen. Ord. 12, par. 3. *In re Siebert*, 133 Fed. Rep. 781, 13 Am. B. R. 348; *In re Benjamin*, 140 Fed. Rep. 320, 15 Am. B. R. 351.

When an order granting a stay has been made, a writ of injunction may be issued and served, but ordinarily a certified copy of the order is served upon the parties personally. It is not necessary that service should be made to make such an order effective, where the parties to be enjoined have actual notice of it.<sup>7</sup>

**§ 65. Discretion to grant or to refuse to stay a suit.**

If it is made to appear that the suit, sought to be stayed, is founded on a provable claim which will be released by a discharge if one is granted, it is the duty of the court to grant the stay.

There are expressions in books to the effect that granting or refusing a stay under Section 11*a* rests in the discretion of the court. Section 11*a* defines what suits are to be stayed in case bankruptcy proceedings are begun against the defendant. Congress clearly intended by this that the defendant in the state court is entitled, as of right, to have the suit stayed until the question of a discharge shall be settled and no longer, if it falls within the description of that section. If it does not, then the plaintiff is entitled to have the stay denied for that reason.

It is different where a stay or restraining order is sought under Section 2, clause 15, on the ground that it is necessary

<sup>7</sup> *In re Krinsky*, 112 Fed. Rep. 972, 7 Am. B. R. 535; *Blake v. Nesbit*, 144 Fed. Rep. 279, 16 Am. B. R. 269.

See also *Ex parte Lennon*, 166 U. S. 549, 554, 41 L. Ed. 1110; *Ritter v. Ulman* (C. C. A. 4th Cir.), 78 Fed. Rep. 222, 224, 24 C. C. A. 71, affirmed 72 Fed. Rep. 1000.

In *Blake v. Nesbit*, *supra*, at p. 282, Judge Phillips said: "The objection that service of notice of the restraining order was had upon the defendant at Leavenworth, in the state of Kansas, can not avail the defendant. It is a well-settled

rule in equity that, 'to render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice thereof' (citing authorities). "In short, the authorities are agreed that the temporary restraining order becomes operative upon the defendant from the time of his having notice of its issuance, regardless of the time of the formal service of notice upon him."



for the enforcement of the bankrupt act. Whether the case presented calls for the exercise of this extraordinary power of a court of bankruptcy rests in the sound judicial discretion of the judge.

This discretion may be reviewed by the circuit court of appeals on petition for review,<sup>1</sup> but will not be disturbed by an appellate court unless there has been a plain disregard of some settled rule of law or equity, which should govern the discretion of the court below.

### § 66. The order granting or refusing a stay.

The order granting or refusing to stay a suit in a state court must be made by the judge and not by the referee.<sup>1</sup>

The stay should run against the parties to the suit in the state court and not to the state court itself or the judge.<sup>2</sup> It is doubtful whether a court of bankruptcy has power to enjoin

<sup>1</sup> *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *Bear v. Chase* (C. C. A. 4th Cir.), 99 Fed. Rep. 920, 40 C. C. A. 182, 3 Am. B. R. 746; *In re Kenney* (C. C. A. 2nd Cir.), 105 Fed. Rep. 897, 45 C. C. A. 113, 5 Am. B. R. 355; *White v. Thompson* (C. C. A. 5th Cir.), 119 Fed. Rep. 868, 56 C. C. A. 398, 9 Am. B. R. 653.

<sup>1</sup> Gen. Ord. 12, par. 3. *In re Siebert*, 133 Fed. Rep. 781, 13 Am. B. R. 348, *In re Benjamin*, 140 Fed. Rep. 320, 15 Am. B. R. 351.

<sup>2</sup> *In re Dana* (C. C. A. 8th Cir.), 167 Fed. Rep. 529, 93 C. C. A. 238, 21 Am. B. R. 683; *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Samson v. Burton*, No. 12285, Fed. Cas., 5 Ben. 343.

*In re Dana*, *supra*, the court said: "The injunction in this case ran, not only against the parties to the

suit in the state court, but also against the state court itself and the judge. Assuming, without deciding, that power exists so to extend the writ, clearly it should never be exercised, except in case of imperative necessity. An injunction operating upon the litigants alone will rarely fail to accomplish all that is needed, and it should not be anticipated that a judge of a state court will of his own motion insist upon proceeding after the parties in interest have been restrained by a court whose jurisdiction in the particular matter is paramount. A considerate regard for the dignity of the courts of the states, so essential to harmony in our intricate judicial systems, forbids an assumption that they will not be equally solicitous to observe the Constitution and laws of the United States, which constitute the supreme law of the land binding upon all the courts."

a state or one of its officers from prosecuting a suit in the courts of that state, in which the title of the state to real property is directly involved as an issue.<sup>3</sup>

If a case is made under Section 11a the state court may order the proceedings stayed until after an adjudication or the dismissal of the petition.<sup>4</sup> If the debtor has been adjudged a bankrupt, the stay may be until twelve months after the date of such adjudication, or if within that time such person applies for a discharge, then until the question of such discharge is determined.<sup>4</sup> If the discharge has been granted it should be pleaded in the state court in bar of the suit instead of making an application to stay the suit.<sup>5</sup>

If the application is made for a stay under Section 2, clause 15, of the act, the state court may order the proceedings stayed for such time as justice may require. The statute does not limit the duration of the injunction. The court may grant a perpetual stay where the controversy is one, which the court of bankruptcy has the exclusive power to decide. It may stay proceedings temporarily to await the action of the court of bankruptcy.

If no steps are taken to stay proceedings in a state court, or a stay is refused, such proceedings, after the adjudication in bankruptcy are valid and binding.<sup>6</sup>

The fact that the plaintiff in the state court proves his claim in bankruptcy does not operate to deprive the state courts of jurisdiction, nor amount to a consent to the exercise of exclusive jurisdiction by the court of bankruptcy.<sup>7</sup>

<sup>3</sup> See *In re Bailey*, 156 Fed. Rep. 691, 19 Am. B. R. 470.

<sup>4</sup> B. A. 1898, Sec. 11a; *In re Flanders*, 121 Fed. Rep. 936, 10 Am. B. R. 379; *In re Rosenthal*, 108 Fed. Rep. 368, 5 Am. B. R. 599.

<sup>5</sup> *Hellman v. Goldstone* (C. C. A. 3rd Cir.), 161 Fed. Rep. 913, 88 C. A. 604, 20 Am. B. R. 539.

<sup>6</sup> *Boynton v. Ball*, 121 U. S. 466-7, 30 L. Ed 985; *Pickens v.*

*Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *Metcalf v. Barker*, 187 U. S. 165, 44 L. Ed. 122, 9 Am. B. R. 36; *In re Gerdes*, 102 Fed. Rep. 318, 4 Am. B. R. 346; *Reed v. Equitable Trust Co.*, 115 Ga. 780, 8 Am. B. R. 242.

<sup>7</sup> *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47.

If a case is not stayed the trustee may apply to the court of bankruptcy for leave to prosecute and defend such pending suits.<sup>6</sup>

**§ 67. The effect of an order staying a suit.**

A stay does not operate as a bar to an action, but only as a suspension of proceedings so long as the injunction is in force.<sup>1</sup>

Where a suit is stayed under Section 11a of the bankrupt act, the suspension of proceedings is until the question of the bankrupt's discharge is determined by the court of bankruptcy.<sup>2</sup> When this question is determined by that court, the court in which the suit is pending may proceed to such judgment as the circumstances of the case may require. If the petition is dismissed or the discharge is refused, the plaintiff upon establishing his claim may obtain a general judgment.<sup>3</sup> If the discharge is granted the bankrupt may plead it in the suit in the state court.<sup>4</sup> That court may then determine the effect of the discharge as a bar to the action and whether the

\* B. A. 1898, Sec. 11b and c; *Heath v. Shaffer*, 93 Fed. Rep. 647, 2 Am. B. R. 98; *In re Klein*, 97 Fed. Rep. 31, 3 Am. B. R. 174; *In re Neely*, 113 Fed. Rep. 210, 7 Am. B. R. 312; *In re Van Alstyne*, 100 Fed. Rep. 929, 4 Am. B. R. 42; *Bank of Commerce v. Elliott*, 109 Wis. 648, 6 Am. B. R. 409; *Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Ia. 432, 12 Am. B. R. 781; *Griffin v. Mutual Life Ins. Co.*, 119 Ia. 664, 11 Am. B. R. 623.

<sup>1</sup> *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 474.

<sup>2</sup> B. A. 1898, Sec. 11a; *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am.

B. R. 474; *Hellman v. Goldstone* (C. C. A. 3rd Cir.), 161 Fed. Rep. 913, 88 C. C. A. 604, 20 Am. B. R. 539; *In re Flanders*, 121 Fed. Rep. 936; *In re Rosenthal*, 108 Fed. Rep. 368, 5 Am. B. R. 799; *In re Herzberg*, 25 Fed. Rep. 699.

<sup>3</sup> *Hill v. Harding*, 107 U. S. 631, 27 L. Ed. 493; *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 88 C. C. A. 604, 21 Am. B. R. 474.

<sup>4</sup> *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *In re Wesson*, 88 Fed. Rep. 855; *In re Rosenberg*, No. 12054 Fed. Cas., 3 Ben. 14; *In re Thomas*, No. 13890 Fed. Cas., 3 N. B. N. 38; *Banquo-Franco-Egyptienne v. Brown*, 24 Fed. Rep. 106; *Ruiz v. Eickerman*, 5 Fed. Rep. 790.

plaintiff is entitled to a special judgment for the purpose of charging sureties.<sup>5</sup>

Where a suit is stayed under Section 2, clause 15, of the bankrupt act the suspension of proceedings in the state court does not depend upon the bankrupt's discharge. Its duration is not limited by the act, but rests in the discretion of the court. If it is improvidently granted or is rendered unnecessary at any time, it may be dissolved.

### § 68. Dissolving an injunction or stay.

An order staying a suit in a state court or restraining a person from doing any particular act is binding and conclusive upon the parties until it is set aside.<sup>1</sup>

Any party in interest may move to dissolve the injunction or stay.<sup>2</sup> If the stay of proceedings was improvidently granted the court of bankruptcy may set aside the order upon motion seasonably filed for that purpose.<sup>3</sup>

If a stay had been granted under Section 11a prior to the discharge, it should be dissolved when the discharge is granted.<sup>4</sup>

If the court of bankruptcy dismisses the petition in bankruptcy, or determines that the basis of the suit in the state court is a claim which is not released by a discharge in bankruptcy, then a stay previously granted should be dissolved and the case pending in the state court permitted to proceed as if it had not been interrupted.<sup>5</sup>

After an injunction staying a suit has been dissolved, then the case pending in the state court may proceed as if it had not been interrupted.

<sup>5</sup> *Hill v. Harding*, 130 U. S. 699, 32 L. Ed. 1083.

See Pleading a discharge, Sec. 802, *post*.

<sup>1</sup> *Wagner v. United States* (C. C. A. 6th Cir.), 104 Fed. Rep. 133, 43 C. C. A. 445, 4 Am. B. R. 596; *In re Marcus*, 105 Fed. Rep. 907, 5 Am. B. R. 365.

<sup>2</sup> *In re Rosenthal*, 108 Fed. Rep. 368, 5 Am. B. R. 799.

<sup>3</sup> *In re Snell*, 125 Fed. Rep. 154,

11 Am. B. R. 35; *In re Bailey*, 156 Fed. Rep. 691, 19 Am. B. R. 470.

<sup>4</sup> *Hellman v. Goldstone* (C. C. A. 3rd Cir.), 161 Fed. Rep. 913, 88 C. C. A. 604, 20 Am. B. R. 539; *In re Flanders*, 121 Fed. Rep. 936; *In re Rosenthal*, 108 Fed. Rep. 368, 5 Am. B. R. 799; *In re Herzberg*, 25 Fed. Rep. 699.

<sup>5</sup> *New River Coal Land Co. v. Ruffner Bros.* (C. C. A. 4th Cir.), 165 Fed. Rep. 881, 91 C. C. A. 559, 21 Am. B. R. 474.

## CHAPTER VI.

**JURISDICTION OF THE OLD CIRCUIT COURTS VESTED  
IN THE DISTRICT COURTS.**

SEC.

69. Circuit courts abolished.  
70. Jurisdiction of the circuit court under the bankrupt act.  
71. The judicial code and bankrupt act.  
72. Suits at law and in equity.  
73. Controversies at law and in equity.  
74. Parties and adverse claimants.

SEC.

75. The citizenship of the bankrupt and claimant determines jurisdiction.  
76. Removal from a state court.  
77. Conflict of jurisdiction between a court of bankruptcy and other federal courts.

**§ 69. Circuit courts abolished.**

The circuit courts of the United States were abolished by the Judicial Code of 1911, and ceased to exist on January 1, 1912.<sup>1</sup>

**§ 70. Jurisdiction of the circuit court under the bankrupt act.**

The bankrupt act conferred no general power, either original or supervisory, upon the circuit courts to entertain bankruptcy proceedings.<sup>1</sup>

The act provided for a trial by jury in the circuit court with respect to the question of the bankrupt's insolvency and of any act of bankruptcy alleged to have been committed by him in an involuntary petition.<sup>2</sup> The circuit courts were given concurrent jurisdiction with the courts of bankruptcy of the offenses enumerated in the act.<sup>3</sup> They also had jurisdiction of suits at law and in equity between trustees as such and adverse claimants concerning the property acquired by the trustee.<sup>4</sup>

<sup>1</sup> Sec. 289 of the Judicial Code.

<sup>2</sup> Hatch v. Curtin, 146 Fed. Rep. 200, 16 Am. B. R. 629; Bray v. United States Fidelity & Guarantee Co. (C. C. A. 4th Cir.), 170 Fed.

Rep. 689, 96 C. C. A. 9, 22 Am. B. R. 363.

<sup>3</sup> B. A. 1898, Sec. 19b.

<sup>4</sup> B. A. 1898, Sec. 23c.

<sup>5</sup> B. A. 1898, Sec. 23a.

Abolishing the circuit courts does not affect jury trials or criminal cases because the district court as a court of bankruptcy had concurrent jurisdiction in such cases.

The Judicial Code conferred upon the several district courts the jurisdiction formerly vested in the circuit courts.<sup>5</sup> It provided that all suits and proceedings pending in the circuit courts should be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun in those courts.<sup>6</sup>

### **§ 71. The judicial code and bankrupt act.**

The judicial code does not operate to repeal or supersede jurisdiction conferred by the bankrupt act. Bankruptcy jurisdiction is not embraced within the Judicial Code.

Section 291 of the code provides that "whenever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

The jurisdiction, therefore, conferred upon circuit courts by the bankrupt act is now vested in the district courts, in addition to that conferred by the bankrupt act on them as courts of bankruptcy.

### **§ 72. Suits at law and in equity.**

The circuit (now the district) court was given a limited jurisdiction of suits at law and in equity brought by or against a trustee in bankruptcy with reference to the property of the bankrupt, or to claims alleged to be due from him or to him.<sup>1</sup>

<sup>5</sup> See Sec. 24 of the Judicial Code.

<sup>6</sup> See Sec. 290 of the Judicial Code.

<sup>1</sup> B. A. 1898, Sec. 23a; *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287, 11 Am. B. R. 563; *Reed v. American-German Bank*, 155

Fed. Rep. 233, 19 Am. B. R. 140; *State Bank v. Cox* (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 74 C. A. 285, 16 Am. B. R. 32; *McFarlan Carriage Co. v. Solanus* (C. C. A. 5th Cir.), 106 Fed. Rep. 145, 45 C. C. A. 253, 5 Am. B. R. 442; *Sims v. Union Ass. Soc.*, 129 Fed. Rep. 804.

Section 23 of the act confers on the circuit courts jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. It also provides that "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted."<sup>2</sup>

This provision limits the jurisdiction of the district court to cases of which it would have had jurisdiction if no bankruptcy proceedings had been instituted. That is to say, if a suit by or against the debtor concerning his property might have been brought in the district court, had there been no bankruptcy proceedings, on the ground that there was a sufficient jurisdictional amount involved, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, the same suit may be maintained by or against his trustee in bankruptcy.<sup>3</sup> If the suit could not have been maintained by or against the debtor prior to this bankruptcy, it can not be brought by or against his trustee in bankruptcy.<sup>4</sup>

This jurisdiction is more limited than that conferred by the act of 1867. The jurisdiction of the district and circuit courts under the act of 1867 was concurrent with the state courts without regard to citizenship or the amount involved.<sup>5</sup>

<sup>2</sup> *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

<sup>3</sup> *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287, 11 Am. B. R. 563; *State Bank v. Cox* (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 74 C. C. A. 285, 16 Am. B. R. 32; *Reed v. American-German Bank*, 155 Fed. Rep. 233, 19 Am. B. R. 140; *Mc-*

*Eldowney v. Card*, 190 Fed. Rep. —.

<sup>4</sup> *Viquesney v. Allen* (C. C. A. 4th Cir.), 131 Fed. Rep. 21, 65 C. C. A. 259, 12 Am. B. R. 402; *Goodier v. Barnes*, 94 Fed. Rep. 798, 2 Am. B. R. 328.

<sup>5</sup> R. S. Sec. 4978; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; *Bardes v. Hawarden Bank*, 178 U. S. 531, 44 L. Ed. 1175, 4 Am. B. R. 163.

Under the present act the district court does not have jurisdiction solely on the ground that the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.<sup>6</sup>

In order that a suit may be brought in the district court under this clause it must involve three distinct elements; namely, *first*: a controversy at law or in equity, as distinguished from proceedings in bankruptcy, concerning property acquired or claimed by the trustee;<sup>7</sup> *second*: the parties to the suit must be the trustee in bankruptcy and an adverse claimant;<sup>8</sup> *third*: the suit must be such as could have been instituted by the bankrupt had no proceedings in bankruptcy intervened.<sup>9</sup> If any of these elements are wanting the district court has no jurisdiction of the case.<sup>10</sup>

### § 73. Controversies at law and in equity.

The jurisdiction of the district court is limited by Section 23a to controversies at law and in equity, as distinguished from proceedings in bankruptcy, concerning property claimed or acquired by the trustee.<sup>1</sup>

Section 23a of the act can not be construed as vesting in the district court jurisdiction of controversies at law and in equity of which they have not jurisdiction under the new Judicial Code of 1911.<sup>2</sup> It is rather a regulation of jurisdiction already existing.

Controversies at law and in equity within the jurisdiction of the district court usually arise with respect to property

<sup>6</sup> Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

<sup>7</sup> See Sec. 73, *post*.

<sup>8</sup> See Sec. 74, *post*.

<sup>9</sup> See Sec. 75, *post*.

<sup>10</sup> Goodier v. Barnes, 94 Fed. Rep. 798, 2 Am. B. R. 328.

<sup>1</sup> As to the distinction between bankruptcy proceedings and controversies arising in bankruptcy, see Sec. 26, *ante*.

<sup>2</sup> In Viquesney v. Allen (C. C. A. 4th Cir.), 131 Fed. Rep. 21, 65 C. C. A. 259, 12 Am. B. R. 402, it

was held that a circuit court had no jurisdiction of a bill in equity by a simple contract creditor to set aside a fraudulent conveyance "as an ancillary proceeding to bankruptcy proceedings."

See also Hatch v. Curtin, 146 Fed. Rep. 200, 16 Am. B. R. 629; Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; Goodier v. Barnes, 94 Fed. Rep. 798, 2 Am. B. R. 328; McEldowney v. Card, 190 Fed. Rep. —.



in the possession of a stranger, who claims some title or interest in it superior to that of the trustee. They include suits to collect debts owing the bankrupt's estate,<sup>3</sup> or to recover property claimed to belong to the bankrupt's estate which claim of ownership is contested,<sup>4</sup> or to recover property fraudulently or preferentially transferred by the debtor prior to his bankruptcy.<sup>5</sup> Of these latter cases a court of bankruptcy usually has jurisdiction irrespective of the amount involved.

The jurisdiction of the court of a suit by the trustee is not affected by the fact that the debtor might have been estopped to recover by reason of his own fraud. The district court, the jurisdictional requisites being present, would have had power to decide such controversy prior to bankruptcy and therefore has jurisdiction of a suit brought by the trustee after bankruptcy.

The district and circuit courts were given concurrent jurisdiction of suits at law and in equity, as distinguished from bankruptcy proceedings, under the act of 1867.<sup>6</sup> Actions at law and suits in equity were frequently before the court in matters relating to bankruptcy. Thus the parties sought the aid of the court in actions of replevin,<sup>7</sup> in assumpsit,<sup>8</sup> in trover<sup>9</sup> and by a bill in equity.<sup>10</sup>

<sup>3</sup> *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; *Sims v. Union Ass. Soc.*, 129 Fed. Rep. 804.

<sup>4</sup> *Duplan Silk Co. v. Spencer* (C. C. A. 3rd Cir.), 115 Fed. Rep. 689, 53 C. C. A. 321, 8 Am. B. R. 367, and 191 U. S. 526, 48 L. Ed. 287, 11 Am. B. R. 563; *State Bank v. Cox* (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 74 C. C. A. 285, 16 Am. B. R. 32; *Reed v. American German Nat. Bank*, 155 Fed. Rep. 233, 19 Am. B. R. 140.

<sup>5</sup> *Goodier v. Barnes*, 94 Fed. Rep. 798, 2 Am. B. R. 328.

<sup>6</sup> R. S. Sec. 4979.

<sup>7</sup> *Haughey v. Albin*, No. 6222, Fed. Cas., 2 Bond, 244.

<sup>8</sup> *Street v. Dawson*, No. 13533 Fed. Cas., 4 N. B. R. 207; *Van Dyke v. Tinker*, No. 16849 Fed. Cas., 11 N. B. R. 308.

<sup>9</sup> *Carr v. Gale*, No. 2434, Fed. Cas., 2 Ware, 330, and No. 2435, Fed. Cas., 3 Woodb. & M. 38; *Mitchell v. McKibben*, No. 9666, Fed. Cas., 8 N. B. R. 548; *Brooke v. McCracken*, No. 1932, Fed. Cas., 10 N. B. R. 461; *Babbitt v. Walburn*, No. 695, Fed. Cas., 6 N. B. R. 359; *Wadsworth v. Tyler*, No. 17032, Fed. Cas., 2 N. B. R. 316; *Cragen v. Carmichael*, No. 3319, Fed. Cas., 2 Dill. 519.

<sup>10</sup> *In re Bowie*, No. 1728, Fed. Cas., 1 N. B. R. 628; *March v. Heaton*, No. 9061, Fed. Cas., 1 Low.

### § 74. Parties and adverse claimants.

It is essential that one party shall be the trustee and the other party an adverse claimant, or claimants, and that the controversy concern the property acquired or claimed by the trustee.<sup>1</sup>

This provision is very similar to that in the act of 1867, which was "any person claiming an adverse interest . . . touching any property or rights of the bankrupt transferable or vested in such assignee."<sup>2</sup> This provision was frequently construed by the courts.<sup>3</sup>

It may be said generally that an adverse claimant is one who asserts a title or interest in property, claimed as a part of the estate of the bankrupt, superior to that of the trustee. An adverse claimant is not one acknowledging the trustee's title and seeking to participate in the distribution of the estate. He claims to own the property or to have some right and interest in it, which the trustee claims. Familiar examples of adverse claimants may be found in debtors of the bankrupt who refuse to pay the debt,<sup>4</sup> mortgagees, grantees, pledges, lien-

278; *Bradshaw v. Klein*, No. 1790, Fed. Cas., 2 Biss. 20; *Shaffer v. Fritchery*, No. 12697, Fed. Cas., 4 N. B. R. 548; *Taylor v. Rasch*, No. 13801, Fed. Cas., 5 N. B. R. 399; *Wilt v. Stickney*, No. 17854, Fed. Cas., 15 N. B. R. 23; *Warren v. Nat. Bank*, No. 17202, Fed. Cas., 10 Blatch. 493; *First Nat. Bank v. Cooper*, 20 Wall. 171; 22 L. Ed. 273; *Garrison v. Markley*, No. 5256, Fed. Cas., 7 N. B. R. 246; *Sutherland v. Lake Superior Canal Co.*, No. 13643, Fed. Cas., 9 N. B. R. 298; *Beecher v. Bininger*, No. 1222, Fed. Cas., 7 Blatch. 170; *Kellogg v. Russell*, No. 7666, Fed. Cas., 11 Blatch. 519.

<sup>1</sup> B. A. 1898, Sec. 23a. *McEl-downey v. Card*, 190 Fed. Rep.—.

<sup>2</sup> R. S. Sec. 4979.

<sup>3</sup> Consult *Morgan v. Thornhill*, 11 Wall. 65, 75, 20 L. Ed. 60; *Smith*

*v. Mason*, 14 Wall. 419, 430, 20 L. Ed. 748; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481; *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542; *Bachman v. Packard*, No. 709, Fed. Cas., 2 Saw. 264; *Carr v. Gale*, No. 2434, Fed. Cas., 2 Ware, 330, and No. 2435, Fed. Cas., 2 Woodb. & M. 38; *Mitchell v. McKibben*, No. 9666, Fed. Cas., 8 N. B. R. 548; *Street v. Dawson*, No. 13533, Fed. Cas., 4 N. B. R. 207; *Haughey v. Albin*, No. 6222, Fed. Cas., 2 Bond, 244; *Brooke v. McCracken*, No. 1932, Fed. Cas., 10 N. B. R. 461; *Spaulding v. McGovern*, No. 13217, Fed. Cas., 10 N. B. R. 188.

<sup>4</sup> *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656; *Mitchell v. Great Works Milling Co.*, No. 9662, Fed. Cas., 2 Story, 648; *Pritchard v. Chandler*, No. 11436, Fed. Cas., 2 Curtis, 488.

holders, and the like. The circuit court does not have jurisdiction of a controversy between all adverse claimants and the trustee, but one party must be an adverse claimant in order to give the court jurisdiction.

If the trustee is dead and no one has been appointed in his stead, a creditor may file a bill to detain property of a bankrupt to be administered by a trustee subsequently appointed.<sup>5</sup>

Who are necessary parties to such actions at law or suits in equity is determined by the general rules governing such proceedings in the circuit courts.

**§ 75. The citizenship of the bankrupt and claimant determines jurisdiction.**

The circuit (now district) courts have jurisdiction only in the same manner and to the same extent as though bankruptcy proceedings had not been instituted and such a controversy had been between the bankrupt and the adverse claimants.<sup>1</sup> This clause is a limitation upon the exercise of the jurisdiction of the district courts.<sup>2</sup>

The judiciary act of 1887, as amended August 13, 1888,<sup>3</sup> conferred jurisdiction upon the circuit courts in "cases arising under the constitution and laws of the United States." It is well settled that where the plaintiff holds an office like that of a receiver appointed by the court, or a receiver of a national bank, that the suit involves a federal question, and may be prosecuted in the circuit courts without regard to the citizenship of the parties. This rule was applied under the act of 1867 with reference to assignees.<sup>4</sup> A trustee, being an officer of the court under the present act, would have undoubtedly been entitled to have prosecuted suits in the district courts on this ground, were it not for the restriction contained

<sup>5</sup> *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77.

<sup>1</sup> B. A. 1898, Sec. 23a.

<sup>2</sup> *Bush v. Elliott*, 202 U. S. 477, 50 L. Ed. 1114, 15 Am. B. R. 656.

<sup>3</sup> 25 Stat. at L. 433.

<sup>4</sup> *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 546; *Claffin v. Houseman*, 93 U. S. 130, 23 L. Ed. 833;

*Woolridge v. McKenna*, 8 Fed. Rep. 650; *Payson v. Dietz*, No. 10961 Fed. Cas., 2 Dill. 504; *Atkinson v. Purdy*, No. 616 Fed. Cas., *Crabbe* 551; *Wehl v. Wald*, No. 17356 Fed. Cas., 17 Blatch. 342; *Connor v. Scott*, No. 3119 Fed. Cas., 4 Dill. 242.

in section 23a. As it is, however, the citizenship and the official character of the trustee are immaterial.<sup>5</sup>

If the jurisdiction of the district court is invoked on the ground of diverse citizenship, there must exist a diversity of citizenship as between the bankrupt and the diverse claimants without regard to that of the trustee, and the amount involved must exceed three thousand dollars.<sup>6</sup>

If the jurisdiction of the district court is invoked on the ground that the case is one arising under the Constitution, laws or a treaty of the United States, the citizenship of the parties is immaterial, provided the jurisdictional amount is involved.<sup>7</sup>

It has been held that a bankrupt, who absconds a few days before bankruptcy proceedings are instituted, does not thereby change his citizenship so as to deprive a circuit court for that district of jurisdiction of a suit brought by his trustee to recover property for the bankrupt estate.<sup>8</sup>

The averments of the first pleading must show that all the jurisdictional requisites exist.

#### § 76. Removal from a state court.

A suit which could have been begun in a district court may be removed from a state court into the district court and there tried as if originally begun there.<sup>1</sup>

If the jurisdictional requisites to original jurisdiction do not exist it can not be removed.<sup>2</sup> A trustee or a receiver in

<sup>5</sup> Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 114, 15 Am. B. R. 656.

In *McEldowney v. Card*, 190 Fed. Rep. —, Judge Sanford held that Sec. 23 did not apply to cases between the trustee and a stranger to enforce a contract or agreement between them after the bankruptcy proceeding had been commenced.

<sup>6</sup> Bush v. Elliott, 202 U. S. 477, 50 L. Ed. 114, 15 Am. B. R. 656; *Swofford v. Cornucopia Mines*, 140 Fed. Rep. 957, 15 Am. B. R. 564; *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287, 11 Am. B. R. 563; *Goodier v. Barnes*, 94 Fed. Rep. 798, 2 Am. B. R. 328.

The jurisdictional amount is fixed at \$3,000, by Sec. 24 of the Judicial Code of 1911.

<sup>7</sup> *Reed v. American-German Nat. Bank*, 155 Fed. Rep. 233, 19 Am. B. R. 140.

<sup>8</sup> *Sims v. Union Ass. Soc.*, 129 Fed. Rep. 804.

<sup>1</sup> *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287, 11 Am. B. R. 563.

Secs. 28 to 39, Judicial Code of 1911.

<sup>2</sup> *Swofford v. Cornucopia Mines*, 140 Fed. Rep. 957, 15 Am. B. R. 564; *Goodier v. Barnes*, 94 Fed. Rep. 798, 2 Am. B. R. 328.

bankruptcy can remove a case to a district court on the ground of diversity of citizenship or a federal question only when the amount in controversy, exclusive of interest and costs, exceeds two thousand dollars.<sup>3</sup>

The plaintiff in a suit in a state court can not remove the case. Defendants alone can remove a case to the district court.<sup>4</sup> All the defendants must join to remove a case on the ground of a federal question being involved,<sup>5</sup> or on the ground of diverse citizenship of the parties,<sup>6</sup> except in cases of a separable controversy.<sup>7</sup>

A petition for removal and bond should be filed in the state court, except where the removal is sought on the ground of prejudice or local influence.<sup>8</sup> The petition should be filed in the state court in which the suit is pending within the time allowed the defendant to plead.<sup>9</sup> The time does not begin to run until the case is removable.<sup>10</sup> No notice to adverse parties of filing the petition and bond is necessary.<sup>11</sup>

The petition for removal should state the jurisdictional facts necessary to indicate the ground upon which the defendant seeks a removal. If diverse citizenship is relied upon, the citizenship of each party at the commencement of the suit

<sup>3</sup> *Swofford v. Cornucopia Mines*, 140 Fed. Rep. 957, 15 Am. B. R. 564.

<sup>4</sup> *Texas & Pac. R. Co. v. Cody*, 166 U. S. 606, 41 L. Ed. 1132.

<sup>5</sup> *Chicago, etc., R. Co. v. Martin*, 178 U. S. 245, 44 L. Ed. 1055.

<sup>6</sup> *Fletcher v. Hamlet*, 116 U. S. 408, 29 L. Ed. 679; *Wilson v. Oswego Township*, 151 U. S. 56, 38 L. Ed. 70; *Stone v. South Carolina*, 117 U. S. 430, 29 L. Ed. 962.

<sup>7</sup> *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. Ed. 121; *Thompson v. Chicago, etc., R. Co.*, 60 Fed. Rep. 773; *Western Union Telg. Co. v. Brown*, 32 Fed. Rep. 337; *Smith v. McKay*, 4 Fed. Rep. 353.

<sup>8</sup> *First Nat. Bank v. Prager* (C. C. A. 4th Cir.), 91 Fed. Rep. 689, 34 C. C. A. 51.

For forms of petitions for removal, see Nos. 1274 to 1278, *Loveland's Forms Fed. Prac.*

<sup>9</sup> *Kansas City, etc., R. Co. v. Daughtry*, 138 U. S. 298, 34 L. Ed. 963; *Rock Is. Nat. Bank v. Keator Lumber Co.*, 52 Fed. Rep. 896; *Oliver v. Iowa Cent. R. Co.*, 102 Fed. Rep. 371; *Rio Grande Irrigation, etc., Co. v. Gildersleeve*, 174 U. S. 603, 43 L. Ed. 1103.

<sup>10</sup> *Powers v. C. & O. R. Co.*, 169 U. S. 92, 42 L. Ed. 673.

<sup>11</sup> *Ashe v. Insurance Co.*, 115 Fed. Rep. 234.

should be pleaded.<sup>12</sup> If the defendant relies upon a federal question being involved he must allege that fact. The amount involved should be alleged. The petition regularly prays for the removal of the cause to the district court of the United States for the district in which the suit is pending. It has long been the practice to verify a petition for removal. The statute and the decisions do not require verification of the petition, but it is not improper to do so.

A bond on removal should be filed with the petition.<sup>13</sup> This may be amended as to form,<sup>14</sup> but not as to matters of substance.<sup>15</sup> The bond is essential to make the removal effective.

The filing of a petition for removal with sufficient bond *ipso facto* removes the cause, the jurisdiction of the state court ceases, and that of the circuit court attaches.<sup>16</sup> No order of the state court is necessary. If the allegations of the petition are denied the trial of that issue is in the district court and can not be tried elsewhere.<sup>17</sup>

Where the removal is on account of local prejudice the petition must be filed in the district court and it is safer practice to file in the state court a certified copy of it and the order made by the judge.<sup>18</sup> Notice should be served upon the oppo-

<sup>12</sup> Tracy v. Morel, 99 Fed. Rep. 801.

For forms of petition see Nos. 1274 to 1277 Loveland's Forms of Fed. Prac.

<sup>13</sup> Austin v. Gagan, 39 Fed. Rep. 626; Kaitel v. Wylie, 38 Fed. Rep. 864.

For form of bond, see No. 1279 Loveland's Forms of Fed. Prac.

<sup>14</sup> Harris v. D. L. & W. R. Co., 18 Fed. Rep. 833; Beede v. Cheeney, 5 Fed. Rep. 388; Deford v. Mehaffy, 13 Fed. Rep. 481.

<sup>15</sup> Austin v. Gagan, 39 Fed. Rep. 626; Burdick v. Hale, 7 Biss. 96.

<sup>16</sup> Kern v. Huidekoper, 103 U. S. 485, 26 L. Ed. 354; Steamship Co. v. Tugman, 106 U. S. 118, 27 L. Ed. 87; Railroad Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643.

<sup>17</sup> Stone v. South Carolina, 117 U. S. 430, 29 L. Ed. 962; Carson v. Hyatt, 118 U. S. 279, 30 L. Ed. 167; Crehore v. Ry. Co., 131 U. S. 244, 33 L. Ed. 144.

<sup>18</sup> Malone v. Ry. Co., 35 Fed. Rep. 625; Kaitel v. Wylie, 38 Fed. Rep. 865.

See Nos. 1284 to 1289, Loveland's Forms of Fed. Prac.

site party a reasonable time before the hearing of the petition in the district court.<sup>19</sup>

In all cases of removal a transcript of the record of the state court must be filed in the circuit court. If the state court refuses to certify its record a writ of certiorari may issue out of the circuit court, requiring the state court to send up its record.

When a case has been removed into the federal court it may be necessary to re-form the pleadings to conform to federal practice.<sup>20</sup> This frequently occurs in those states where the distinction between lien and equity has been abolished by statute.

#### **§ 77. Conflict of jurisdiction between a court of bankruptcy and other federal courts.**

The general rule of comity, which exists between the courts of bankruptcy and the state courts, regulates the relations between the courts of bankruptcy and other federal courts.<sup>1</sup>

The old circuit courts of the United States and the courts of admiralty, as well as the courts of bankruptcy, have exercised great caution to prevent a conflict of jurisdiction.<sup>2</sup>

<sup>19</sup> *Ellison v. L. & N. R. Co.* (C. C. A. 6th Cir.), 112 Fed. Rep. 805, 50 C. C. A. 530, where the practice on a petition of this kind is explained at length.

<sup>20</sup> As to the time within which to plead after removal, see *Phenix Insurance Co. v. Charleston Bridge Co.* (C. C. A. 4th Cir.), 65 Fed. Rep. 628, 13 C. C. A. 58; *Torrent v. Lumber Co.*, 37 Fed. Rep. 727; *Wilcox & Gibbs Guano Co. v. Ins. Co.*, 60 Fed. Rep. 929; *Pelzer Mfg. Co. v. Ins. Co.*, 40 Fed. Rep. 185.

As to when repleading is necessary, see *Perkins v. Hendryx*, 23 Fed. Rep. 418; *In re Foley*, 76 Fed. Rep. 390; *Phelps v. Elliott*, 26 Fed. Rep. 881; *Whittenton Mfg. Co. v.*

*Memphis & O. R. Packet Co.*, 19 Fed. Rep. 273; *Wright v. Kentucky, etc., Ry. Co.*, 117 U. S. 72, 29 L. Ed. 821; *Leo v. Union Pac. Ry. Co.*, 17 Fed. Rep. 273.

<sup>1</sup> See Sec. 42, *ante*.

<sup>2</sup> *American Graphophone Co. v. Leeds & Catlin Co.*, 174 Fed. Rep. 158, 23 Am. B. R. 337; *In re Wm. B. Kibbee*, 164 Fed. Rep. 653; *In re Hudson River Elec. Power Co.*, 173 Fed. Rep. 934, 23 Am. B. R. 191; *Nat. Bank v. Hobbs*, 118 Fed. Rep. 626, 9 Am. B. R. 190; *State Bank v. Cox* (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 74 C. C. A. 285, 16 Am. B. R. 32; *In re Hughes*, 170 Fed. Rep. 809, 22 Am. B. R. 303, and 214 U. S. 487.

Where the court of bankruptcy has first acquired jurisdiction of the bankrupt and his estate a circuit court of the United States,<sup>3</sup> and the courts of admiralty,<sup>4</sup> have declined to entertain jurisdiction, which will interfere with the administration in bankruptcy. The court of bankruptcy may yield jurisdiction to a federal court for a special purpose, when it appears that the ends of justice may be better served thereby.<sup>5</sup>

<sup>3</sup> *Bray v. United States Fidelity & Guaranty Co.* (C. C. A. 4th Cir.), 170 Fed. Rep. 689, 96 C. C. A. 9, 22 Am. B. R. 363; *State Bank v. Cox* (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 74 C. C. A. 285, 16 Am. B. R. 32.

In *American Graphophone Co. v. Leeds & Catlin Co.*, 174 Fed. Rep. 158, 23 Am. B. R. 337, Judge Lacombe, speaking for the circuit court, said:

"It is not for this court to say what moneys the receiver shall or shall not pay out. All questions as to priority of claims and as to payment of moneys in the custody of the District Court should be submitted to that court for determination. If the claim be one not provable in bankruptcy, presumably that court will make no provision for its payment. If it be a provable claim, it is equally presumable that whatever funds there may be in the hands of the receiver, over and above the expenses of administering the estate, will be retained, until all provable claims are liquidated and all questions of priority (if any arise) are determined. The whole matter is exclusively in the jurisdiction of the bankruptcy court."

<sup>4</sup> *In re Wm. B. Kibbee*, 164 Fed. Rep. 653.

<sup>5</sup> *In re Hughes*, 170 Fed. Rep.

809, 22 Am. B. R. 303, permission was given to file libels and have the vessels sold by the marshal in admiralty proceedings. In this case Judge Lanning said: "Counsel appeared before the court and vigorously protested against the order authorizing the trustee in bankruptcy to sell the vessels, denied his right to sell free from maritime liens, and insisted upon their right to file libels and have the sales made by the marshal in admiralty proceedings. In view of the statement that there were not less than 60 maritime claims against the vessels—the number now shown is 274—and of the fact that the sales by the trustee would almost certainly be followed by suits in admiralty against the vessels in the hands of the trustee's vendees, and, consequently, by protracted and expensive litigation, the court vacated the order directing the trustee to sell and granted permission for the filing of libels. Libels have been filed against 25 of the vessels, and they have been sold by the marshal, in due course, in admiralty proceedings."

A motion for leave to file a petition for prohibition in this case was denied. *Hudson Oil & Supply Co.*, Petitioner, 214 U. S. 487, 53 L. Ed. 1057; *Frank McWilliams*, Petitioner 214 U. S. 488, 53 L. Ed. 1057.



Where property of a debtor was in the lawful custody of an old circuit court of the United States or a court of admiralty, before proceedings in bankruptcy are instituted, the court of bankruptcy declined to interfere with that possession.\*

\* *In re* Hudson River Elec. Power Co., 173 Fed. Rep. 934, 23 Am. B. R. 191, Judge Ray declined to oust, by an adjudication in bankruptcy, the jurisdiction and control of the circuit court of a receivership suit involving the property of eight corporations. In his opinion he uses this language: "Here we have no conflict between the courts of the United States in bankruptcy and the state courts, where, in such matters, the laws of the United States are paramount, but one between different courts of the United

States, both acting under the Constitution of the United States and the laws of Congress enacted by virtue thereof. It seems to me that a decent respect for the authority of the circuit court demands that the district court, acting as a court of bankruptcy, refrain from recognizing and enforcing acts of parties within its jurisdiction done in violation of the orders of that court."

See also *The Ironsides*, No. 7069 Fed. Cas., 4 Biss. 518; *In re* Wm. B. Kibbee, 164 Fed. Rep. 653.

## CHAPTER VII.

### REFEREES.

SEC.	SEC.
78. The appointment, removal and districts of referees.	89. Power to administer oaths and examine witnesses.
79. Qualifications of referees.	90. No power to commit for contempt.
80. The oath and bond of a referee.	91. Practice and pleadings before the referee.
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82. The administrative duties of referees.	93. Review by the judge.
83. General powers of referees.	94. The petition for review and record.
84. What referees can not do.	95. The hearing and order of judge on review.
85. Power to make an adjudication.	96. Records of referees.
86. The referee and the election of a trustee.	97. Offenses of referees.
87. Power to take possession and release the bankrupt's property.	98. Compensation and expenses of referees.
88. Power to grant injunctions.	

#### § 78. The appointment, removal and districts of referees.

The office of the referee is created by statute.<sup>1</sup> Referees are officers of the courts of bankruptcy. They are appointed within the territorial limits of each court of bankruptcy by the judge of that court.<sup>2</sup>

The number of referees rests in the discretion of the judge.<sup>3</sup> There should be a sufficient number to expeditiously transact the bankruptcy business within each district. The term of office is two years.<sup>4</sup> They are, however, at all times subject to removal by the judge, because their services are not needed, or for other cause.<sup>4</sup>

<sup>1</sup> B. A. 1898, Sec. 33.

<sup>2</sup> B. A. 1898, Sec. 34.

<sup>3</sup> B. A. 1898, Sec. 37; *Bray v. Cobb*, 1 Am. B. R. 153, 91 Fed. Rep. 102.

<sup>4</sup> B. A. 1898, Sec. 34.

*In re Steele*, 156 Fed. 853, 19 Am. B. R. 671; *In re Steele*, 161 Fed. 885, 20 Am. B. R. 445; *Ex parte Steele*, 162 Fed. 694, 20 Am. B. R. 575; *Burch v. Steele* (C. C. A. 5th Cir.), 165 Fed. 577,

21 Am. B. R. 539. These cases present a controversy between two judges for the northern district of Alabama in regard to the appointment and removal of a referee. The circuit court of appeals held that a district judge holding a court of bankruptcy may appoint or remove a referee, although there is another district judge in the same district having equal and concurrent authority.

Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act or may appoint another referee, or another referee holding an appointment under the same court may, by the order of the judge, temporarily fill the vacancy.<sup>5</sup>

A referee ought not to perform any official acts after his term expires and before he has been re-appointed and qualified. Any official act performed after the expiration of his term would be valid on the theory that he is a referee *de facto*.<sup>6</sup>

The court has also authorized to designate and from time to time change the districts of referees, so that each county where the services of a referee are needed may constitute at least one district.<sup>7</sup>

#### § 79. Qualifications of referees.

No person is eligible to be a referee unless he is competent to perform the duties of that office.

Under the act of 1867 no person was eligible for appointment as register unless he was an attorney at law.<sup>8</sup> Although no such restriction is contained in the present statute, judges of some of the districts have publicly announced that no person would be appointed a referee unless he is an attorney. It may be doubted if a person may be considered competent to perform the duties unless he has pursued studies in law and been admitted to practice in a court of record.

No person is eligible for the appointment if he holds any "office of profit or emolument under the laws of the United States or of any state, other than commissioners of deeds,

<sup>5</sup> B. A. 1898, Sec. 43. See *Bray v. Cobb*, 91 Fed. Rep. 102, 1 Am. B. R. 153; *In re Schenectady Eng. & Const. Co.*, 147 Fed. Rep. 868, 17 Am. B. R. 279.

<sup>6</sup> The acts of a justice of the peace or other officer after his official term has expired are valid. *Read v. Buffalo*, 3 Keyes (N. Y.), 447; *Hamlin v. Kassafer*, 15 Ore.

456; *Brown v. Lunt*, 37 Me. 423; *Petersilea v. Stone*, 119 Mass. 465; *Hale v. Bischoff*, 53 Kan. 301.

The acts of a *de facto* judge are valid. *McDowell v. United States*, 159 U. S. 596, 40 L. Ed. 271; *Ball v. United States*, 140 U. S. 118, 35 L. Ed. 377; *In re Manning*, 139 U. S. 504, 35 L. Ed. 264.

<sup>7</sup> B. A. 1898, Sec. 34, clause 2.

<sup>8</sup> R. S. Sec. 4994.

justices of the peace, masters in chancery or notaries public."<sup>9</sup> By profit or emolument is meant "the profit arising from office or employment; that which is received as a compensation for services or which is annexed to the position of office as salary, fees and perquisites."<sup>10</sup> Such are the offices of postmaster,<sup>11</sup> United States surveyor general,<sup>12</sup> inspector of customs,<sup>13</sup> county recorder or county commissioner,<sup>14</sup> or a member of a state legislature.<sup>15</sup> But an employe of an officer or a municipal board, not in fact an officer, although he receives compensation for his services, is not within this prohibition.<sup>16</sup>

No person is eligible for appointment who is related by consanguinity or affinity within the third degree, as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed.\* Every generation in lineal consanguinity constitutes a different degree, reckoning either upwards or downwards. The method of computing the degree of collateral relationship at common law, in the words of Mr. Justice Blackstone, is as follows: "We begin at the common ancestor, and reckon downwards: and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other."<sup>17</sup>

No person is eligible to appointment unless he resides in or has his office in the territorial district for which he is to be appointed.<sup>18</sup>

<sup>9</sup> B. A. 1898, Sec. 35.

<sup>10</sup> Century Dictionary, subject, Emolument; Standard Dictionary, subject, Emolument; Webster's Dictionary, subject, Emolument; Apple v. Crawford Co., 105 Pa. St. 300.

<sup>11</sup> McGregor v. Balch, 14 Vt. 428.

<sup>12</sup> People v. Whitman, 10 Cal. 38.

<sup>13</sup> Crawford v. Dunbar, 52 Cal. 36.

<sup>14</sup> Dailey v. State, 8 Blackf. (Ind.) 329.

<sup>15</sup> State v. Valle, 41 Iowa 29.

<sup>16</sup> *In re Greve* (So. Dist. of Ohio not reported), Judge Thompson held that a clerk of the Board of Sinking Fund Trustees of Cincinnati was not an officer and that such clerk could also serve as referee.

\*B. A. 1898, Sec. 35.

<sup>17</sup> 2 Black. Com. 206. Coke on Litt. 23; 3 Washburn on Real Property, star p. 406; McDowell v. Adams, 45 Penn. St. 432.

<sup>18</sup> B. A. 1898, Sec. 35.

**§ 80. The oath and bond of a referee.**

The referee must take the same oath of office as that prescribed for the judges of the United States courts.<sup>19</sup>

Before entering upon the duties of his office every referee must enter into a bond to the United States in such sum as shall be fixed by the court, not to exceed \$5,000, conditioned for the faithful performance of his official duty.<sup>20</sup> The court fixes the time within which the bond is to be given and approves the sureties. If a referee fails to give bond within such time he is deemed to have declined the appointment and there is a vacancy in his office.<sup>21</sup>

There must be at least two sureties upon each bond, each of whom must qualify in a sum equal at least to the amount of the bond.<sup>22</sup> Corporations organized for the purpose of becoming sureties on bonds, or authorized by law to do so, may be accepted as sureties.<sup>23</sup> The court must require evidence as to the actual value of the property of sureties, and all sureties must be approved by the court.<sup>24</sup>

Such bonds are filed of record in the office of the clerk.<sup>25</sup> They may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.<sup>26</sup> Such suits must be brought within two years after the alleged breach of the bond.<sup>26</sup>

**§ 81. Territorial jurisdiction of referees.**

The court of bankruptcy defines the district of the referees and may change the same from time to time.<sup>27</sup> The statute provides that each county, where the services of a referee are needed, may constitute at least one district.<sup>28</sup>

The referee is required by law to be a resident of, or have his office in, the territorial district for which he is appointed.<sup>29</sup>

<sup>19</sup> B. A. 1898, Sec. 36, Form No. 33; R. S. Sec. 712; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 181.

<sup>20</sup> B. A. 1898, Sec. 50a.

<sup>21</sup> B. A. 1898, Sec. 50k.

<sup>22</sup> B. A. 1898, Sec. 50e and f.

<sup>23</sup> B. A. 1898, Sec. 50g.

<sup>24</sup> B. A. 1898, Sec. 50a, d.

<sup>25</sup> B. A. 1898, Sec. 50h.

<sup>26</sup> B. A. 1898, Sec. 50i.

<sup>27</sup> B. A. 1898, Sec. 34a, clause 2.

<sup>28</sup> B. A. 1898, Sec. 34a, clause 2.

<sup>29</sup> B. A. 1898, Sec. 35a, clause 4.

Jurisdiction is conferred upon referees "within the limits of their districts as established from time to time."<sup>80</sup> The territorial jurisdiction of a referee is limited to the county or district for which he is appointed. The statute contemplates that the referee shall make his orders and perform his official duties within his district and not outside of it.

A referee may be specially designated by the judge to temporarily fill a vacancy in another county or district within the jurisdiction of the court, whenever the office of the referee is vacant or the referee is absent or disqualified to act.<sup>81</sup> The court can not refer a case to a referee outside of the judicial district in which the case is pending.<sup>82</sup> Whenever a referee is designated to fill a vacancy in another county or district his jurisdiction in that case is limited by that county or district.

### § 82. The administrative duties of referees.

In addition to his judicial duties, the statute enumerates certain administrative duties of the referee.

It provides,<sup>83</sup> that referees shall

*First*, declare dividends and prepare and deliver to trustees dividend sheets, showing the dividends declared and to whom payable;

*Second*, examine all schedules of property and lists of creditors filed by bankrupts, and cause such as are incomplete or defective to be amended;<sup>84</sup>

*Third*, furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest. This does not include furnishing copies of proceedings pending before them;<sup>85</sup>

*Fourth*, give notices to creditors as provided by the statute;<sup>86</sup>

<sup>80</sup> B. A. 1898, Sec. 38a.

<sup>81</sup> B. A. 1898, Sec. 43. *Bray v. Cobb*, 91 Fed. Rep. 102, 1 Am. B. R. 153.

<sup>82</sup> *In re Schenectady Eng. & Const. Co.*, 147 Fed. Rep. 868, 17 Am. B. R. 279.

<sup>83</sup> B. A. 1898, Sec. 39a.

<sup>84</sup> *In re Mackey*, (Ref. op.) 1 Am. B. R. 593. See Sec. 180, *post*.

<sup>85</sup> *In re Lewin*, 103 Fed. Rep. 850, 4 Am. B. R. 632.

<sup>86</sup> B. A. 1898, Sec. 58a, provides that "creditors shall have at least ten days' notice by mail, to their respective addresses as they appear

*Fifth*, make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges;

*Sixth*, prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse or neglect to do so;<sup>87</sup>

*Seventh*, safely keep, perfect and transmit to the clerks the records herein required to be kept by them, when the cases are concluded;

*Eighth*, transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it is impracticable to transmit the original papers, transmit certified copies thereof by mail;

*Ninth*, upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance;<sup>88</sup> and

*Tenth*, whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined

and passed upon; (7) the proposed compromise of any controversy; (8) the proposed dismissal of the proceedings, and (9) there shall be thirty days' notice of all applications for the discharge of bankrupts.

<sup>87</sup> See Gen. Ord. 9; *In re Schiller*, 96 Fed. Rep. 400, 2 Am. B. R. 704.

<sup>88</sup> *In re Rozinsky*, 101 Fed. Rep. 229, 3 Am. B. R. 830; *In re Todd*, 109 Fed. Rep. 265, 6 Am. B. R. 88.

All notices are given by the referee, unless otherwise ordered by the judge.<sup>39</sup> In sending notices the referee is entitled to use an official penalty envelope, and need not pay postage.<sup>40</sup>

A penalty envelope for conducting the official business by a referee may be in the following form:

<p><b>JOHN DOE,</b></p> <p><i>Referee in Bankruptcy,</i></p> <p><b>CINCINNATI, O.</b></p>	<p><b>DEPARTMENT OF JUSTICE.</b></p> <p><b>OFFICIAL BUSINESS.</b></p> <p><b>Penalty for Private Use, \$300.</b></p>
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**§ 83. General powers of referees.**

The function of a referee is chiefly judicial in its nature.<sup>41</sup> Referees are appointed for the purpose of assisting the judge of the court of bankruptcy in the performance of his duties.

<sup>39</sup> B. A. 1898, Sec. 58c.

<sup>40</sup> Post Office Department, First Assistant Postmaster-General, Division of Correspondence, Washington, August 6, 1898.  
Postmaster, Cincinnati, O.

Sir:—Your letter of August 1, addressed to the Assistant Attorney-General for the Post Office Department, has been referred to this office for reply. Answering your inquiry you are advised that a referee in bankruptcy, appointed by the Court in Bankruptcy, is entitled to make use of the official penalty envelope,

for conducting the official business, for which he is appointed.

Very respectfully,  
Geo. M. Allen, Acting First Assistant Postmaster-General.

<sup>41</sup> B. A. 1898, Sec. 38.

In *White v. Schloerb*, 178 U. S. 542, 546, 44 L. Ed. 1183, 4 Am. B. R. 178, the court said: "Referees in bankruptcy are appointed by the court of bankruptcy, and take the same oath of office as judges of United States courts, each case in bankruptcy is referred by the court of bankruptcy to a referee, and he



The referee has the same power generally as the judge has in the performance of his judicial duties under the bankruptcy act, subject to a few exceptions to be noted presently.<sup>42</sup>

Referees are given power to act in bankruptcy proceedings proper. Although the statute confers on the district court, as a court of bankruptcy, jurisdiction of proceedings in bankruptcy proper, and also, as an ordinary court, jurisdiction of suits at law and in equity,<sup>43</sup> it limits the jurisdiction of the referees to the bankruptcy proceedings proper. They have no jurisdiction of plenary suits at law or in equity arising out of the settlement of insolvent estates.<sup>44</sup>

The referee has power to act only by virtue of a reference by the judge or the clerk of the court of bankruptcy.

The clerk is required to refer a petition in case the judge is absent from the district or the division of the district.<sup>45</sup> A voluntary petition should be referred immediately,<sup>46</sup> an involuntary petition on the next day after the last day on which pleadings may be filed.<sup>47</sup> Such references are general in their nature.

The judge, after an adjudication, may refer the case generally to a referee or specially with only limited authority to act in the premises or to consider and report upon specified issues.<sup>48</sup> The power of the referee in such cases depends upon the order of reference.

exercises much of the judicial authority of that court."

*In re Simon & Sternberg*, 151 Fed. Rep. 507, 18 Am. B. R. 205, the court said: "The referee is a court, and a court of very great importance in the administration of bankrupt assets and the determination of conflicting rights arising thereunder."

*In re McIntyre*, 142 Fed. Rep. 593, 16 Am. B. R. 85, the court said: "Referees in their hearings within the scope of their powers are clothed with the authority of judges."

<sup>42</sup> See Sec. 84.

<sup>43</sup> See Sec. 26, *ante*.

<sup>44</sup> *In re Scherber*, 131 Fed. Rep. 121, 12 Am. B. R. 616; *In re Steuer*, 104 Fed. Rep. 979, 5 Am. B. R. 209; *In re Grahs* (Ref. op.) 1 Am. B. R. 465; *In re Goldberg* (Ref. op.), 1 Am. B. R. 385; *In re Hayden*, 172 Fed. Rep. 623, 22 Am. B. R. 764.

<sup>45</sup> B. A. 1898, Sec. 18f and g. Official Form No. 15, Form No. 32, *post*. *In re Humbert Co.*, 100 Fed. Rep. 439, 4 Am. B. R. 76.

<sup>46</sup> B. A. 1898, Sec. 18g.

<sup>47</sup> B. A. 1898, Sec. 18f.

<sup>48</sup> B. A. 1898, Sec. 22; *In re Russ*, 164 Fed. Rep. 749, 21 Am. B. R. 257.

The reference is regularly made to the referee in whose district the bankrupt lives or does business, but the judge is not required to do so. He may refer the case to any referee within the territorial jurisdiction of the court, if the convenience of the parties in interest will be served thereby, or for cause or if the bankrupt does not do business, reside or have his domicile in the district;<sup>49</sup> or for the convenience of parties or for cause he may transfer a case from one referee to another within the same district.<sup>50</sup>

After a case has been referred to a referee all proceedings thereafter, except such as are required by the statute or general orders to be had before the judge, are had before the referee.<sup>51</sup> The time when and the place where the referee shall act upon the matters arising under the several cases referred to him are fixed by special order of the judge, or by the referee, and at such times and places the referees may perform the duties which they are empowered by the act to perform.<sup>52</sup> This includes the power to appoint a receiver,<sup>53</sup> to order sale of property of the bankrupt free from liens,<sup>54</sup> to appoint appraisers of such property,<sup>55</sup> to marshal lien on property in the custody of the court and to determine their validity and priority,<sup>56</sup> including intervening petitions of ad-

<sup>49</sup> B. A. 1898, Sec. 22. *In re* Western Inv. Co., 170 Fed. Rep. 677, 21 Am. B. R. 367.

<sup>50</sup> B. A. 1898, Sec. 22b. *In re* Schnectady Eng. & Const. Co., 147 Fed. Rep. 868.

<sup>51</sup> Gen. Ords. 12 and 20. B. A. 1898, Sec. 38, clause 4.

<sup>52</sup> Gen. Ords. 12 and 20. B. A. 1898, Sec. 38, clause 4.

<sup>53</sup> *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re* Florcken, 107 Fed. Rep. 241, 5 Am. B. R. 802; See Sec. 87, *post*.

<sup>54</sup> *In re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424; *In re* Sanborn, 96 Fed. Rep. 551, 3 Am. B. R. 54; *In re* Matthews, 109 Fed. Rep. 603, 6

Am. B. R. 99; *In re* Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 368. *In re* Waterloo Organ Co., 118 Fed. Rep. 904, 9 Am. B. R. 427; *In re* Granite City Bank (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 14 Am. B. R. 404; *In re* Miners' Brewing Co., 162 Fed. Rep. 327, 20 Am. B. R. 717.

<sup>55</sup> *In re* Fisher & Co., 135 Fed. Rep. 223, 14 Am. B. R. 368; *In re* Styer, 98 Fed. Rep. 290, 3 Am. B. R. 424.

<sup>56</sup> *In re* Kellogg (C. C. A. 2nd Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7; *In re* Tilden, 91 Fed. Rep. 501, 1 Am. B. R. 302.

verse claimants,<sup>57</sup> to tax costs,<sup>58</sup> to allow attorneys fees,<sup>59</sup> to summon witnesses for examination,<sup>60</sup> to order the bankrupt or his agent, but not an adverse claimant,<sup>60\*</sup> to surrender property to the trustee,<sup>61</sup> to order the return of property unlawfully taken from the custody of the court of bankruptcy,<sup>62</sup> and generally to make orders relating to the administration of the estate of the bankrupt.

#### § 84. What referees cannot do.

The statute provides that the word "court" when used in the statute may include the referee and that the word "judge" excludes the referee.<sup>63</sup> Consequently the referee has no power to perform those duties which are imposed by the act on the judge alone.

They are, *first*, to issue a warrant to the marshal against the bankrupt to compel his immediate examination or detention upon satisfactory proof that the bankrupt is about to leave the district;<sup>64</sup>

*Second*, to confirm or set aside compositions and order distribution of the consideration;<sup>65</sup>

*Third*, to extend the time for filing a petition for his discharge by the bankrupt, to hear applications for a discharge,

<sup>57</sup> *In re Drayton*, 135 Fed. Rep. 883, 13 Am. B. R. 602.

<sup>58</sup> *In re Scott* (Ref. op.) 7 Am. B. R. 710.

<sup>59</sup> *In re Stotts*, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re Tcho*, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re Dreeben*, 101 Fed. Rep. 110, 4 Am. B. R. 146.

<sup>60</sup> *In re The Abbey Press* (C. C. A. 2nd Cir.), 134 Fed. Rep. 51, 67 C. C. A. 161, 13 Am. B. R. 11; *In re Johnson & Knox Lumber Co.* (C. C. A. 7th Cir.), 151 Fed. Rep. 207, 80 C. C. A. 259, 18 Am. B. R. 50.

<sup>60\*</sup> *In re Hayden*, 172 Fed. Rep. 623, 22 Am. B. R. 764.

<sup>61</sup> *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224;

*In re Miller*, 105 Fed. Rep. 57, 5 Am. B. R. 184; *In re Oliver*, 96 Fed. Rep. 85, 2 Am. B. R. 783; *In re Rosser*, 101 Fed. Rep. 462, 4 Am. B. R. 153.

<sup>62</sup> *White v. Schloerb*, 178 U. S. 545, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Huddleston* (Ref. op.) 1 Am. B. R. 572; *Knapp & Spencer Co. v. Drew* (C. C. A. 8th Cir.), 160 Fed. Rep. 413, 87 C. C. A. 365, 20 Am. B. R. 355.

<sup>63</sup> B. A. 1898, Sec. 1, cl. 7 and 16.

<sup>64</sup> B. A. 1898, Sec. 9, cl. b, and Sec. 38, cl. 4. See Sec. 637, *post*.

<sup>65</sup> B. A. 1898, Sec. 12d and Sec. 13a; Gen. Ord. 12, cl. 3. As to hearing objections and confirming compositions, see Secs. 699 and 700, *post*.

to refuse or grant the same, and to revoke discharges once granted;<sup>66</sup>

*Fourth*, to determine the issues presented whenever the facts alleged in a petition for involuntary bankruptcy are controverted by either the bankrupt or his creditors;<sup>67</sup>

*Fifth*, to punish or commit persons who have disobeyed the orders or process of courts of bankruptcy or misbehaved during a hearing, even though the contempt be with reference to the process or orders of, or in the presence of the referee who can only certify the facts to the judge for his action;<sup>68</sup>

*Sixth*, to refer causes after adjudication either generally or specifically to a referee, and transfer causes from one referee to another;<sup>69</sup> and,

*Seventh*, to order notices to creditors to be given otherwise than by the referee.<sup>70</sup>

The referee should not collect the estate of the bankrupt nor issue subpoenas; these should be done by the trustee and clerk respectively.<sup>71</sup>

There are also certain powers ordinarily to be exercised by the judge, but which are to be exercised by the referee only when the judge is absent from the division of the district in which the proceedings are pending and they are referred or certified by the clerk to the referee. These are: *first*, to make adjudications on voluntary and on uncontested involuntary petitions;<sup>72</sup> and, *second*, to take possession of the bankrupt's property pending the adjudication and release it.<sup>73</sup> This last power may be exercised by the referee also on certification of the judge's illness or inability to act,<sup>73</sup> but adjudications can

<sup>66</sup> B. A. 1898, Secs. 14 and 15, and Sec. 38, cl. 4; Gen. Ord. 12 cl. 3. *In re Johnson*, 158 Fed. Rep. 342, 19 Am. B. R. 814.

As to hearing an application for a discharge, see Secs. 734 and 740, *post*.

<sup>67</sup> B. A. 1898, Sec. 18*d*. See Secs. 237 and 238, *post*.

<sup>68</sup> B. A. 1898, Sec. 41*b*, and see "Proceedings in Contempt." Chap. XXXIV; *Smith v. Belford* (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 45 C. C. A. 526, 5 Am. B. R. 291.

<sup>69</sup> B. A. 1898, Sec. 22. See Secs. 169 and 246, *post*.

<sup>70</sup> B. A. 1898, Sec. 58*c*.

<sup>71</sup> *In re Pierce*, 111 Fed. Rep. 516, 6 Am. B. R. 747.

<sup>72</sup> B. A. 1898, Sec. 18*c*, *b* and *g*, and Sec. 38, cl. 1, and "Power to make an adjudication;" Sec. 85, *post*.

<sup>73</sup> B. A. 1898, Secs. 69 and 38, cl. 3; and "Power to take possession, etc.;" Sec. 87, *post*.

only be made in cases of the judge's absence. A referee has no power to dismiss a petition in bankruptcy after an adjudication and reference.<sup>76</sup>

Where the bankrupt has not made a deposit for the fees of the clerk, referee and trustee, the judge may order these fees paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.<sup>74</sup> There is no law or rule authorizing a referee to make such an order.<sup>75</sup>

### § 85. Power to make an adjudication.

Every referee within his own district has power to consider any petition referred to him by the clerk and make an adjudication or dismiss the petition.<sup>77</sup> This includes petitions in involuntary as well as in voluntary bankruptcy.

It is regularly the duty of the judge to consider the petition and make the adjudication or dismiss the proceedings.<sup>78</sup> Whenever the judge is absent from the district, or the division of the district in which the petition is filed, it is the duty of the clerk to refer the petition, in either voluntary or involuntary bankruptcy, to the referee for adjudication.<sup>79</sup> Unless so referred to him by the clerk the referee can not consider the petition or make the adjudication. His action in such case is subject to review by the judge.<sup>80</sup>

When there is a reference by the clerk of a petition it may be considered in the nature of a default. The consideration necessary is probably the same as that required in taking a de-

<sup>76</sup> *In re Elby*, 157 Fed. Rep. 935, 19 Am. B. R. 734.

<sup>74</sup> Gen. Ord. 35, par. 4; *In re Plimpton*, 103 Fed. Rep. 775.

<sup>75</sup> *In re Plimpton*, 103 Fed. Rep. 775, 4 Am. B. R. 614.

<sup>77</sup> B. A. 1898, Sec. 38, clause 1. Official Forms Nos. 11 and 12, see Forms Nos. 28 and 29, *post*.

<sup>78</sup> B. A. 1898, Sec. 2, clause 1. Official Forms Nos. 11 and 12, see Forms Nos. 28 and 29, *post*. *In re Elby*, 157 Fed. Rep. 935, 19 Am. B. R. 734.

<sup>79</sup> B. A. 1898, Sec. 18, clauses f and g. *In re Elby*, 157 Fed. Rep. 935, 19 Am. B. R. 734.

<sup>80</sup> B. A. 1898, Sec. 38a. Gen. Ord. 27.

cree *pro confesso*. The matter of the petition ought to be opened and explained to the referee so that he may see that a proper case of bankruptcy is made. It is not necessary that he should hear evidence in addition to the affidavit attached to the petition. If such a proper case is made by the petition it is the duty of the referee to adjudge the person a bankrupt. The case then proceeds as though the adjudication had been made by the judge.

### § 86. The referee and the election of a trustee.

The referee regularly presides at the first meeting of creditors,<sup>81</sup> at which time one or three trustees are elected.<sup>82</sup> The duties of the referee as presiding officer are of a judicial character. The referee presides at this meeting in the same manner and in the same sense that a judge presides over his court.

The referee should not interfere with or influence the choice of a trustee by the creditors. The policy of the bankrupt law is to give the creditors of a bankrupt a free, deliberate, unbiased choice in the first instance of the person, who is to take the assets and manage them.<sup>83</sup> He should not permit improper means or undue influence on the part of bankrupt or any class of creditors. Where such means are employed, or where the voters are not entitled to vote, the referee may reject the vote and disapprove the election.<sup>84</sup> The referee has power to reject improper votes,<sup>85</sup> he can not set aside the election for such reasons, but may merely refuse to confirm it and report his refusal to the judge, who alone can remove the trustee elected.<sup>86</sup>

<sup>81</sup> B. A. 1898, Sec. 55b.

<sup>82</sup> B. A. 1898, Sec. 44.

<sup>83</sup> *In re Smith*, No. 12971, Fed. Cas., 2 Ben. 113.

<sup>84</sup> *In re McGill* (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re Henschel* (C. C. A. 2nd Cir.), 113 Fed. Rep. 443, 51 C. C. A. 277, 17 Am. B. R. 662; *In re Rekersdres*, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re*

*Dayville Woolen Co.*, 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re Morton*, 118 Fed. Rep. 908, 9 Am. B. R. 508; *In re Eastlack*, 145 Fed. Rep. 68, 16 Am. B. R. 529.

<sup>85</sup> *In re McGill* (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re Malino*, 118 Fed. Rep. 368, 8 Am. B. R. 205.

<sup>86</sup> Gen. Ord. 13. *In re Hare*, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In*

It is his duty to prepare a list of debts proved at the meeting,<sup>87</sup> and to notify the trustee of his appointment and the penal sum of his bond.<sup>88</sup> He regularly approves the bond of the trustee.<sup>89</sup>

In the absence of the appointment of a trustee by the creditors, the referee may appoint the trustee,<sup>90</sup> but he should do so only after the creditors have had full opportunity to elect one and have failed to do so.<sup>91</sup> If there are any assets, although exempt by law, a trustee should be appointed although no creditor appears to prove a claim.

Where there are no assets the referee may, in his discretion, order that no trustee be appointed.<sup>92</sup> If it shall subsequently be deemed advisable a trustee may be appointed.<sup>93</sup>

### **§ 87. Power to take possession and release the bankrupt's property.**

It is properly within the province of the judge to take possession and release the property of the debtor by or against whom a petition is filed.

The referee is clothed with this power, provided the clerk issues a certificate showing the absence of the judge from the judicial district or the division of the district, or his sickness or inability to act.<sup>94</sup> This language evidently means that the

*re* Mackellar, 116 Fed. Rep. 547, 8 Am. B. R. 669.

But see *In re* Rekersdres, 108 Fed. Rep. 206, 5 Am. B. R. 811.

<sup>87</sup> Official Form No. 19. See Form No. 38, *post*.

<sup>88</sup> Gen. Ord. 16; Official Form No. 24. See Form No. 43, *post*.

<sup>89</sup> Official Form No. 26. See Form No. 45, *post*.

<sup>90</sup> B. A. 1898, Sec. 44; Official Form No. 23, see Form No. 42, *post*; *In re* Mackellar, 116 Fed. Rep. 547, 8 Am. B. R. 669; *In re* Nice & Schreiber, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R.

158; *In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162; *In re* Brooke, 100 Fed. Rep. 432, 4 Am. B. R. 50; *In re* Richards, 103 Fed. Rep. 849, 4 Am. B. R. 631.

<sup>91</sup> *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 199; *In re* Nice & Schreiber, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re* Mackellar, 116 Fed. Rep. 547, 8 Am. B. R. 669.

<sup>92</sup> *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190; *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

<sup>93</sup> *Clark v. Pidcock* (C. C. A. 3rd Cir.), 129 Fed. Rep. 745, 64 C. C. A. 273, 12 Am. B. R. 315.

<sup>94</sup> B. A. 1898, Sec. 38, clause 3. See also B. A. 1898 Sec. 69.

referee has the same power to act in cases properly referred to him as the judge has when no reference is made. The referee has no authority to take possession of or release the property under any other circumstances.

The referee may appoint a receiver or the marshal, upon application of parties in interest, in case it shall be necessary for the preservation of the estate, to take charge of the property of the bankrupt at any time after the filing of the petition and until it is dismissed or the trustee is qualified,<sup>95</sup> or where an estate is opened pending a hearing to set aside a composition.<sup>95\*</sup> If necessary for the best interest of the estates, the referee may authorize the business of the bankrupt to be conducted for a limited period by a receiver, the marshal or the trustee.<sup>96</sup>

In case it becomes necessary to take possession of the property after the petition is filed and before an adjudication, a warrant may issue to the marshal to seize and hold the property subject to further orders.<sup>97</sup> In such cases an indemnity bond, in such an amount as the referee shall fix, with such sureties as he shall approve, is required. Such property may be released upon the bankrupt giving a bond in such sum and with such sureties as the referee may approve. In case the petition is dismissed the referee has power to release the property. After the adjudication the referee may direct a receiver appointed by him or a marshal to take possession of the property before the trustee is appointed. In such case no bond is required.

It should be observed, however, that the referee has power to act only in the absence of the judge, or his sickness, or dis-

<sup>95</sup> B. A. 1898, Sec. 2, clause 3, and Sec. 38, clause 4.

*In re Maher* (not reported), at Cincinnati, Referee Waite appointed a receiver of a stable of horses on the application of a voluntary bankrupt, who was unable to obtain hay and grain to feed them. The receiver was in possession until a trustee was appointed.

Where the property is of a perishable nature, see *In re Vila*, No. 16941, Fed. Cas., 5 Law Rep. 17; Gen. Ord. 18.

<sup>95\*</sup> *In re Sonnabend* (Ref. op.), 18 Am. B. R. 117.

<sup>96</sup> B. A. 1898, Sec. 2, clause 5, and Sec. 38, clause 4.

<sup>97</sup> B. A. 1898, Sec. 38, clause 3, and Sec. 69.



ability to act. If any person refuses to obey a proper order of the referee the court may enforce it by an order of attachment for contempt.<sup>98</sup> The referee may also have the property insured by the direction of the judge.<sup>99</sup>

As soon as a trustee is appointed and qualified he is vested by law with the title to the bankrupt's property as of the date of the adjudication, except property exempt by law,<sup>1</sup> and is entitled to the possession of the property. The bankrupt regularly surrenders possession of his property to the trustee. If the bankrupt does not turn over his property to his trustee the referee has power to order him to do so.<sup>2</sup>

### § 88. Power to grant injunctions.

The referee is authorized to grant injunctions, except "to stay proceedings of a court or officer of the United States or of a state."<sup>3</sup>

The statute confers on the referee jurisdiction to perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by the act conferred on "courts of bankruptcy and as shall be prescribed by rules or orders."<sup>4</sup> If no general order or rule of court limited the power of a referee in this respect he would be authorized, under the general power conferred on him by the bankrupt act, to grant any injunction that a court of bankruptcy might grant.

The general orders of the supreme court have limited the power of the referee in this respect by providing that applications "for an injunction to stay proceedings of a court or officer of the United States or of a state shall be heard and decided by the judge."<sup>5</sup> This provision is not modeled upon any

<sup>98</sup> See Secs. 632 and 670, *post*.  
*In re Speyer*, 42 How. Prac. 397;  
*In re Kempner*, No. 7689, Fed. Cas.,  
6 B. R. 521.

<sup>99</sup> *In re Carow*, 41 How. Prac.  
112.

<sup>1</sup> B. A. 1898, Sec. 70.

<sup>2</sup> *In re Tudor*, 96 Fed. Rep. 942.

2 Am. B. R. 808. See Sec. 670,  
*post*.

<sup>3</sup> B. A. 1898, Sec. 38, clause 4.  
Gen. Ord. No. 12, clause 3. *In re*  
*Berkowitz*, 143 Fed. Rep. 598, 16  
Am. B. R. 251.

<sup>4</sup> B. A. 1898, Sec. 38, clause 4.

<sup>5</sup> Gen. Ord. No. 12, clause 3.

rule or order promulgated under any previous bankrupt act. The power of the supreme court to thus limit the power of a referee can not be questioned.<sup>6</sup>

It is only in bankruptcy cases that any federal court can enjoin a proceeding in a state court.<sup>7</sup> The propriety of confiding to the judge alone the right to exercise this extraordinary power is in accord with the rule of comity which should be observed between the court of bankruptcy and the state courts.

Under the present act a referee may exercise jurisdiction to grant restraining orders and injunctions, except as limited by General Order No. 12, clause 3, or rule of court not in conflict with the statute or general orders.<sup>8</sup> He may grant injunctions restraining any party not an officer of the United States or of a state, unless the injunction has the effect to stay the proceeding of a court.<sup>9</sup>

If a restraining order or injunction is granted by the referee, copy of the order is regularly served upon the person to be restrained. If an injunction is issued it must be issued by the clerk of the court.<sup>10</sup>

#### § 89. Power to administer oaths and examine witnesses.

Referees are authorized to exercise the powers vested in courts of bankruptcy for the administration of oaths to and the examination of persons as witnesses, and for requiring the production of documents in proceedings before them, except the power of commitment.<sup>11</sup>

<sup>6</sup> B. A. 1898, Secs. 30 to 38, clause 4. *In re Berkowitz*, 143 Fed. Rep. 598, 16 Am. B. R. 251; *In re Siebert*, 133 Fed. Rep. 781, 13 Am. B. R. 348.

<sup>7</sup> R. S. Sec. 720. As to the power to stay suits in state courts, see Sec. 49, *ante*.

<sup>8</sup> *In re Siebert*, 133 Fed. Rep. 781, 13 Am. B. R. 348; and *In re Berkowitz*, 173 Fed. Rep. 1013, 16 Am. B. R. 251, Judge Lanning construes the rule of the district court of New Jersey.

<sup>9</sup> *In re Steuer*, 104 Fed. Rep. 976, 980, 5 Am. B. R. 209, 214; *In re Berkowitz*, 143 Fed. Rep. 598, 16 Am. B. R. 251; *In re Berkowitz*, 173 Fed. Rep. 1013, 16 Am. B. R. 251; *In re Martin*, 105 Fed. Rep. 753, 5 Am. B. R. 423; *In re Adams*, 134 Fed. Rep. 142, 14 Am. B. R. 23. In *In re Benjamin*, 140 Fed. Rep. 320, 15 Am. B. R. 355, an injunction by referee was sustained.

<sup>10</sup> R. S. Secs. 911 and 912.

<sup>11</sup> B. A. 1898, Sec. 38, clause 2.

The referee is given power to administer the oaths required by the bankrupt act in all cases except upon hearings in court.<sup>12</sup>

Under these provisions the referee is empowered to take evidence with reference to questions pending before him, and to summon witnesses for the purpose of examining them. The subpoena must be duly issued by the clerk of the court of bankruptcy and not by the referee.<sup>13</sup> Subpoenas for witnesses may run into another district, provided no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fees for one day's attendance shall be first paid or tendered to him.<sup>14</sup>

Generally any witness competent to testify in a court of bankruptcy may be compelled by subpoena to appear and bring with him documents and papers mentioned in the subpoena. It, however, may be doubted if the referee has power to compel a trustee to appear as a witness or to produce documents.<sup>15</sup> The court in proper cases may call the trustee to an account, but whether the referee has a supervisory power of this character may be questioned.

The referee is authorized, upon the application of the trustee, to employ a stenographer at the expense of the estate, at a compensation not to exceed ten cents per folio for reporting and transcribing proceedings before him.<sup>16</sup> He may, when necessary, employ a clerk, whose hire will be paid as part of the cost of administration.<sup>17</sup>

<sup>12</sup> B. A. 1898, Sec. 20, clause 1.

<sup>13</sup> Gen. Ord. 3; R. S. Secs. 911 and 912; *In re Pierce* 111 Fed. Rep. 516, 6 Am. B. R. 747.

<sup>14</sup> B. A. 1898, Sec. 41a; R. S. Sec. 876; *In re Hemstreet*, 117 Fed. Rep. 568, 8 Am. B. R. 760; *In re Cole*, 133 Fed. Rep. 414, 13 Am. B. R. 300; *In re Kerber*, 125 Fed. Rep. 653, 10 Am. B. R. 747; *In re Woodward*, No. 18000, Fed. Cas., 12 N. B. R. 297.

<sup>15</sup> *In re Hicks*, 2 Fed. Rep. 651; but see B. A. 1898, Sec. 49.

<sup>16</sup> B. A. 1898, Sec. 38, clause 5; *In re Rozinsky*, 101 Fed. Rep. 229, 3 Am. B. R. 830; as to taxing such fees as costs see *In re Todd*, 109 Fed. Rep. 265, 6 Am. B. R. 88.

<sup>17</sup> *In re Pierce*, 111 Fed. Rep. 516, 5 Am. B. R. 747; *In re Tebo*, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re Todd*, 109 Fed. Rep. 265, 6 Am. B. R. 88.

The examination of witnesses before the referee<sup>18</sup> may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee must be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee.

The referee has no power to exclude evidence offered, although he may decide it to be incompetent, immaterial and irrelevant.<sup>19</sup> He must note upon the deposition any question objected to, with his decision thereon, and the court has power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

**§ 90. No power to commit for contempt.**

The referee has no power to punish for contempt committed in proceedings before him.<sup>20</sup>

Where a person, in proceedings before a referee, disobeys or resists any lawful order or process or writ, misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent documents, or refuses to appear after having been properly summoned, or upon hearing refuses to take an oath as witness, or, having taken the oath, refuses to

<sup>18</sup> Gen. Ord. 22; B. A. 1898, Sec. 39, clause 9. See also Examinations, Sec. 607, *post*.

*In re Sturgeon* (C. C. A. 2nd Cir.), 139 Fed. Rep. 608, 71 C. C. A. 592, 14 Am. B. R. 681; *Bank of Ravenswood v. Johnson* (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 74 C. C. A. 597, 16 Am. B. R. 206; *In re Romine*, 138 Fed. Rep. 837, 14 Am. B. R. 785; *In re Lipset*, 119 Fed. Rep. 379, 9 Am. B. R. 32.

But see *In re Wilde's Sons*, 131 Fed. Rep. 142, 11 Am. B. R. 714.

<sup>19</sup> *First Nat. Bank v. Abbott* (C. C. A. 8th Cir.), 165 Fed. Rep. 852, 91 C. C. A. 538, 21 Am. B. R. 436; *Missouri-American Elec. Co. v. Hamilton-Brown* (C. C. A. 8th Cir.), 165 Fed. Rep. 283, 91 C. C. A. 251, 21 Am. B. R. 270.

<sup>20</sup> *Smith v. Belford* (C. C. A. 6th Cir.), 106 Fed. Rep. 658, 45 C. C. A. 526, 5 Am. B. R. 291. See Sec. 669, *post*.

be examined according to law,<sup>21</sup> proceedings must be taken in the court of bankruptcy for commitment.

In such cases the referee certifies the facts to the judge. The judge, in a summary manner, hears the evidence as to the acts complained of and makes such orders, and decrees such punishment as he would had the contempt been committed in proceedings before the court.<sup>22</sup>

### § 91. Practice and pleadings before the referee.

After a case has been referred to a referee all proceedings thereafter, except such as are required by the statute or general orders to be held before the judge, are had before the referee.<sup>23</sup>

All claims, pleadings, petitions and applications for the action of the referee within his jurisdiction are filed with the referee. Petitions and applications which require the action of the judge should be filed with the clerk of the court and may thereafter be specially referred to the referee in the discretion of the judge.

The proceedings before a referee are summary in their nature. He has no jurisdiction of a plenary suit.<sup>24</sup> It may be said generally that a proceeding is summary, when an order is sought upon a motion, petition, or rule to show cause, with or without notice, and the order is enforceable by commitment for contempt of court in disobeying it. A plenary action is begun by filing a formal pleading, bill, petition, or declaration, a summons or subpoena is issued to bring in the respondent and require him to demur, plead or answer, and the decree or judgment rendered upon the pleadings, or upon pleadings and proofs, is enforceable by execution according to the practice in law or equity.

<sup>21</sup> B. A. 1898, Sec. 41. *In re Githen*, 164 Fed. Rep. 71, 21 Am. B. R. 113; *In re Mitter*, 105 Fed. Rep. 57, 5 Am. B. R. 184; *In re Sorkin*, 166 Fed. Rep. 831, 20 Am. B. R. 637.

<sup>22</sup> B. A. 1898, Sec. 41 and Sec. 2, clauses 13 and 16. See also Contempt, Chap. XXXIV. *post*.

<sup>23</sup> Gen. Ords. Nos. 12 and 20. B. A. 1898, Sec. 38, clause 4.

<sup>24</sup> *In re Hayden*, 172 Fed. Rep. 623, 22 Am. B. R. 764.

Less formality and precision in pleading before a referee is required than in a plenary action in court. The matter is regularly presented for the action of the referee by petition, motion, rule to show cause, or other similar application, with notice to persons to be affected by the order sought. In many cases the statute requires ten days' notice of the hearing to be given.<sup>25</sup> In other cases the referee should ordinarily require reasonable notice to give an opportunity to the respondent to appear before him and contest the application. The question of notice rests very largely in the discretion of the referee. The time when, and the place where, the referee shall act upon the matters arising under the several cases referred to him are fixed by special order of the judge or by the referee, usually by the referee.<sup>26</sup> The referee is not required to furnish to parties a copy of petition or motions or other papers filed, unless they are ordered by them.<sup>27</sup>

Any party in interest may appear before the referee on or before the day fixed in the notice to oppose the application. Ordinarily he will be required to state his objections in writing. In some cases he may be permitted to make oral objections. The proceedings before the referee are equitable in character and governed by the rules of equity practice, where not in conflict with the direct provisions of the act itself.<sup>28</sup> It has been suggested that an answer is the proper form to present objections and that a demurrer will not lie to a summary petition.<sup>29</sup> In practice it is not unusual to file a demurrer to a petition, which on its face does not show ground for relief. This is in accord with good equity pleading. Defenses on the merits should be stated in the form of an answer.

Where facts are contested the referee will hear evidence. There is no such thing as a jury trial before a referee. Generally any witness competent to testify in a court of bankruptcy

<sup>25</sup> B. A. 1898, Sec. 58a.

<sup>26</sup> Gen. Ords. Nos. 12 and 20. B. A. 1898, Sec. 38, clause 4.

<sup>27</sup> *In re Lewin*, 103 Fed. Rep. 884, 4 Am. B. R. 632; B. A. 1898, Sec. 38a, clause 3.

<sup>28</sup> *In re McIntyre*, 142 Fed. Rep. 593, 16 Am. B. R. 80; *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541.

<sup>29</sup> *In re Mullen*, 101 Fed. Rep. 413, 4 Am. B. R. 224.

may be compelled by subpoena to appear and bring with him any documents and papers mentioned in the subpoena.<sup>30</sup> The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney and the witnesses examined and cross-examined.<sup>31</sup> The evidence thus taken should be preserved, as in equity, for the purpose of review by the judge in case such a review is asked.<sup>32</sup> To this end the referee may, upon the application of the trustee, employ a stenographer at the expense of the estate at a compensation not to exceed ten cents a folio for reporting and transcribing proceedings before him.<sup>33</sup> The referee should rule upon the admissibility and competency of evidence and note his ruling. He should, however, preserve all evidence offered, admissible and inadmissible.<sup>34</sup> If the evidence is incomplete, the referee may *sua sponte* take additional proof for the purpose of investigating the matter fully.<sup>35</sup>

When the case is ripe for decision the referee will set a day for argument and hear counsel for the respective parties. The referee then considers the whole case, weighing the evidence, if any is introduced, and determines both the law and the facts and makes an order as law and justice may require.

<sup>30</sup> *In re Johnson & Knox Lumber Co.* (C. C. A. 7th Cir.), 151 Fed. Rep. 207, 80 C. C. A. 259, 18 Am. B. R. 50.

<sup>31</sup> Gen. Ord. No. 22. B. A. 1898, Sec. 39, clause 9.

<sup>32</sup> *First Nat. Bank v. Abbott* (C. C. A. 8th Cir.), 165 Fed. Rep. 852, 91 C. C. A. 538, 21 Am. B. R. 436; *Blease v. Garlington*, 92 U. S. 1, 8, 23 L. Ed. 521.

<sup>33</sup> B. A. 1898, Sec. 38, clause 5. *In re Rozinsky*, 101 Fed. Rep. 229, 3 Am. B. R. 830.

As to taxing such fees as costs, see *In re Todd*, 109 Fed. Rep. 265, 6 Am. B. R. 88.

<sup>34</sup> Gen. Ord. No. 22. *First Nat. Bank v. Abbott* (C. C. A. 8th Cir.), 165 Fed. Rep. 852, 91 C. C. A. 538,

21 Am. B. R. 436; *Missouri-American Elec. Co. v. Hamilton-Brown* (C. C. A. 8th Cir.), 165 Fed. Rep. 283, 91 C. C. A. 251, 21 Am. B. R. 270; *In re Sturgeon* (C. C. A. 2nd Cir.), 139 Fed. Rep. 608, 71 C. C. A. 592, 14 Am. B. R. 681; *Bank of Ravenswood v. Johnson* (C. C. A. 4th Cir.), 143 Fed. Rep. 463, 74 C. C. A. 597, 16 Am. B. R. 206; *In re Romine* 138 Fed. Rep. 837, 14 Am. B. R. 785; *In re Lipset*, 119 Fed. Rep. 379, 9 Am. B. R. 32.

But see *In re Wilde's Sons*, 131 Fed. Rep. 142, 11 Am. B. R. 714.

<sup>35</sup> *Carroll & Bro. Co. v. Young* (C. C. A. 3rd Cir.), 119 Fed. Rep. 576, 56 C. C. A. 380, 9 Am. B. R. 643.

In all orders made by a referee it must be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.<sup>36</sup>

Where there is an appearance and a contest, the referee should notify the litigating parties of his decision, and the order for the payment of money should not be executed until an opportunity has been given to review the order of the referee by the judge.<sup>37</sup> Where creditors do not appear no such duty rests upon the referee.

The referee may grant a rehearing and vacate or modify his order before steps are taken to review<sup>38</sup> but not afterwards.<sup>39</sup>

## § 92. Referees' records as evidence.

The referee may furnish on application a certified copy of any proceeding before him to be used as evidence in a state or federal court.

Certified copies of proceedings before a referee, or of papers, when issued by the referee, are admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.<sup>40</sup>

<sup>36</sup> Gen. Ord. No. 23.

*In re Saxton Furnace Co.*, 136 Fed. Rep. 697, 14 Am. B. R. 483, Judge McPherson said: "The record should show affirmatively that every creditor whose lien will be discharged by the sale has received notice of the trustee's application to sell. The referee's general statement, that such notice 'was given to each and every general creditor and lien creditor,' is obviously insufficient. No doubt this is his opinion, and it may be true, but his record must show the facts by

which other persons can verify the correctness of his statement."

<sup>37</sup> *In re Nichols*, 166 Fed. Rep. 603, 607, 22 Am. B. R. 216.

<sup>38</sup> *In re Hawley*, 116 Fed. Rep. 429, 8 Am. B. R. 629; *In re Royal*, 113 Fed. Rep. 146, 7 Am. B. R. 636; *In re Russell Card Co.*, 174 Fed. Rep. 202, 23 Am. B. R. 300.

<sup>39</sup> *In re Marks*, 171 Fed. Rep. 281, 22 Am. B. R. 568; *In re Greek Mfg. Co.*, 164 Fed. Rep. 211, 21 Am. B. R. 111.

<sup>40</sup> B. A. 1898, Sec. 21d.



### § 93. Review by the judge.

The court of bankruptcy is an appellate tribunal to revise the rulings and orders of the referee.

Any ruling or order of a referee may be reviewed by the judge of the court of bankruptcy.<sup>41</sup> It is a specific order or ruling which may be reviewed.<sup>42</sup> A general review of the proceedings before the referee is not contemplated.<sup>43</sup>

A bankrupt, creditor, trustee or other person may apply for a review of the ruling or order of the referee. The application should be made by a person interested or whose rights are affected by the ruling or order complained of. Unless a party prosecute a petition to review, setting forth errors he complains of, he will not be heard to complain of an order of the referee on petition for review filed by another party having a different interest.<sup>44</sup> A bankrupt will not be heard to complain of an order of the referee on a creditor's petition to review it, or *vice versa*.

No time is specified in the statute or general orders within which a petition for review must be filed. The courts have held that the application must be within a reasonable time.<sup>45</sup> In some districts the court has promulgated a rule fixing the time within which a petition to review may be filed.<sup>46</sup> Where a rule exists it should be strictly followed. Ordinarily the time within which an appeal in bankruptcy will lie should

<sup>41</sup> B. A. 1898, Sec. 2, clause 10. Gen. Ord. No. 27.

<sup>42</sup> *In re Smith*, 93 Fed. Rep. 791, 2 Am. B. R. 190.

<sup>43</sup> *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 4 Am. B. R. 528.

<sup>44</sup> *In re Cohn*, 171 Fed. Rep. 568, 22 Am. B. R. 761.

<sup>45</sup> *In re Rome*, 162 Fed. Rep. 971, 19 Am. B. R. 820; *In re Nichols*, 166 Fed. Rep. 603, 22 Am. B. R. 216; *In re Foss*, 147 Fed. Rep. 790, 17 Am. B. R. 436; *In re Scott*, 99 Fed. Rep. 404, 3 Am. B. R. 625; *In re Chambers, Calder & Co.*, 98 Fed. Rep. 865, 6 Am. B. R. 709; *In re Reliance*

*Storage and Warehouse Co.*, 100 Fed. Rep. 619, 4 Am. B. R. 49; *Crim v. Woodford* (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 68 C. C. A. 584, 14 Am. B. R. 302; *In re Milgraum & Ost*, 133 Fed. Rep. 802, 13 Am. B. R. 337; *In re Heebner*, 132 Fed. Rep. 1003, 13 Am. B. R. 256; *In re Grant*, 143 Fed. Rep. 661, 16 Am. B. R. 256; *In re Koenig & Van Hoogenhuyze*, 127 Fed. Rep. 891, 11 Am. B. R. 617; *In re Scherr*, 138 Fed. Rep. 695, 14 Am. B. R. 794.

<sup>46</sup> *In re Greek Mfg. Co.*, 164 Fed. Rep. 211, 21 Am. B. R. 11; *In re Marks*, 171 Fed. Rep. 281, 22 Am. B. R. 568.

govern the time within which a petition for review may be filed, that is to say, ten days. The courts have not been rigid in enforcing the time limit for filing a petition for review.

#### § 94. The petition for review and record.

The application to review an order or ruling of a referee should be in the form of a petition filed with the referee.<sup>47</sup> The petition should be filed after the order or ruling sought to be reviewed has been made by the referee<sup>48</sup> and not before.<sup>49</sup>

The petition should clearly set forth the error complained of and pray that the order or ruling of the referee may be reviewed.<sup>50</sup>

It should be signed by the petitioner or his attorney. It need not be verified by an affidavit for the reason that it does not allege facts. The facts are brought up by the certificate or record of the evidence.

When such a petition has been filed with the referee he must forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.<sup>51</sup> The summary of the evidence mentioned in General Order 27 may be all the evidence taken stenographically or the substance thereof as agreed upon by the parties.<sup>52</sup> The summary and not the complete evidence should be certified whenever the rules of justice will permit.<sup>53</sup> Where this is done the district court may require original evi-

<sup>47</sup> Gen. Ord. 27; *In re Russell*, 105 Fed. Rep. 501, 5 Am. B. R. 566; *In re Schiller*, 96 Fed. Rep. 400, 2 Am. B. R. 704; *In re Hawley*, 116 Fed. Rep. 428, 8 Am. B. R. 632; *In re Clark Coal & Coke Co.*, 173 Fed. Rep. 658, 23 Am. B. R. 273.

<sup>48</sup> *In re Russell*, 105 Fed. Rep. 501, 5 Am. B. R. 566; *In re Scott*, 99 Fed. Rep. 404, 3 Am. B. R. 625; *In re Schiller*, 96 Fed. Rep. 400, 2 Am. B. R. 704; *In re Reukauff Sons & Co.*, 135 Fed. Rep. 251, 14 Am. B. R. 344.

<sup>49</sup> *In re Smith*, 93 Fed. Rep. 791; 2 Am. B. R. 190.

<sup>50</sup> For forms of petition, see Forms Nos. 130 to 134, *post*.

<sup>51</sup> Gen. Ord. 27. For form of certificate, see Forms Nos. 135 to 139, *post*. *In re Kurtz*, 125 Fed. Rep. 992, 11 Am. B. R. 129.

<sup>52</sup> B. A. 1898, Sec. 39a, cl. 5 and 9.

<sup>53</sup> *Cunningham v. German Ins. Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 43 C. C. A. 377, 4 Am. B. R. 192; *Crim v. Woodford* (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 68 C. C. A. 584, 14 Am. B. R. 302.

dence or parts thereof certified to it.<sup>54</sup> If exhibits are attached to the certificate, they should be referred to in the certificate and marked in some manner to identify them.

The practice prevails in some districts to file exceptions before the referee to his action.<sup>55</sup> The statute and general orders do not require exceptions to be filed as a basis for the petition for review. In the absence of a rule or order of court requiring exceptions to be filed, it is not necessary to do so.<sup>56</sup> The petition for review should sufficiently indicate the disputed questions which are assigned for error. Where a referee makes a ruling upon the admissibility of evidence in the course of an examination the certificate should show the ruling and the question should be answered in any case and the examination continued, and the question decided by the court after the deposition is completed.<sup>57</sup>

<sup>54</sup> *Cunningham v. German Ins. Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 932, 43 C. C. A. 377, 4 Am. B. R. 192; *Crim v. Woodford* (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 68 C. C. A. 584, 14 Am. B. R. 302.

<sup>55</sup> *In re Rogowski*, 166 Fed. Rep. 165, 21 Am. B. R. 523; *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541; *In re Carver*, 113 Fed. Rep. 138, 7 Am. B. R. 739; *In re Carolina Cooperage Co.*, 96 Fed. Rep. 604, 3 Am. B. R. 154.

<sup>56</sup> *In re Cogley*, 107 Fed. Rep. 73, 5 Am. B. R. 731; *In re Peoples' Dept. Store Co.*, 159 Fed. Rep. 286, 20 Am. B. R. 244; *In re Greek Mfg. Co.*, 164 Fed. Rep. 211, 21 Am. B. R. 11.

*In re Swift*, 118 Fed. Rep. 348, 9 Am. B. R. 237; Judge Lowell said: "Counsel for the joint creditors raised certain formal objections, based upon the state of the record. It is sufficient to say that this court has not hitherto required, and does not intend to require hereafter, any

particular formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee. If the matter in dispute is substantially set out, that is enough. No formal exceptions to the referee's findings or rulings need be filed. If this practice shall seem lax to some, the answer is that it has hitherto been found convenient in this district, both for the judge and for the parties, and it has not been abused. A stricter practice has been adopted in some other districts, doubtless because it has been deemed convenient there."

<sup>57</sup> *First Nat. Bank v. Abbott* (C. C. A. 8th Cir.), 165 Fed. Rep. 852, 91 C. C. A. 538, 21 Am. B. R. 436; *Missouri-American Elec. Co. v. Hamilton-Brown* (C. C. A. 8th Cir.), 165 Fed. Rep. 283, 91 C. C. A. 251, 21 Am. B. R. 270; *In re Lipset, Levittan & Co.*, 119 Fed. Rep. 379, 9 Am. B. R. 32; *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541.

The certificate should be prepared and signed by the referee and by him transmitted to the clerk of the court.

**§ 95. The hearing and order of judge on review.**

When the certificate is filed in the clerk's office it becomes the duty of the judge to consider and confirm, modify or overrule, or return with instructions for further proceedings such record and findings.<sup>58</sup> If the question be improperly certified the court may refuse to give an opinion.<sup>59</sup>

The case is regularly set for hearing upon the petition and exhibits without answer or pleading on the part of the respondent. The judge will usually hear arguments of counsel. If the judge is not satisfied with the evidence certified by the referee he may allow further evidence to be taken before him,<sup>60</sup> or refer the matter to the referee for further proofs.

Ordinarily the review by the judge of an order made by the referee will be confined to the errors pointed out in the petition for review, but the judge may properly consider any point presented by the record then before him whether such point was or was not discussed before or by the referee.<sup>61</sup>

The judge reviews both law and fact. No fixed rule can be laid down with reference to the weight to be given by the judge to the finding of fact by the referee in making his ruling or order. Much depends upon the character of the finding. As observed by Judge Lurton,<sup>62</sup> "If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw

<sup>58</sup> B. A. 1898, Sec. 2, cl. 10.

<sup>59</sup> *In re Smith*, 93 Fed. Rep. 791, 2 Am. B. R. 190; *In re Reukauff Sons & Co.*, 135 Fed. Rep. 251, 14 Am. B. R. 344; *In re Clark Coal & Coke Co.*, 173 Fed. Rep. 658, 23 Am. B. R. 273;

*In re Morris*, 164 Fed. Rep. 211, 18 Am. B. R. 828, the judge renewed an order of the referee on an incomplete record, counsel agreeing as to what took place before the referee.

<sup>60</sup> *In re Stotts*, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re Leech* (C. A. 6th Cir.), 171 Fed. Rep. 622, 625, 96 C. C. A. 424, 22 Am. B. R. 599.

<sup>61</sup> *In re Samuel Wilde's Sons* (C. A. 2nd Cir.), 144 Fed. Rep. 972, 75 C. C. A. 601, 16 Am. B. R. 386; *In re Gottardi*, 114 Fed. Rep. 328, 7 Am. B. R. 723.

<sup>62</sup> *Ohio Valley Bank v. Mack* (C. A. 6th Cir.), 163 Fed. Rep. 155, 89 C. C. A. 605, 20 Am. B. R. 40.

inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, would not disturb his finding unless there is most cogent evidence of a mistake and miscarriage of justice."<sup>63</sup>

<sup>63</sup> *Ohio Valley Bank v. Mack* (C. C. A. 6th Cir.), 163 Fed. Rep. 155, 89 C. C. A. 605, 20 Am. B. R. 40; *In re Simon & Sternberger*, 151 Fed. Rep. 507, 18 Am. B. R. 204; *In re McCrary Bros.* 169 Fed. Rep. 485, 22 Am. B. R. 161; *In re Shriver*, 125 Fed. Rep. 511, 10 Am. B. R. 746; *In re Littman*, 159 Fed. Rep. 233, 20 Am. B. R. 300; *In re Peoples Department Store Co.*, 159 Fed. Rep. 286, 20 Am. B. R. 244; *In re Kenyon*, 156 Fed. Rep. 863, 19 Am. B. R. 194; *In re McKissic*, 171 Fed. Rep. 259, 22 Am. B. R. 817; *In re McCann Bros. Ice Co.*, 171 Fed. Rep. 265, 22 Am. B. R. 555; *Fouche v. Shearer*, 172 Fed. Rep. 592, 22 Am. B. R. 828; *In re Grant Bros.*, 118 Fed. Rep. 73, 9 Am. B. R. 93; *In re Carver*, 113 Fed. Rep. 138, 7 Am. B. R. 539; *In re Covington*, 110 Fed. Rep. 143, 6 Am. B. R. 373; *In re Mayer*, 98 Fed. Rep. 839, 3 Am. B. R. 533; *In re McCormick*, 97 Fed. Rep. 566, 3 Am. B. R. 340; *In re Waxelbaum*, 101 Fed. Rep. 228, 4 Am. B. R. 120; *In re Booth*, 96 Fed. Rep. 943, 2 Am. B. R. 770.

*In re Swift*, 118 Fed. Rep. 348, 9 Am. B. R. 237, Judge Lowell, speaking on this subject, said: "Again, no precise quantitative weight is, in this district, assigned to the findings of fact made by a referee. If those findings are based largely upon the good or bad faith of witnesses seen

and heard by the referee, this court will always bear in mind that the referee's means of judgment are, in an important respect, better than its own. If, on the other hand, the findings depend upon inferences to be drawn from admitted facts, this court's means of judgment are nearly as good as the referee's. The weight to be assigned to the referee's findings in the two cases supposed is by no means the same. No labor-saving formula will determine the weight of the finding, or show just how strongly the court must incline against it in order to reverse it. To say that the finding should not be set aside unless it is 'clearly erroneous,' 'manifestly erroneous,' 'so manifestly erroneous as to invoke the sense of justice of the court,' or 'unless it discloses prejudicial errors by the referee, some of which may, without exaggeration, be denominated gross,' is to darken counsel, if more is meant than that the court will not set aside the finding unless it is deemed erroneous, after due allowance for the circumstances under which it was made. Artificial and quantitative presumptions of fact are foreign to the spirit of the common law, and the introduction of these presumptions has been rare and unfortunate."

If the order of the referee is modified or reversed the judge will usually direct the proper order to be entered with reference to the further proceedings. A certified copy of this order should be furnished the referee for his direction and guidance.<sup>64</sup>

#### § 96. Records of referees.

A record of proceedings in each case before a referee is required to be kept as nearly as may be in the same manner as records are now kept in equity cases in the circuit courts of the United States.<sup>65</sup>

The referee is required to endorse on each paper filed with him the date and the hour of filing and a brief statement of its character.<sup>66</sup> He must, upon application of any party in interest, preserve the evidence taken or the substance thereof, as agreed between the parties before him, when a stenographer is not in attendance.<sup>67</sup> If a stenographer is in attendance a transcript of his notes is used.<sup>68</sup> These papers, together with such orders as the referee from time to time makes, such notices as he is required to give and a record of the proceedings in each case required to be kept in a separate book or books, constitute the record of the case.<sup>69</sup>

The record is frequently kept on one or more sheets of paper, upon which are stated the proceedings in the same form as proceedings are usually stated in an appearance docket. These separate sheets form the first pages of the record. The various sheets constituting the record should be firmly and neatly bound together, when the case is concluded, by the referee, should be certified by him and transmitted to the clerk of the court of bankruptcy, and there remains as a part of the record of the court.<sup>70</sup>

<sup>64</sup> For forms of orders, see Forms Nos. 143 to 145, *post*.

<sup>65</sup> B. A. 1898, Sec. 42a.

<sup>66</sup> Gen. Ord. 2.

<sup>67</sup> B. A. 1898, Sec. 39, clause 9; Gen. Ord. 22.

<sup>68</sup> B. A. 1898, Sec. 38, clause 5; Gen. Ord. 22.

<sup>69</sup> B. A. 1898, Sec. 42b.

<sup>70</sup> B. A. 1898, Sec. 42c.

Whenever a bankrupt, creditor, trustee or other person shall desire a review by the judge of any order made by the referee he applies to the referee by petition that the question may be certified to the judge for review.<sup>71</sup> He is required thereupon to make up a record embodying the evidence or substance thereof, as agreed upon between the parties, together with his findings, certify to the same and transmit the record to the judge.<sup>72</sup>

He is also required to transmit to the clerk such papers as may be on file before him whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or if it be impracticable to transmit the original papers, transmit certified copies thereof by mail.<sup>73</sup> These last two are partial or interlocutory records, and do not affect the making of the final record above referred to at the proper time.

#### § 97. Offenses of referees.

Referees are forbidden by the statute to act in cases in which they are directly or indirectly interested;<sup>74</sup> to practice as attorneys and examiners at law in any bankruptcy proceedings; or to purchase, directly or indirectly, any property of an estate in bankruptcy.

The statute provides<sup>75</sup> that

"A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly

"*first*, acted as referee in a case in which he is directly or indirectly interested;<sup>76</sup> or

<sup>71</sup> Gen. Ord. 27. See *ante*, Sec. 32a.

<sup>72</sup> B. A. 1898, Sec. 39, clause 5; Gen. Ord. 27.

<sup>73</sup> B. A. 1898, Sec. 39, clause 8.

<sup>74</sup> *Bray v. Cobb*, 91 Fed. Rep. 102, 1 Am. B. R. 153; B. A. 1898, Sec. 39b.

<sup>75</sup> B. A. 1898, Sec. 29c. See Sec. 657, *post*.

A court of bankruptcy has jurisdiction to punish for any of these offenses. B. A. 1898, Sec. 23c and Sec. 2, clause 4.

<sup>76</sup> *In re Stoebel*, 155 Fed. Rep. 692, 19 Am. B. R. 109.

"second, purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or

"third, refused, while a referee, or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of estates in his charge by parties in interest when directed by the court so to do."

### § 98. Compensation and expenses of referees.

The compensation is fixed by the statute <sup>77</sup> as follows:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the costs of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

Sec. 72, added by the amendment of 1903, provides "That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act."<sup>78</sup>

The bankruptcy act as originally passed allowed referees ten dollars instead of fifteen dollars, and no fee for filing claims. Commissions were allowed on "sums to be paid out as dividends." This was held not to include commissions on moneys paid secured creditors, because they were not dividends.<sup>79</sup> This rule applies to all proceedings begun prior to

<sup>77</sup> B. A. 1898, Sec. 40, as amended Feb. 5, 1903; 32 Stat. at L. 797.

<sup>78</sup> 32 Stat. at L. 797; Dressel v. North State Lumber Co., 119 Fed. Rep. 531, 9 Am. B. R. 541.

But see *In re Goldville Mfg. Co.*, 123 Fed. Rep. 579; 10 Am. B. R. 552.

<sup>79</sup> *In re Utt* (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 45 C. C. A. 32, 5



February 5, 1903.<sup>80</sup> Under the provision of the amendment referees are clearly entitled to commissions on moneys paid secured creditors as well as on dividends to unsecured creditors.<sup>81</sup> But when a secured creditor resorts to a state court to enforce his security and the proceeds do not come into the possession of the bankruptcy court the referee is not entitled to commissions on such sums as may be paid the secured creditor.<sup>82</sup>

Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and the commissions therefor shall be divided between the referees.

In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

The compensation of referees prescribed by the act is in full compensation for all services performed by them under the act or under the general orders, but does not include expenses necessarily incurred by them in the performance of their duties under the act and allowed by special order of the judge.<sup>83</sup> It is the practice in some districts to appoint the referee a special master and to allow him extra compensation for such services.<sup>84</sup> This may be proper in cases where the services per-

Am. B. R. 383; *In re Smith*, 108 Fed. Rep. 39, 5 Am. B. R. 559; *In re Mammoth Pine Lumber Co.*, 116 Fed. Rep. 731; *In re Ft. Wayne Elec. Corp.*, 94 Fed. Rep. 109, 1 Am. B. R. 706; *In re Gardner*, 103 Fed. Rep. 922, 4 Am. B. R. 420; *In re Fielding*, 96 Fed. Rep. 800, 3 Am. B. R. 135; *In re Goldsmith*, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re Barker*, 111 Fed. Rep. 501, 7 Am. B. R. 132. But see *In re Barber*, 97 Fed. Rep. 547, 3 Am. B. R. 306.

<sup>80</sup> B. A. 1898, Sec. 40a. Act of Feb. 5, 1903, Sec. 19; 32 Stat. at L. 797.

<sup>81</sup> *In re Sanford Furniture Mfg. Co.*, 126 Fed. Rep. 888, 11 Am. B. R. 414; *In re Baughman*, 163 Fed. Rep. 669, 20 Am. B. R. 811.

<sup>82</sup> *In re Iowa Falls Mfg. Co.*, 140 Fed. Rep. 527, 15 Am. B. R. 384.

<sup>83</sup> Gen. Ord. 35, par. 2; *In re Daniels*, 130 Fed. Rep. 597, 12 Am. B. R. 446.

<sup>84</sup> *In re Todd*, 109 Fed. Rep. 265, 9 Am. B. R. 88; *In re Goldville Mfg. Co.*, 123 Fed. Rep. 579, 10 Am. B. R. 552; *In re Herskovitz*, 152 Fed. Rep. 316, 18 Am. B. R. 247; *In re Hendricks*, 138 Fed. Rep. 473, 14 Am. B. R. 795.

formed are not required of the referee under the act or general orders, but certainly there is no authority under the act to appoint a special master to perform the duties of a referee.<sup>85</sup> No extra compensation can be allowed a referee where the judge refers an application for a discharge, or composition, or an injunction, or any specified issue arising thereon to a referee because this is a part of his regular duties.<sup>86</sup> Thus a referee will not be allowed any extra compensation for hearing specifications in opposition to a discharge,<sup>87</sup> or for preparing the dividend sheet, or for hearing the evidence during the examination,<sup>88</sup> or for hearing numerous claims for specific liens,<sup>89</sup> or for services in giving notice of application for discharge.<sup>90</sup> No allowance will be made for notices sent to creditors other than those required by Sec. 58 of the act, or for the employment of a stenographer in adjustment correspondence or other business of the estate.<sup>91</sup> Clerk hire will be allowed where the

<sup>85</sup> *In re Sweeney* (C. C. A. 6th Cir.), 168 Fed. Rep. 612, 94 C. C. A. 90, 21 Am. B. R. 866, speaking for the circuit court of appeals for the sixth circuit, Judge Lurton said: "There is no authority for converting the referee into a special master. The bankruptcy proceeding may be referred to the referee by a general order, or to him as referee upon special issues, his power depending upon the order of reference." "For the most part the duties of a referee are those of a special master, and we know of no authority for the appointment of a special master to do the proper business of the referee. Nor do we know of any power to allow a referee the compensation of a special master. The fees and compensation of that officer were enlarged by amendments of the act passed February 5, 1903."

See also *In re Wilcox*, 156 Fed. Rep. 685, 19 Am. B. R. 241.

<sup>86</sup> Gen. Ord. 12, clause 3.

<sup>87</sup> *In re Troth*, 104 Fed. Rep. 291, 4 Am. B. R. 780; *Bragasa v. St. Louis Cycle* (C. C. A. 5th Cir.), 107 Fed. Rep. 77, 46 C. C. A. 154, 5 Am. B. R. 700; *contra*, *Fellows v. Freundenthal* (C. C. A. 7th Cir.), 102 Fed. Rep. 731, 42 C. C. A. 607, 4 Am. B. R. 490; *In re Grossman*, 111 Fed. Rep. 507, 6 Am. B. R. 510; *In re Wilcox*, 156 Fed. Rep. 685, 19 Am. B. R. 241.

<sup>88</sup> *In re Barker*, 111 Fed. Rep. 501, 7 Am. B. R. 132.

<sup>89</sup> *In re Mammoth Pine Lumber Co.*, 116 Fed. Rep. 731, 8 Am. B. R. 651; *In re Barker*, 111 Fed. Rep. 501, 7 Am. B. R. 132.

<sup>90</sup> *In re Dixon*, 114 Fed. Rep. 675, 8 Am. B. R. 145.

<sup>91</sup> *In re Mammoth Pine Lumber Co.*, 116 Fed. Rep. 731, 8 Am. B. R. 651.

services of a clerk are necessary.<sup>92</sup> The referee is not entitled to commissions on moneys paid out by trustee while carrying on the business of the bankrupt.<sup>93</sup>

The referee's claim for commissions must be presented to and passed upon by the court.<sup>94</sup> Every referee is required to keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him and to make return of the same under oath to the judge, with proper vouchers, when vouchers can be procured, on the first Tuesday in each month.<sup>95</sup>

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the referee may require, from the bankrupt, or other person in whose behalf the duty is to be performed, indemnity for such expense.<sup>96</sup> Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.<sup>97</sup>

In any case in which the fees of the referee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate, or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.<sup>97</sup>

<sup>92</sup> Gen. Ord. 35; *In re Pierce*, 111 Fed. Rep. 516, 6 Am. B. R. 747; *In re Tebo*, 101 Fed. Rep. 419, 4 Am. B. R. 235; *In re Todd*, 109 Fed. Rep. 265; 6 Am. B. R. 88.

<sup>93</sup> *Bray v. Johnson* (C. C. A. 4th Cir.), 166 Fed. Rep. 57, 91 C. C. A. 643, 21 Am. B. R. 383.

But see *In re Hart & Co.* 18 Am. B. R. 137.

<sup>94</sup> *In re Mammoth Pine Lumber Co.*, 116 Fed. Rep. 731, 8 Am. B. R. 651.

<sup>95</sup> Gen. Ord. 26.

<sup>96</sup> Gen. Ord. 10; B. A. 1898, Sec. 62.

<sup>97</sup> Gen. Ord. 35, par. 4.

## CHAPTER VIII.

## CLERKS, MARSHALS AND ATTORNEYS.

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| <p>SEC.<br/>99. Duties of the clerk.<br/>100. Compensation and expenses of clerks.<br/>101. Marshals.<br/>102. Compensation and expenses of marshals.<br/>103. Duty of the attorney-general to report annually.<br/>104. Attorney at law.<br/>105. Attorneys' fees.<br/>106. Fees of the attorney for the bankrupt.</p> | <p>SEC.<br/>107. The court may revise attorneys' fees paid by a debtor prior to his bankruptcy.<br/>108. Fees of the attorney for petitioning creditors.<br/>109. Fees of an attorney for a secured or unsecured creditor.<br/>110. Fees of the attorney for the trustee or receiver.<br/>111. Fees of an attorney for an assignee for creditors.<br/>112. Enforcing an attorney's lien for fees.<br/>113. Attorneys' fees as taxable costs.</p> |
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**§ 99. Duties of the clerk.**

The word clerk, as used in the bankrupt act, means the clerk of a court of bankruptcy, unless such a meaning is inconsistent with the context.<sup>1</sup>

The clerk is required to keep a docket,<sup>2</sup> in which the cases shall be entered and numbered in the order in which they are commenced. It must contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case, except those duly entered on the referee's certified record aforesaid. The docket must be arranged in a manner convenient for reference, and shall at all times be open to public inspection. The clerk is also required to endorse on each paper filed with him the date and hour of filing and a brief statement of its character.<sup>3</sup> He issues all process, summons and subpoenas under the seal of the court.<sup>4</sup>

<sup>1</sup> B. A. 1898, Sec. 1, clause 5.

<sup>2</sup> Gen. Ord. 1.

<sup>3</sup> Gen. Ord. 2.

<sup>4</sup> Gen. Ord. 3.

The clerks are also required to prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed;<sup>5</sup> and they are entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts;<sup>6</sup> provided, that said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.

It is the duty of a clerk to refer a case to a referee if the judge is absent from the district or division of the district in which the petition is filed. This may be done by a deputy clerk.<sup>7\*</sup> In voluntary cases the reference is made immediately upon the filing of the petition.<sup>7</sup> In involuntary cases the reference is made on the next day after the last day on which pleadings may be filed, provided none have been filed by the bankrupt or any of his creditors.<sup>8</sup> For the purpose of enabling the referee to exercise the powers of the judge for the taking possession of and releasing the property of the bankrupt the clerk may issue a certificate showing the absence of the judge from the judicial district or division of the district, or his sickness or inability to act.<sup>9</sup> Recitals in an order of reference in the absence of the district judge can not be attacked in a collateral proceeding, or evidence admitted to show that the judge in fact was in the district, although it may be attacked in a direct proceeding to review the action of the referee.<sup>9\*</sup>

The clerks are required to respectively<sup>10</sup>

<sup>5</sup> Sec. 71, added by the amendment of 1903 to the Bankruptcy Act, 32 Stat. at L. 797.

<sup>6</sup> R. S. Sec. 828.

<sup>7\*</sup> *Gilbertson v. U. S.* (C. C. A. 7th Cir.), 168 Fed. Rep. 672, 94 C. C. A. 158, 22 Am. B. R. 32.

But see *Bray v. Cobb*, 91 Fed. Rep. 102, 1 Am. B. R. 153.

<sup>7</sup> B. A. 1898, Sec. 18g. Official Form No. 15, Form No. 32, *post*.

<sup>8</sup> B. A. 1898, Sec. 18f. Official Form No. 15, Form No. 32, *post*.

<sup>9</sup> B. A. 1898, Sec. 38, clause 3.

<sup>9\*</sup> *Gilbertson v. U. S.* (C. C. A. 7th Cir.), 168 Fed. Rep. 672, 94 C. C. A. 158, 22 Am. B. R. 32.

<sup>10</sup> B. A. 1898, Sec. 51.

(1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers;

(2) collect the fees of the clerk, referee and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, the money with which to pay such fees;

(3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used;

(4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

The clerk is entitled to one copy of the petition<sup>11</sup> and to a copy of the schedule.<sup>12</sup>

It is not the duty of a clerk of court to furnish referees with blank forms.<sup>13</sup>

#### **§100. Compensation and expenses of clerks.**

The clerk receives as full compensation for his service to each estate a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.<sup>14</sup>

Such fee is in full compensation for all services performed by him in regard to filing petitions or other papers required by the act to be filed with him, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but does not include copies furnished to other persons, or expenses necessarily incurred

<sup>11</sup> B. A. 1898, Sec. 59c.

1st Cir.), 129 Fed. Rep. 742, 64 C. C.

<sup>12</sup> B. A. 1898, Sec. 7, clause 8.

A. 270.

<sup>13</sup> United States v. Mason (C. C. A.

<sup>14</sup> B. A. 1898, Sec. 52

in publishing or mailing notices or other papers.<sup>15</sup> In any case in which the fees of the clerk are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate, or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.<sup>16</sup>

The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved they shall be paid or allowed out of the estates in which they were incurred.<sup>17</sup> Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.<sup>18</sup>

Clerks of courts of bankruptcy are not entitled to charge as expenses, money expended for printing blank forms for the use of referees.<sup>19</sup>

Clerks are entitled to a per diem compensation for attending court each day on which a petition in bankruptcy is referred to the referee during the absence of the judge.<sup>19\*</sup>

<sup>15</sup> Gen. Ord. 35, par. 1; *In re Dunn Hardware & Furniture Co.*, 134 Fed. Rep. 997, 14 Am. B. R. 186, it was held that clerks are not entitled to a fee for mailing notice of application for discharge.

<sup>16</sup> Gen. Ord. 35, par. 4.

<sup>17</sup> B. A. 1898, Sec. 62.

<sup>18</sup> Gen. Ord. 10.

<sup>19</sup> *United States v. Mason* (C. C. A. 1st Cir.), 129 Fed. Rep. 742, 64 C. C. A. 270.

<sup>19\*</sup> *United States v. Marvin*, 212 U. S. 275, — L. Ed. —, 22 Am. B. R. 717.

**§ 101. Marshals.**

The word "officer," as used in the act, including a marshal, and the imposing of duty upon or the forbidding of an act by any officer includes his successor and any person authorized by law to perform the duties of such officer.<sup>20</sup>

It is the duty of the marshal to serve such writs and process as may be directed to him. It is his duty to serve the bankrupt in involuntary proceedings with the writ of subpœna and a copy of the petition filed against him.<sup>21</sup> The judge may authorize him to seize and hold the property of the bankrupt subject to further orders,<sup>22</sup> or to conduct the business of the bankrupt for a limited period.<sup>23</sup> Notices are usually served by the referee, and not by the marshal.<sup>24</sup>

**§ 102. Compensation and expenses of marshals.**

Marshals respectively receive from the estate where an adjudication in bankruptcy is made, except as by the act otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.<sup>25</sup> A marshal has been allowed a fee of \$2 for serving a petition and affidavits and a fee of \$2 for an order to show cause, both of which were served upon the same person.<sup>26</sup> In one case he was allowed

<sup>20</sup> B. A. 1898, Sec. 1, clause 18.

<sup>21</sup> B. A. 1898, Sec. 18a; Eq. Rule 13.

<sup>22</sup> B. A. 1898, Sec. 69a, and Sec. 2, clause 3.

<sup>23</sup> B. A. 1898, Sec. 2, clause 5; *In re Adams Sartorial Co.*, 101 Fed. Rep. 215, 4 Am. B. R. 107.

<sup>24</sup> B. A. 1898, Sec. 58c.

<sup>25</sup> B. A. 1898, Sec. 52b; R. S. Sec. 829, provides for fees of marshals. The act of May 28, 1896, Sec. 6, 29 Stat. at L. 179, provides that all

fees and emoluments of U. S. marshals shall be charged as heretofore.

<sup>26</sup> *In re Damon*, 104 Fed. Rep. 775, 5 Am. B. R. 133, Judge Hazel said: "Those charges, having always been made in accordance with custom and practice of United States courts, must, therefore, be regarded as reasonable. The charge for the one is fixed by statute, and the other by custom and tacit concurrence."



\$20 for seventeen days' services;<sup>27</sup> in another case \$3 a day for services of a deputy marshal,<sup>28</sup> and in another case \$2.50 a day for services of a deputy marshal and \$1 a day for the services of a watchman.<sup>29</sup> In each case he was allowed his actual expenses in addition to his compensation. Actual expenses, however, do not include the cost of board and lodging.<sup>30</sup> The marshal must make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for the custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.<sup>31</sup>

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the marshal may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense.<sup>32</sup> Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.<sup>33</sup>

#### **§ 103. Duty of the attorney-general to report annually.**

The attorney-general is required annually to lay before congress statistical tables showing for the whole country, and by states, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property in the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.<sup>34</sup>

<sup>27</sup> *In re Adams Sartorial Art Co.*, 101 Fed. Rep. 215, 4 Am. B. R. 107.

<sup>28</sup> *In re Woodard*, 95 Fed. Rep. 955, 2 Am. B. R. 692.

<sup>29</sup> *In re Scott*, 99 Fed. Rep. 404, 3 Am. B. R. 625.

<sup>30</sup> *In re Scott*, 99 Fed. Rep. 404, 3 Am. B. R. 625.

<sup>31</sup> Gen. Ord. 19; *In re Scott*, 99 Fed. Rep. 404, 3 Am. B. R. 625.

<sup>32</sup> Gen. Ord. 10.

<sup>33</sup> B. A. 1898, Sec. 53.

Officers, including clerks, marshals, receivers, referees and trustees,<sup>34</sup> are required to furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney-general, for statistical purposes, within ten days after being requested by him to do so.<sup>35</sup>

#### § 104. Attorneys at law.

Proceedings in bankruptcy may be conducted by the party in person or by his attorney.<sup>36</sup> The court of bankruptcy has jurisdiction of a voluntary petition signed and sworn to by the bankrupt, although his attorney is not admitted to practice in the district court.<sup>37</sup>

An attorney, agent, or proxy, should be required to produce and file with the referee written authority from the creditor to represent him and vote at the creditors' meeting.<sup>38</sup> But an attorney at law, admitted to practice in the district court, may appear in bankruptcy proceedings generally in behalf of his client, without written power of attorney, as in other cases.<sup>39</sup> Notices of hearings before a referee may be given by mail to the attorneys interested.<sup>40</sup>

It has been held that an attorney may take the oath of his client to prove a debt,<sup>41</sup> but this is not good practice. An attorney for the bankrupt may act as notary to take the affidavit of the bankrupt to a petition and schedule prior to insti-

<sup>34</sup> B. A. 1898, Sec. 1, clause 18.

<sup>35</sup> B. A. 1898, Sec. 54.

<sup>36</sup> R. S. Sec. 747, Gen. Ord. 22.

<sup>37</sup> *In re Kindt*, 98 Fed. Rep. 403, 3 Am. B. R. 443.

<sup>38</sup> *In re Blankfein & Deitz*, 2 N. B. N. 49; *In re Sugenheimer*, 91 Fed. Rep. 744, 1 Am. B. R. 425; *In re Eagles & Crisp*, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re Richards*, 103 Fed. Rep. 849, 4 Am. B. R. 631.

But see *In re Gasser* (C. C. A. 8th Cir.), 104 Fed. Rep. 537, 44 C. A. 20, 5 Am. B. R. 32.

<sup>39</sup> *In re Gasser* (C. C. A. 8th Cir.), 104 Fed. Rep. 537, 44 C. C. A. 20, 5 Am. B. R. 32.

<sup>40</sup> *In re Lewin*, 103 Fed. Rep. 850, 4 Am. B. R. 632.

<sup>41</sup> *In re Kimball*, 100 Fed. Rep. 777, 4 Am. B. R. 144.

But see *In re Brumelkamp*, 95 Fed. Rep. 814, 2 Am. B. R. 318.

tuting proceedings in bankruptcy.<sup>42</sup> A petition in involuntary bankruptcy should be verified by the petitioner and specification in opposition to the discharge by objecting creditors. An attorney may verify either pleading if he is cognizant of the facts and can make positive oath to them.<sup>43</sup>

The bankrupt's attorney should not represent creditors proving claims against the estate,<sup>44</sup> and it is not good practice for the same attorney to represent the trustee and the bankrupt.<sup>45</sup> The trustee may employ an attorney if necessary, but it has been held that the court will not make directions in advance with reference to such employment.<sup>46</sup> An attorney for creditors should not be appointed attorney for the trustee, where there are matters in controversy between different classes of creditors.<sup>47</sup> When an attorney accepts the office of trustee he can not also be attorney for creditors.<sup>48</sup> The creditors may elect an attorney for the trustee,<sup>49</sup> but do not ordinarily do so.<sup>50</sup>

Where an attorney collects a claim placed in his hands before he is engaged for a bankrupt estate, he should pay the money to the client for whom he made the collection, not-

<sup>42</sup> *In re Kindt*, 98 Fed. Rep. 867, 2 Am. B. R. 546.

<sup>43</sup> *In re Herzikopf*, 118 Fed. Rep. 101, 9 Am. B. R. 90; *In re Hunt*, 118 Fed. Rep. 282, 9 Am. B. R. 251; *In re Chequassat Lumber Co.*, 112 Fed. Rep. 56, 7 Am. B. R. 87; *In re Glass*, 119 Fed. Rep. 509, 9 Am. B. R. 391.

But see *In re Nelson*, 98 Fed. Rep. 76, 1 Am. B. R. 63.

<sup>44</sup> *In re Kimball*, 100 Fed. Rep. 777, 4 Am. B. R. 144; *In re Wooten*, 118 Fed. Rep. 670, 9 Am. B. R. 247; *In re Dimm & Co.*, 146 Fed. Rep. 402, 17 Am. B. R. 119.

*In re Cooper*, 135 Fed. Rep. 196, 14 Am. B. R. 320, an attorney whose retainer from bankrupt covered the filing of petition only was permitted subsequently to represent creditors.

<sup>45</sup> *Keyes v. McKirrow*, 180 Mass. 261, 9 Am. B. R. 322; *In re Teuthorn* (Ref. op.), 5 Am. B. R. 767.

<sup>46</sup> *In re Abram*, 103 Fed. Rep. 272, 4 Am. B. R. 575; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

<sup>47</sup> *In re Rusch*, 105 Fed. Rep. 607, 4 Am. B. R. 575; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

<sup>48</sup> *In re Evans*, 116 Fed. Rep. 909, 8 Am. B. R. 730.

<sup>49</sup> *In re Little River Lumber Co.*, 101 Fed. Rep. 558; 3 Am. B. R. 682; *In re Smith* (Ref. op.), 1 Am. B. R. 37.

<sup>50</sup> *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

withstanding he received it during the time he is employed for the estate.<sup>51</sup>

An attorney for a receiver under general employment is not authorized to sell the bankrupt's assets.<sup>52</sup>

An attorney is entitled to the usual privileges and exemptions in regard to giving evidence. This privilege extends only to information derived from clients as such. Information derived from other persons or sources, although derived or obtained while acting as attorney, is not privileged.<sup>53</sup>

If an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interest of his client, he can not be held in contempt for error in judgment.<sup>54</sup> Where an attorney, testifying as a witness, declined to produce a certain paper but returned it to his client without the intention of placing it beyond the reach of the court, he was held not to be in contempt.<sup>55</sup> An attorney is liable for his acts where he unites with his client in committing a wrong.<sup>56</sup>

#### § 105. Attorneys' fees.

Attorneys are entitled to fees to be paid from the estate of the bankrupt for professional services performed on behalf of the trustee, a receiver, the petitioning creditors, and the bankrupt in voluntary and involuntary cases.

The bankrupt act provides for the allowance of attorneys' fees in bankruptcy proceedings proper on behalf of the respondent upon the withdrawal or dismissal of a petition in

<sup>51</sup> *In re Ernest Martin & Co.*, 167 Fed. Rep. 236, 20 Am. B. R. 705.

<sup>52</sup> *Mason v. Wolkowich*, 150 Fed. Rep. 699, 17 Am. B. R. 709.

<sup>53</sup> *Peoples' Bank v. Brown* (C. C. A. 3rd Cir.), 112 Fed. Rep. 652, 50 C. C. A. 411, 7 Am. B. R. 475; *In re Ruos*, 159 Fed. Rep. 252, 20 Am. B. R. 281.

As to privilege of attorneys generally, see Sec. 627, *post*.

<sup>54</sup> *In re Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 933, 10 Am. B. R. 113.

<sup>55</sup> *In re Johnson & Knox Lumber Co.*, 151 Fed. Rep. 207, 18 Am. B. R. 50.

As to contempt generally, see Sec. 674, *post*.

<sup>56</sup> *In Clay v. Waters* (C. C. A. 8th Cir.), 161 Fed. Rep. 815, 88 C. C. A. 633, 20 Am. B. R. 561, an attorney who aided in the concealment of the bankrupt's assets held to have been properly ordered to return the same, the evidence showing a sudden expansion of the attorney's bank account.

bankruptcy,<sup>57</sup> and also as costs of administration, to which priority is given, one reasonable attorney's fee, for professional services actually rendered irrespective of the number of attorneys employed, in three classes of cases,<sup>58</sup> namely: *first*, to petitioning creditors in involuntary cases; *second*, to the bankrupt in involuntary cases while performing the duties prescribed by the act; *third*, to the bankrupt in voluntary cases. The court will also allow a fee for an attorney for a receiver,<sup>59</sup> or the trustee, in both involuntary and voluntary cases, when his services are reasonably necessary.<sup>60</sup> This is a part of the expenses of administration and, as such entitled to priority under Section 64*b* of the act.<sup>61</sup>

One attorney's fee can be allowed in each case.<sup>62</sup> Where a partnership is adjudged a bankrupt, but one attorney's fee can be allowed, although each of the partners appeared throughout the proceedings by different attorneys. Where two bankruptcy proceedings are filed by attorneys representing different creditors and thereafter consolidated by order of court, a single attorney's fee will be allowed for such attorneys.<sup>63</sup>

The claim for an attorney's fee should be worked out through the bankrupt, the petitioning creditors, or the trustee or receiver, as may be. An attorney's fee is allowed as an

<sup>57</sup> B. A. 1898, Sec. 3*e*.

<sup>58</sup> B. A. 1898, Sec. 64*b*, clause 3.

<sup>59</sup> *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73; *In re Southern Steel Co.*, 169 Fed. Rep. 702, 22 Am. B. R. 476; *In re Oppenheimer*, 146 Fed. Rep. 140, 17 Am. B. R. 59.

<sup>60</sup> *Page v. Rogers* (C. C. A. 6th Cir.), 149 Fed. Rep. 194, 79 C. C. A. 153, 17 Am. B. R. 854, affirmed 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *In re Waterloo Organ Co.* (C. C. A. 2nd Cir.), 154 Fed. Rep. 654, 83 C. C. A. 481, 18 Am. B. R. 752; *In re Little River Lumber Co.*, 101 Fed. Rep. 558, 3 Am. B. R. 682;

*In re Stotts*, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re Salaberry*, 107 Fed. Rep. 95, 5 Am. B. R. 847.

<sup>61</sup> *In re Lacov* (C. C. A. 2nd Cir.), 142 Fed. Rep. 960, 74 C. C. A. 130, 15 Am. B. R. 290; *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73; *In re Weiss*, 159 Fed. Rep. 295, 20 Am. B. R. 247.

<sup>62</sup> *In re Eschwege & Cohn* (Ref. op.), 8 Am. B. R. 282.

<sup>63</sup> *In re McCracken & McLeod*, 129 Fed. Rep. 621, 12 Am. B. R. 95; *Frank v. Dickey* (C. C. A. 8th Cir.), 139 Fed. Rep. 744, 71 C. C. A. 562, 15 Am. B. R. 155.

expense of administration which is given priority in payment. It is allowed to the parties and not to the attorneys by the statute. It is not necessary to pay the attorney before obtaining an order fixing the amount.<sup>64</sup> The proper course to pursue is for the bankrupt, the petitioning creditors, trustee or receiver to apply to the judge or the referee, usually the referee, to fix the amount and direct payment from the funds of the estate. The application may be presented by the attorney but should be made in the name of his client.

The amount of fees to be allowed an attorney for services in bankruptcy rests in the discretion of the court.<sup>65</sup> It may be allowed by the referee.<sup>66</sup> This may be done without notice to creditors,<sup>67</sup> but it is better practice to give notice of the hearing to such parties as may be interested in contesting the amount to be allowed.

The policy of the bankrupt act is to have the estate of the bankrupt administered as economically as possible, but this does not imply that an attorney shall be required to render services in bankruptcy for less compensation than in other cases. The court should not permit the estate to be burdened with unnecessary attorney's fees, but an attorney is entitled to a reasonable fee commensurate with the actual services rendered. An attorney for a trustee or creditors, who succeeds in recovering property concealed or transferred in fraud of creditors, is entitled to the same compensation as would be allowed for like services in other cases.

<sup>64</sup> *In re McKenna*, 137 Fed. Rep. 611, 15 Am. B. R. 6.

<sup>65</sup> *Page v. Rogers*, 211 U. S. 575, 580, 53 L. Ed. 332, 21 Am. B. R. 496; *In re Curtis* (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 41 C. C. A. 59, 4 Am. B. R. 17; *Smith v. Cooper*, 120 Fed. Rep. 230, 9 Am. B. R. 755; *In re Young*, 142 Fed. Rep. 891, 16 Am. B. R. 108.

As to the right to a jury trial, see *In re Rude*, 101 Fed. Rep. 805, 4 Am. B. R. 319.

<sup>66</sup> *In re Stotts*, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re Tebo*, 101 Fed. Rep. 419, 4 Am. B. R. 146; *In re Michel*, 95 Fed. Rep. 803, 1 Am. B. R. 665.

<sup>67</sup> *In re Stotts*, 93 Fed. Rep. 438, 1 Am. B. R. 641.

An attorney will be allowed to recover from the estate money expended for proper disbursements while employed in the interests of the estate.<sup>68</sup>

The order of the referee allowing an attorney's fee is subject to review by the judge.<sup>69</sup> The order of the judge may be reviewed in the circuit court of appeals on petition to review.<sup>70</sup> An appeal has been sustained where the fee exceeded five hundred dollars on the ground that the order was a judgment allowing or rejecting a claim.<sup>71</sup> It should be observed that where it was not a debt against the bankrupt before adjudication, it is not a claim against his estate within Section 25a of the act. It is merely an expense of administration for which the estate may be charged. The order, therefore, may be reviewed on petition and not by appeal.

#### § 106. Fees of the attorney for the bankrupt.

The statute expressly provides for the payment out of the estate of one reasonable attorney's fee for professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt, in involuntary cases while performing the duties prescribed by the act, and to the bankrupt in voluntary cases, as the court may allow.<sup>72</sup>

<sup>68</sup> *In re Hoffman*, 173 Fed. Rep. 234, 23 Am. B. R. 19, Judge Quales said: "On the second branch of the case, involving disbursements of \$202.96, I can see no reason why counsel should not be repaid the money actually expended for proper disbursements. The certificate of the referee seems to cover the fact of the expenditure and the propriety of the outlay. In my judgment this should not be confused with the question of attorney's fees; and that portion of the finding of the referee disallowing said sum of \$202.96 is reversed, and an order should be entered for the payment

of such disbursements to the claimants."

See, also, *In re Fidler & Sons*, 172 Fed. Rep. 632, 23 Am. B. R. 16, Gen. Ord. No. 27.

<sup>70</sup> *Ohio Valley Bank v. Switzer* (C. C. A. 6th Cir.), 153 Fed. Rep. 362, 82 C. C. A. 438, 18 Am. B. R. 689; *Davidson v. Friedman* (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 72 C. C. A. 553, 15 Am. B. R. 489.

<sup>71</sup> *In re Roche* (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 42 C. C. A. 115, 4 Am. B. R. 369; *In re Curtis* (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 41 C. C. A. 59, 4 Am. B. R. 17.

<sup>72</sup> B. A. 1898, Sec. 64b, clause 3.

The bankrupt act contemplates that a voluntary or involuntary bankrupt may have the benefit of the advice and services of an attorney who may be paid from the estate. The reason for this is that the attorney may assist the court in carrying out the law by advising the bankrupt what duties he is required to perform, as well as what are his rights and privileges. It is not the object of the law to provide an attorney for the bankrupt at the expense of the estate to oppose the progress of the proceedings against his client, but rather to assist the court in administering the law fairly between creditors and debtor. It is the policy of the law that litigants in court shall be represented by attorneys. The attorney for the bankrupt should not represent creditors proving claims against his estate,<sup>73</sup> or the trustee,<sup>74</sup> or other adverse interests to the bankrupt. His duty is primarily to his client.

An attorney for the bankrupt, either voluntary or involuntary, is not entitled to a fee as a matter of right. The allowance<sup>75</sup> as well as the amount<sup>76</sup> is within the sound discretion of the court, which includes the referee. Where the referee is not satisfied with the evidence of services rendered, he may suspend the claim for a time, but must make an allowance within a reasonable time on such evidence as he may have.<sup>77</sup>

It is intimated in some cases that a different rule applies to the allowance of an attorney's fee to a bankrupt in an invol-

<sup>73</sup> *In re Kimball*, 100 Fed. Rep. 777, 4 Am. B. R. 144; *In re Wooten*, 118 Fed. Rep. 670, 9 Am. B. R. 247; *In re Dimm & Co.*, 146 Fed. Rep. 402, 17 Am. B. R. 119.

*In re Cooper*, 135 Fed. Rep. 196, 14 Am. B. R. 320, an attorney whose retainer from the bankrupt covered the filing of the petition only was permitted subsequently to represent creditors.

<sup>74</sup> *Keyes v. McKirrow*, 180 Mass. 261, 9 Am. B. R. 322; *In re Teuthorn* (Ref. op.), 5 Am. B. R. 767.

<sup>75</sup> *In re Carr*, 117 Fed. Rep. 572, 9 Am. B. R. 58; *In re Morris*, 125 Fed. Rep. 841, 11 Am. B. R. 145; *In re Burrus*, 97 Fed. Rep. 926, 3 Am. B. R. 296.

<sup>76</sup> *In re Beck*, 92 Fed. Rep. 889, 1 Am. B. R. 535; *In re Burrus*, 97 Fed. Rep. 926, 3 Am. B. R. 296; *In re Curtis* (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 41 C. C. A. 59, 4 Am. B. R. 17.

<sup>77</sup> *In re Dreeben*, 101 Fed. Rep. 110, 4 Am. B. R. 146.



untary and a voluntary proceeding. This is founded upon the language of Section 64*b*, clause 3, authorizing an attorney's fee "to the bankrupt in an involuntary case while performing the duties herein prescribed, and to the bankrupt in a voluntary case, as the court may allow." It is hard to conceive of the allowance of an attorney's fee to a voluntary bankrupt except while performing duties prescribed by the act. The services of the bankrupt's attorney are substantially the same in a voluntary and an involuntary proceeding.

The act does not authorize a bankrupt to employ, at the expense of the estate, counsel to attend him in the performance of every duty prescribed by the act. It is only such a reasonable attorney's fee as the court may allow in each individual case and only such professional aid as the nature, exigency and difficulty of the duty to be performed in each individual case reasonably require. To justify the allowance of an attorney's fee in bankruptcy proceedings professional services must have been rendered in good faith and be reasonably necessary.<sup>78</sup> The services rendered must be professional and not merely clerical.<sup>79</sup> The amount of the fee allowed should be, not what is reasonable for the work done, but what is reasonable for the work necessary.<sup>80</sup>

<sup>78</sup> *In re Rosenthal & Lehman*, 120 Fed. Rep. 848, 9 Am. B. R. 626; *Liddon & Bro. v. Smith* (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 14 Am. B. R. 204; *In re Payne*, 151 Fed. Rep. 1018, 18 Am. B. R. 192; *In re Goldville Mfg. Co.*, 123 Fed. Rep. 579, 10 Am. B. R. 552; *In re Connell & Sons*, 120 Fed. Rep. 846, 9 Am. B. R. 474; *In re Anderson*, 103 Fed. Rep. 854, 4 Am. B. R. 640; *In re Michel*, 95 Fed. Rep. 803, 1 Am. B. R. 665; *In re O'Hara*, 166 Fed. Rep. 384, 21 Am. B. R. 508; *In re Woodward*, 95 Fed. Rep. 955, 2 Am. B. R. 592.

<sup>79</sup> *In re Connell & Sons*, 120 Fed. Rep. 846, 9 Am. B. R. 474.

<sup>80</sup> *In re Connell & Sons*, 120 Fed. Rep. 846, 9 Am. B. R. 471; *In re Terrill*, 103 Fed. Rep. 781, 4 Am. B. R. 625; *In re Payne*, 151 Fed. Rep. 1018, 18 Am. B. R. 192; *In re Mayer*, 101 Fed. Rep. 695, 4 Am. B. R. 241.

Under different circumstances the following amounts have been allowed as reasonable fees to attorney for a bankrupt: Fifty dollars, *In re Mayer*, 101 Fed. Rep. 695, 4 Am. B. R. 238; ninety dollars, *In re Anderson*, 103 Fed. Rep. 854, 4 Am. B. R. 640; one hundred and twenty-five dollars, *In re Carr*, 117 Fed. Rep. 572, 9 Am. B. R. 58; one hundred dollars, *In re Connell & Sons*, 120

The attorney for a voluntary bankrupt may be allowed a fee for preparing the petition and schedules and procuring an adjudication.<sup>81</sup> The court will not allow the bankrupt's attorney an additional fee where he has been paid for preparing the petition and schedules before filing them.<sup>82</sup> The bankrupt can not recover from the estate money paid for attorney's fees in preparing the schedules and petition.<sup>83</sup> The attorney for an involuntary bankrupt may be allowed a fee for preparing schedules.<sup>84</sup>

An attorney's fee may be allowed for attending the bankrupt during his examination,<sup>85</sup> but not when he is "employed for the purpose of screening the bankrupt from the consequences of his own wrongful conduct, or for the purpose of suppressing the truth or otherwise thwarting the operation of the act."<sup>86</sup>

Fed. Rep. 846, 9 Am. B. R. 474; fifty dollars, *In re Covington*, 132 Fed. Rep. 884, 13 Am. B. R. 150; fifty dollars, *In re Smith*, 108 Fed. Rep. 89, 5 Am. B. R. 559; seventy-five dollars, *In re Lang*, 127 Fed. Rep. 755, 11 Am. B. R. 794; nothing. *In re O'Connell*, 98 Fed. Rep. 83, 3 Am. B. R. 422; fifty dollars, *In re Felson*, 139 Fed. Rep. 275, 15 Am. B. R. 185; two hundred dollars, *In re Burrus*, 97 Fed. Rep. 926, 3 Am. B. R. 296; fifty dollars, *In re Stratemeyer*, 14 Am. B. R. 121; two hundred and seventy dollars, *In re Brundin*, 112 Fed. Rep. 306, 7 Am. B. R. 298; nothing, *Liddon & Bro. v. Smith*, (C. C. A. 5th Cir.), 135 Fed. Rep. 43, 67 C. C. A. 517; 14 Am. B. R. 204; twenty-five dollars, *In re Carolina Cooperage Co.*, 96 Fed. Rep. 950, 3 Am. B. R. 154; fifty dollars, *In re Kross*, 96 Fed. Rep. 816, 3 Am. B. R. 187; fifty-five dollars, *In re Christianson*, 175 Fed. Rep. 867, 23 Am. B. R. 710.

<sup>81</sup> *In re Kross*, 96 Fed. Rep. 816, 3 Am. B. R. 188; *In re Hitchcock* (D. C. Haw.), 17 Am. B. R. 664; *In re Terrill*, 103 Fed. Rep. 781, 4 Am. B. R. 625; *In re Christianson*, 175 Fed. Rep. 867, 23 Am. B. R. 710.

But see *In re Beck*, 92 Fed. Rep. 889, 1 Am. B. R. 535; *In re Stotts*, 93 Fed. Rep. 438, 1 Am. B. R. 641.

<sup>82</sup> *In re O'Connell*, 98 Fed. Rep. 83, 3 Am. B. R. 422.

<sup>83</sup> *In re Matthews*, 97 Fed. Rep. 772, 3 Am. B. R. 265.

<sup>84</sup> *In re Anderson*, 103 Fed. Rep. 854, 4 Am. B. R. 640; *In re Michel*, 95 Fed. Rep. 803, 1 Am. B. R. 665.

<sup>85</sup> *In re Michel*, 95 Fed. Rep. 803, 1 Am. B. R. 665; *In re Stratemeyer* (D. C. Haw.), 14 Am. B. R. 121; *In re Mayer*, 101 Fed. Rep. 695, 4 Am. B. R. 241; *In re Anderson*, 103 Fed. Rep. 854, 4 Am. B. R. 645.

<sup>86</sup> *In re Rosenthal & Lehman*, 120 Fed. Rep. 848, 9 Am. B. R. 626; *In re Kross*, 96 Fed. Rep. 816, 3 Am. B. R. 187.

An attorney for the bankrupt has been allowed a fee for services rendered before a contempt committed by the bankrupt in which the attorney had no part.<sup>87</sup>

Ordinarily no fee will be allowed an attorney for opposing an adjudication of bankruptcy.<sup>88</sup> A case may arise where the court may be justified in allowing fees to the attorney for the bankrupt in contesting an adjudication.

It has been held that a fee should not be allowed an attorney for assisting a bankrupt in getting his discharge.<sup>89</sup> It would however, seem to be within the spirit of the act that the bankrupt be entitled to the services of an attorney in preparing and defending a petition for his discharge.<sup>90</sup> It is a right, if not strictly a duty, provided by the bankrupt act.

<sup>87</sup> *In re Mayer*, 101 Fed. Rep. 695, 4 Am. B. R. 239.

<sup>88</sup> *In re Woodard*, 95 Fed. Rep. 955, 2 Am. B. R. 692; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

In *Pratt v. Bothe* (C. C. A. 6th Cir.), 130 Fed. Rep. 670, 65 C. C. A. 48, 12 Am. B. R. 533, Judge Severens speaking for the circuit court of appeals said: "By section 64b, the law provides for compensation to an attorney who assists the bankrupt in performing the duties imposed upon him. But this is done for the purpose of facilitating the proceedings, and for the benefit of the estate. It is not done in recognition of any contract obligation of the bankrupt. Many cases have been cited to us—mostly cases arising upon the last preceding act—in which the bankruptcy courts have given some countenance to the appellant's contention that the debtor may employ counsel to resist the petition of his creditors for an order adjudging him a bankrupt, and charge his assets with the payment thereof, and in one case that doctrine seems to have been quite pointedly held. *In re Com-*

*stock*, 6 Fed. Cas. 239, No. 3074. The idea which pervades the allowance of such a charge seems to have been grounded upon a disposition to be merciful to the debtor, who, it is said, has given up all his property, and is without other means of repelling an unjust prosecution. But it is by no means a new thing—indeed, it is a situation constantly recurring—where a man, whether by his fault or his misfortune, is without means to make full defense of his property rights. It is unfortunate often, but it has never been thought that property belonging to others, or which might be adjudged to them, should be drawn upon to enable the man to make defense. Many cases are cited which more or less oppugn the doctrine of such decisions as *In re Comstock*."

<sup>89</sup> *In re Brundin*, 112 Fed. Rep. 306, 7 Am. B. R. 296.

<sup>90</sup> *In re Hitchcock* (D. C. Haw.), 17 Am. B. R. 664; *In re Stratemeyer* (D. C. Haw.), 14 Am. B. R. 120; *In re Kross*, 96 Fed. Rep. 816, 3 Am. B. R. 187; *In re Christianson*, 175 Fed. Rep. 867, 23 Am. B. R. 710.

It has been held that an attorney's fee was not allowable out of the estate for defending a bankrupt for contempt,<sup>91</sup> or for securing his exemptions,<sup>92</sup> or in securing a composition with creditors after a contest when the order of confirmation required the bankrupt to pay all the costs,<sup>93</sup> or for services in connection with a suit brought by a trustee to set aside a conveyance of real estate made by the bankrupt.<sup>94</sup>

Fees due an attorney for services performed prior to bankruptcy are provable claims against the estate, but are not entitled to preference.<sup>95</sup> It will be observed that it is only fees due an attorney which are provable claims. An attorney's collection fee, provided for in a note, is provable as a part of the debt itself if the note falls due before the institution of bankruptcy proceedings and may be enforced in a court of bankruptcy,<sup>96</sup> but if the note does not fall due prior to bankruptcy and has not become a fixed liability, it is not provable.<sup>97</sup>

**§ 107. The court may revise attorneys' fees paid by a debtor prior to his bankruptcy.**

Section 60*d* of the bankrupt act provides that "if a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or

<sup>91</sup> *In re* Anderson, 103 Fed. Rep. 854, 4 Am. B. R. 640.

<sup>92</sup> *In re* O'Hara, 166 Fed. Rep. 384, 21 Am. B. R. 508; *In re* Castleberry, 143 Fed. Rep. 1021, 16 Am. B. R. 430.

<sup>93</sup> *In re* Martin, 152 Fed. Rep. 582, 18 Am. B. R. 250.

<sup>94</sup> *In re* Stratemeyer (D. C. Haw.), 14 Am. B. R. 120.

<sup>95</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re* Morris, 125 Fed. Rep. 841, 11 Am. B. R. 145.

<sup>96</sup> *Merchants Bank v. Thomas* (C. C. A. 5th Cir.), 121 Fed. Rep.

306, 57 C. C. A. 374, 10 Am. B. R. 299; *Chesterton Bank v. Walker* (C. C. A. 4th Cir.), 163 Fed. Rep. 510, 90 C. C. A. 140, 20 Am. B. R. 840; *In re* Edens Co., 151 Fed. Rep. 940, 18 Am. B. R. 643; *McCabe v. Patton* (C. C. A. 3rd Cir.), 174 Fed. Rep. 217, 98 C. C. A. 225, 23 Am. B. R. 335.

<sup>97</sup> *In re* Thompson Milling Co., 144 Fed. Rep. 314, 16 Am. B. R. 454; *In re* Roche (C. C. A. 5th Cir.), 101 Fed. Rep. 956, 42 C. C. A. 115, 4 Am. B. R. 369.

proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

This provision relates to security for or the payment of attorney's fees for services to be performed before bankruptcy.<sup>97\*</sup> Payment for services rendered after bankruptcy proceedings are commenced is provided by Section 64*b* of the act. It has been held that the character of services referred to in Section 60*d* are only such as tend to conserve and benefit the estate of the bankrupt.<sup>98</sup> The act does not seem to so limit it. The object of this provision is to prevent a failing debtor from using creditor's money too liberally in dealing with his attorney on the eve of bankruptcy.

The promise by a debtor to transfer certain property to his attorney in contemplation of bankruptcy where there was no actual delivery or change of possession until after adjudication upon the petition does not constitute a transfer to secure the payment of attorney's fees.<sup>99</sup>

This section, as observed by Mr. Justice Day<sup>1</sup> is *sui generis*, and does not contemplate the bringing of plenary suits or the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and

<sup>97\*</sup> *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *Pratt v. Bothe* (C. C. A. 6th Cir.), 130 Fed. Rep. 670, 65 C. C. A. 48, 12 Am. B. R. 529; *Furth v. Stahl*, 205 Pa. 439, 10 Am. B. R. 442; *Swartz v. Frank*, 183 Mo. 438.

But see observation of Judge Brown *In re Kross*, 96 Fed. Rep. 816, 3 Am. B. R. 188; *In re Habegger* (C. C. A. 8th Cir.), 139 Fed.

Rep. 623, 71 C. C. A. 607, 15 Am. B. R. 198.

<sup>98</sup> *In re Habegger* (C. C. A. 8th Cir.), 139 Fed. Rep. 623, 71 C. C. A. 607, 15 Am. B. R. 198.

<sup>99</sup> *In re Corbett*, 104 Fed. Rep. 872, 5 Am. B. R. 224.

<sup>1</sup> *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1.

advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness."

The petition by the trustee to re-examine a transaction between a bankrupt and his attorney under this section is a proceeding in bankruptcy proper, of which the court of bankruptcy has jurisdiction irrespective of Section 23 of the act.<sup>2</sup> There is no provision for the enforcement of this section in any other court, state or federal, than the one in which the estate is being administered.<sup>3</sup> An attorney residing without the district may be brought in by notice by mail or otherwise, as the court may direct, so that an opportunity is given him to appear and contest the reasonableness of the charges in question.<sup>4</sup>

After a hearing of the parties the judge or the referee may make an order fixing the amount of the excessive transfer for an attorney's fee.<sup>5</sup> This order is binding on the parties. If the attorney is within the jurisdiction of the court, it may compel him to pay the sum adjudged into court. If he is not within the jurisdiction, it may be that the order can not be made effectual until a judgment is rendered in a jurisdiction where it can be executed.<sup>6</sup>

#### **§ 108. Fees of the attorney for petitioning creditors.**

The statute expressly provides for the payment out of the estate of one reasonable attorney's fee, for professional services

<sup>2</sup> *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *In re Lewin*, 103 Fed. Rep. 850, 4 Am. B. R. 632.

<sup>3</sup> *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *Swartz v. Frank*, 183 Mo. 438.

<sup>4</sup> *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1.

<sup>5</sup> *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1.

<sup>6</sup> *In re Wood & Henderson*, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1.

actually rendered, irrespective of the number of attorneys employed, to petitioning creditors in involuntary cases.<sup>7</sup>

This provision is founded upon the theory that the services of the attorneys for the petitioning creditors in instituting bankruptcy proceedings in any case and carrying them forward to the adjudication benefit equally, in proportion to what is owing to them, all the unsecured creditors of the bankrupt. The payment of a reasonable attorney's fee to them from the estate makes this expense fall equitably in the same proportion upon all such creditors.

An attorney's fee to petitioning creditors may be allowed for professional services actually rendered prior to the adjudication.<sup>8</sup> These services include the preparation of the petition, procuring the adjudication, and any service rendered before adjudication in pursuing property, or obtaining the appointment of a receiver, or in staying suits in a state court, or in securing an injunction to restrain interference with or the disposition of assets, whenever such services are required for the protection and conservation of the estate for the creditors before the appointment of a receiver or the election of a trustee.

The amount of attorneys' fees to be allowed to the petitioning creditors for services in bankruptcy proceedings rests in the sound judicial discretion of the court, which includes the referee.<sup>9</sup> There is no fixed rule or standard by which the court can measure the amount of attorneys' fees to petitioning creditors. It depends upon the amount of professional services necessary and actually rendered, the amount involved, the character of the opposition, and the result obtained.<sup>10</sup>

<sup>7</sup> B. A. 1898, Sec. 64b.

<sup>8</sup> *In re Curtis* (C. C. A. 7th Cir.), 100 Fed. Rep. 785, 41 C. C. A. 59, 4 Am. B. R. 17; *Smith v. Cooper*, 120 Fed. Rep. 230, 9 Am. B. R. 755; *Frank v. Dickey* (C. C. A. 8th Cir.), 139 Fed. Rep. 744, 71 C. C. A. 562, 15 Am. B. R. 155; *In re Hart & Co., Ltd.* (D. C. Haw.), 16 Am. B. R. 725; *In re Young*, 143 Fed. Rep. 891, 16 Am. B. R. 108.

<sup>9</sup> *In re Curtis* (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 41 C. C. A. 59, 4 Am. B. R. 17; *In re Young*, 143 Fed. Rep. 891, 16 Am. B. R. 108.

<sup>10</sup> The following amounts have been allowed as reasonable fees to attorneys for the petitioning creditors; two hundred and fifty dollars, *In re Goldville Mfg. Co.*, 123 Fed. Rep. 579, 10 Am. B. R. 552; two hundred dollars, *In re Covington*,

The attorney for the petitioning creditors is not entitled to a fee for attending creditors' meetings, or for doing the work which the bankrupt act requires the referee to do.<sup>11</sup> Petitioning creditors are not entitled to recover from the estate attorneys' fees or stenographers' fees paid by them in contesting claims of other creditors prior to the election of a trustee,<sup>12</sup> or for services performed after a trustee has been elected, because the trustee represents all creditors.<sup>13</sup> The court has denied attorneys' fees for consultation and advice before it was decided to begin bankruptcy proceedings, on the ground that the estate was not chargeable for services rendered a client.<sup>14</sup>

A fee should not be allowed for useless and unnecessary services. No fee was allowed petitioning creditors in a second petition in bankruptcy which was ignored and never acted upon,<sup>15</sup> or petitioning creditors in the first petition which was

132 Fed. Rep. 884, 13 Am. B. R. 150; nothing, *In re Fletcher* (Ref. op.), 10 Am. B. R. 400; one hundred dollars, *In re Harrison Mercantile Co.*, 95 Fed. Rep. 123, 2 Am. B. R. 219; seventy-five dollars, *In re Woodard*, 95 Fed. Rep. 955, 2 Am. B. R. 692; two thousand dollars, *In re Curtis* (C. C. A. 7th Cir.), 100 Fed. Rep. 784, 41 C. C. A. 59, 4 Am. B. R. 17; seventy-five dollars, *In re Silverman*, 97 Fed. Rep. 325, 3 Am. B. R. 227; one hundred and fifty dollars, *In re Carr*, 117 Fed. Rep. 572, 9 Am. B. R. 58; five thousand dollars, *In re Southern Steel Co.*, 169 Fed. Rep. 702; one thousand dollars, *Smith v. Cooper*, 120 Fed. Rep. 230, 9 Am. B. R. 755.

In *Davidson v. Friedman*, 140 Fed. Rep. 853, 15 Am. B. R. 489, \$2,500 was allowed the attorney for creditors for recovering \$16,000 for the estate; and in *Rogers v. Page*, (C. C. A. 6th Cir.), 149 Fed. Rep. 194, 79 C. C. A. 153, 17 Am. B. R.

854, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; \$15,000 was allowed the attorney for creditors for recovering \$70,000 for the estate.

<sup>11</sup> *In re Harrison Merc. Co.*, 95 Fed. Rep. 123, 2 Am. B. R. 219; *In re Silverman*, 97 Fed. Rep. 325, 3 Am. B. R. 227.

But see *In re Little River Lumber Co.*, 101 Fed. Rep. 558, 3 Am. B. R. 682.

<sup>12</sup> *In re Fletcher* (Ref. op.), 10 Am. B. R. 398; *In re Worth*, 130 Fed. Rep. 927, 12 Am. B. R. 572.

<sup>13</sup> *In re Felson*, 139 Fed. Rep. 275, 15 Am. B. R. 191; *In re Silverman*, 97 Fed. Rep. 325, 3 Am. B. R. 227.

But see *In re Little River Lumber Co.*, 101 Fed. Rep. 558, 3 Am. B. R. 682.

<sup>14</sup> *In re Hart & Co., Ltd.* (D. C. Haw.), 16 Am. B. R. 725.

<sup>15</sup> *Frank v. Dickey* (C. C. A. 8th Cir.), 139 Fed. Rep. 744, 71 C. C. A. 562, 15 Am. B. R. 155.



faulty and all proceedings were held under the second petition.<sup>16</sup>

Where two bankruptcy proceedings are filed by attorneys representing different petitioning creditors and are subsequently consolidated, a single attorney's fee should be divided between the attorneys according to the relative value of the services and the amount of work done by each.<sup>17</sup> Where creditors intervene to join in the petition they may share in the single attorney's fee for petitioning creditors as the court may allow.

**§ 109. Fees of an attorney for a secured or unsecured creditor.**

It may be said generally that there is no authority to allow compensation from the estate for services of an attorney employed by a secured or an unsecured creditor in bankruptcy proceedings. He must look to the creditor employing him for his fee.

Thus where a creditor employs an attorney to prosecute a claim, or to enforce a mortgage or lien against the estate of a bankrupt, he is not entitled to an allowance for attorney's fees out of the estate.<sup>18</sup> An attorney employed by a creditor to oppose claims, after the appointment of a trustee, can not be allowed compensation for such services from the estate, unless in a case where the trustee has improperly refused to make defense.<sup>19</sup> Where the trustee refused to make defense

<sup>16</sup> *In re Southern Steel Co.*, 169 Fed. Rep. 703, 22 Am. B. R. 476; *In re Fischer* (C. C. A. 2nd Cir.), 175 Fed. Rep. 531, 99 C. C. A. 153, 23 Am. B. R. 427.

<sup>17</sup> *In re McCracken & McLeod*, 129 Fed. Rep. 621, 12 Am. B. R. 95.

*In Frank v. Dickey* (C. C. A. 8th Cir.), 139 Fed. Rep. 744, 71 C. C. A. 562, 15 Am. B. R. 155, no allowance was made to the attorneys for the petitioning creditors in a second petition because it was subsequently ignored.

<sup>18</sup> *In re Hersey*, 171 Fed. Rep. 1004, 22 Am. B. R. 863; *In re Goldville Mfg. Co.*, 123 Fed. Rep. 579, 10 Am. B. R. 552; *In re Smith*, 108 Fed. Rep. 739, 5 Am. B. R. 559; *In re Claussen & Co.*, 164 Fed. Rep. 300, 21 Am. B. R. 34; *In re Felson*, 139 Fed. Rep. 275, 15 Am. B. R. 185.

But see *In re Wendel*, 152 Fed. Rep. 672, 18 Am. B. R. 665.

<sup>19</sup> *In re Roadarmour* (C. C. A. 6th Cir.), 177 Fed. Rep. 379, 100 C. C. A. 611, 24 Am. B. R. 49.

the court of bankruptcy may, under its general equity powers, allow compensation to an attorney employed by creditors for the purpose of such defense.<sup>20</sup>

But where creditors have discovered and succeeded in recovering assets for the benefit of all the creditors, they may be allowed attorney's fees out of the fund so recovered.<sup>21</sup> Where creditors have obtained a lien by attachment of property, which the trustee could not otherwise reach and the lien is preserved for the benefit of the estate, a reasonable attorney's fee may be allowed them.<sup>22</sup>

<sup>20</sup> *In re Little River Lumber Co.*, 101 Fed. Rep. 558, 3 Am. B. R. 682; *In re Roadarmour* (C. C. A. 6th Cir.), 177 Fed. Rep. 379, 100 C. C. A. 611, 24 Am. B. R. 49; *In re Fidler & Sons*, 172 Fed. Rep. 632, 23 Am. B. R. 16.

<sup>21</sup> *In Davidson v. Friedman* (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 72 C. C. A. 553, 15 Am. B. R. 489, \$2,500.00 was allowed the attorney for creditors for recovering \$16,000.00 for the estate.

*In Page v. Rogers* (C. C. A. 6th Cir.), 149 Fed. Rep. 194, 79 C. C. A. 153, 17 Am. B. R. 854, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496, \$15,000.00 was allowed the attorney for creditors for recovering \$70,000.00 for the estate.

<sup>22</sup> *In re Receivers, etc. v. Staake* (C. C. A. 4th Cir.), 133 Fed. Rep. 717, 66 C. C. A. 547, 13 Am. B. R. 281, s. c. 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639, Judge Morris speaking for the circuit court of appeals said: "The other question is as to the allowance of a reasonable compensation to the attorneys who represented the attaching creditors, and whose proceedings produced the fund which now is to pass to the trustee of the

bankrupt. The attaching creditors, in good faith, and in a justifiable exercise of the right given to them by the Virginia law, employed counsel to institute proceedings to seize the property which the bankrupt, as it now appears, had sold. By virtue of that seizure, and solely by virtue of it, and to the extent of the seizure, the proceeds of those proceedings now pass to the trustee. The equity of the claim for compensation to be paid out of the fund is very strong. It is clearly a case in which, by an appropriation which the bankrupt law makes of a fund which came into existence and was preserved by the legal proceedings instituted by the attaching creditors, all the common creditors, without distinction, are benefited. The fund which otherwise the attaching creditors would have secured for their own benefit the bankrupt law says shall be shared equally among all the creditors. The fund was brought into existence by the exertions of the attaching creditors, and should be considered as in the same class as a fund arising under a creditors' bill, because the bankrupt act declares it shall be so treated. The fund comes into the hands

### § 110. Fees of the attorney for the trustee or receiver.

The trustee <sup>23</sup> or a receiver <sup>24</sup> in voluntary or involuntary bankruptcy may employ counsel, when necessary for the proper discharge of his duties as such trustee or receiver. A reasonable attorney's fee for such services constitutes a part of the costs and expense of administration and as such is entitled to preferential payment.<sup>25</sup>

Many matters may arise in the course of administering an estate concerning which a trustee is entitled not only to the aid and advice of counsel, but it is his duty to employ an attorney. The trustee must determine whether such services are reasonably necessary as the court will not instruct him in advance as to whether or not he should employ an attorney.<sup>26</sup>

of the trustee of the bankrupt burdened with the charges which were necessarily incurred to bring it into existence. It would appear eminently proper in such a case that the bankruptcy court should, in its discretion, allow such reasonable counsel fees and expenses as were necessarily incurred in the prosecution of the suits. *Trustees v. Greenough*, 105 U. S. 527-534, 26 L. Ed. 1157."

<sup>23</sup> *Page v. Rogers* (C. C. A. 6th Cir.), 149 Fed. Rep. 194, 79 C. C. A. 153, 17 Am. B. R. 854, s. c. 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *In re McKenna*, 137 Fed. Rep. 611, 15 Am. B. R. 6; *In re Abram*, 103 Fed. Rep. 272, 4 Am. B. R. 575; *In re Byerly*, 128 Fed. Rep. 637, 12 Am. B. R. 186; *In re Erie Lumber Co.*, 150 Fed. Rep. 817, 17 Am. B. R. 702; *In re Little River Lumber Co.*, 101 Fed. Rep. 558, 3 Am. B. R. 682; *In re Stotts*, 93 Fed. Rep. 438, 1 Am. B. R. 641; *In re Salaberry*, 107 Fed. Rep. 95, 5 Am. B. R. 847.

But see *In re Smith*, 108 Fed. Rep. 39, 5 Am. B. R. 559; *In re Lang*, 127 Fed. Rep. 755, 11 Am. B. R. 794.

<sup>24</sup> *In re Oppenheimer*, 146 Fed. Rep. 140, 17 Am. B. R. 59; *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re Martin-Borgeson Co.*, 151 Fed. Rep. 780, 18 Am. B. R. 179; *In re Leonard*, 177 Fed. Rep. 503, 24 Am. B. R. 97.

<sup>25</sup> *Page v. Rogers* (C. C. A. 6th Cir.), 149 Fed. Rep. 194, 79 C. C. A. 153, 17 Am. B. R. 854, s. c. 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *Davidson v. Friedman* (C. C. A. 6th Cir.), 140 Fed. Rep. 853, 72 C. C. A. 553, 15 Am. B. R. 489; *In re Byerly*, 128 Fed. Rep. 637, 12 Am. B. R. 186; *In re Abram*, 103 Fed. Rep. 272, 4 Am. B. R. 575; *In re Oppenheimer*, 146 Fed. Rep. 140, 17 Am. B. R. 59; *In re Lacov* (C. C. A. 2nd Cir.), 142 Fed. Rep. 960, 74 C. C. A. 130, 15 Am. B. R. 290; *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73.

<sup>26</sup> *In re Abram*, 103 Fed. Rep. 272, 4 Am. B. R. 575.

But see *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

He may require the services of an attorney in bringing suits to collect debts, or to recover preferences or fraudulent transfers of property by the bankrupt,<sup>27</sup> or to intervene to defend pending suits against the bankrupt,<sup>27\*</sup> or to contest claims of secured or unsecured creditors against the estate,<sup>28</sup> or for services and advice with respect to his legal rights generally as trustee of the estate.

It has been held that the creditors may elect an attorney for the trustee,<sup>29</sup> but the better and usual practice is to leave the selection of his attorney to the trustee, subject to the control of the court.<sup>30</sup> The trustee or a receiver should not ordinarily employ the attorney who represents the bankrupt,<sup>31</sup> or an attorney who represents interests in the litigation which are either adverse to the general estate, or in conflict with other interests represented by the trustee.<sup>32</sup> The attorney for the trustee or receiver should be free to represent all of the creditors and not any particular creditor or class of creditors.<sup>33</sup> He should not act for a creditor proving a claim against the estate.

<sup>27</sup> *Page v. Rogers* (C. C. A. 6th Cir.), 149 Fed. Rep. 194, 79 C. C. A. 153, 17 Am. B. R. 854, s. c. 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *In re Hoffman*, 173 Fed. Rep. 234, 23 Am. B. R. 19.

<sup>27\*</sup> *In re Waterloo Organ Co.* (C. C. A. 2nd Cir.), 154 Fed. Rep. 657, 83 C. C. A. 481, 18 Am. B. R. 752.

<sup>28</sup> *In re Lowensohn* (C. C. A. 2nd Cir.), 121 Fed. Rep. 538, 57 C. C. A. 600, 9 Am. B. R. 368; *In re Fletcher* (Ref. op.), 10 Am. B. R. 398.

<sup>29</sup> *In re Little River Lumber Co.*, 101 Fed. Rep. 558, 3 Am. B. R. 682; *In re Smith* (Ref. op.), 1 Am. B. R. 37.

<sup>30</sup> *In re Columbia Iron Works*, 142<sup>d</sup> Fed. Rep. 234, 14 Am. B. R. 526; *In re Arnett*, 112 Fed. Rep.

770, 7 Am. B. R. 522; *In re McKenna*, 137 Fed. Rep. 611, 15 Am. B. R. 4.

<sup>31</sup> *Keyes v. McKirrow*, 180 Mass. 261, 9 Am. B. R. 322; *In re Teuthorn* (Ref. op.), 5 Am. B. R. 767; *In re Mallory*, No. 8990, Fed. Cas., 4 N. B. R. 157.

See also *In re Fidler & Son*, 172 Fed. Rep. 632, 23 Am. B. R. 16.

<sup>32</sup> *In re Rusch*, 105 Fed. Rep. 607, 4 Am. B. R. 575; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

<sup>33</sup> *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73; *In re Southern Steel Co.*, 169 Fed. Rep. 702, 22 Am. B. R. 476; *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 749, 4 Am. B. R. 528; *In re Rusch*, 105 Fed. Rep. 607, 4 Am. B. R. 575;

The claim for an attorney's fee should be worked out through the trustee or receiver. It is an expense of administration incurred by the trustee or receiver. The trustee does not usually pay his attorney until he has obtained an order fixing the amount and directing payment from the funds of the estate.<sup>84</sup>

The amount of the attorney's fee to be allowed to a receiver or a trustee in bankruptcy rests in the sound judicial discretion of the court, which includes the referee.<sup>85</sup> There is no fixed rule or standard by which the court can measure the amount of attorneys' fees to trustees or receivers because the amount of professional services rendered is not the same in any two cases.<sup>86</sup>

*In re Fidler & Son*, 172 Fed. Rep. 632, 23 Am. B. R. 16; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

*In re Strobel* (C. C. A. 2nd Cir.), 160 Fed. Rep. 916, 88 C. C. A. 98, 20 Am. B. R. 22, Judge Lacombe, speaking of the employment of counsel in a dual capacity in bankruptcy, said: "It would have been well had congress in the bankrupt act expressly prohibited receivers from selecting as attorneys or counsel lawyers who had appeared for either the bankrupt or the petitioning creditor. Such selection affords a ready opportunity for chicanery, fraud, and perjury; and it would seem desirable for bankruptcy courts generally to adopt the wholesome rule in force in the Southern District of New York forbidding such selection, and to enforce such rule rigidly."

<sup>84</sup> *In re McKenna*, 137 Fed. Rep. 611, 15 Am. B. R. 6.

<sup>85</sup> *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *In re Oppenheimer*, 146 Fed. Rep. 140, 17 Am. B. R. 59.

<sup>86</sup> *In Hoffman*, 173 Fed. Rep. 234, 23 Am. B. R. 19, Judge Quales said: "It is undoubtedly true that the success or failure of an attorney is an important factor to be considered in determining the value of his services. Success is the test applied by the business world in measuring compensation. It is largely so in the courts. As a rule, professional services, however able or prolonged, which yield no results, command no high reward. I would not hold that an attorney is to be held an insurer of results; but it is clearly incumbent upon him, before he launches an estate into a tedious and expensive litigation, to look ahead and determine whether, in the event of success in the court, he will be able to secure any practical result."

The following amounts have been allowed as reasonable attorneys' fees to trustees: \$800.00 *In re McKenna*, 137 Fed. Rep. 611, 15 Am. B. R. 4; \$2,500.00 *In re Niman* (Ref. op.), 14 Am. B. R. 515; nothing *In re Rozinsky*, 101 Fed. Rep. 229, 3 Am. B. R. 831; \$125.00

An attorney for the trustee is entitled to fees for professional services only.<sup>37</sup> The trustee is elected by the creditors to manage and control the business interests of the estate. To this end he only needs the advice of an attorney when legal problems are presented. A trustee who is an attorney at law will not be allowed extra compensation for his professional services.<sup>43</sup> The attorney for a trustee is not entitled to a fee for professional services for attending examinations where his services were rendered in behalf of creditors who were his real clients,<sup>44</sup> or in general when the attorney for the trustee is also attorney for the creditors.<sup>45</sup> An attorney must disclose his dealings with his client to enable the court to fix the amount of his compensation.<sup>46</sup>

The court will not require a defeated claimant to pay a fee to the trustee's attorney.<sup>38</sup>

**§ 111. Fees of an attorney for an assignee for creditors or a state receiver.**

An attorney for an assignee under a general assignment for creditors in a state court, where the property of the debtor is later administered in bankruptcy, is entitled to a reasonable

*In re* Byerly, 128 Fed. Rep. 637, 12 Am. B. R. 188; \$125.00 *In re* Stotts, 93 Fed. Rep. 438, 1 Am. B. R. 641; \$20.00 *In re* Mitchell (Ref. op.), 1 Am. B. R. 687; \$25.00 *In re* Salaberry, 107 Fed. Rep. 95, 5 Am. B. R. 847; \$1,500.00 *In re* Hoffman, 173 Fed. Rep. 234, 23 Am. B. R. 19; \$25.00 *In re* Fidler & Son, 172 Fed. Rep. 632, 23 Am. B. R. 16.

To attorneys for receivers: \$150.00 *In re* Martin-Borgeson Co., 151 Fed. Rep. 780, 18 Am. B. R. 179; \$100.00 *In re* Oppenheimer, 146 Fed. Rep. 140, 17 Am. B. R. 59; \$6,000.00 *In re* Southern Steel Co., 169 Fed. Rep. 702, 22 Am. B. R. 476.  
<sup>37</sup> *Mason v. Wolkowich*, 150 Fed. Rep. 699, 17 Am. B. R. 712; *In re* Harrison Mercantile Co., 95 Fed. Rep. 123, 2 Am. B. R. 419; *In re*

*Byerly*, 128 Fed. Rep. 637, 12 Am. B. R. 186.

<sup>43</sup> *In re* Byerly, 128 Fed. Rep. 637, 12 Am. B. R. 186; *In re* George Halbert Co. (C. C. A. 2nd Cir.), 134 Fed. Rep. 236, 67 C. C. A. 18, 13 Am. B. R. 399; *In re* Felson, 139 Fed. Rep. 275, 15 Am. B. R. 185.

<sup>44</sup> *In re* Rozinsky, 101 Fed. Rep. 229, 3 Am. B. R. 830.

<sup>45</sup> *In re* Carolina Cooperage Co., 96 Fed. Rep. 920, 3 Am. B. R. 154; *In re* Felson, 139 Fed. Rep. 275, 15 Am. B. R. 185; *In re* Southern Steel Co., 169 Fed. Rep. 702, 22 Am. B. R. 476.

<sup>46</sup> *In re* Carr, 117 Fed. Rep. 572, 9 Am. B. R. 58.

<sup>38</sup> *In re* Rome, 162 Fed. Rep. 971, 19 Am. B. R. 820.

fee for services rendered such assignee before and after the petition in bankruptcy is filed, which are beneficial to the estate,<sup>39</sup> but he is not entitled to a fee for resisting bankruptcy proceedings.<sup>40</sup> Fees for services rendered the assignee which are beneficial to the estate should be given priority under Sec. 64b.<sup>41</sup>

A fee for services rendered the debtor in preparing the deed of assignment may be proved as an unsecured claim.<sup>42</sup>

Attorneys for a receiver appointed by a state court prior to bankruptcy are entitled to fees only so far as their services were beneficial to the estate.<sup>43</sup>

### **§ 112. Enforcing an attorney's lien for fees.**

Where an attorney has a lien for his fees on the amount secured for a creditor, the bankruptcy court may enforce that lien.<sup>44</sup>

The court of bankruptcy will not enjoin the enforcement of an attorney's lien for fees on a judgment recovered in a state court prior to bankruptcy.<sup>45</sup> In such case the state court may proceed to enforce the lien.<sup>46</sup>

### **§ 113. Attorneys' fees as taxable costs.**

A court of bankruptcy will not ordinarily tax as costs attorneys' fees upon the dismissal of a petition in involuntary bankruptcy.<sup>47</sup>

<sup>39</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

<sup>40</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

<sup>41</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re Chase* (C. C. A. 1st Cir.), 124 Fed. Rep. 753, 59 C. C. A. 629, 13 Am. B. R. 677; *Summers v. Abbott* (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 58 C. C. A. 352, 10 Am. B. R. 254.

<sup>42</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1.

<sup>43</sup> *In re Zier & Co.* (C. C. A. 7th Cir.), 142 Fed. Rep. 102, 73 C. C. A. 326, 15 Am. B. R. 646; *Randolph v. Scruggs*, 190 U. S. 533 47 L. Ed. 1165, 10 Am. B. R. 1.

<sup>44</sup> *In re Rude*, 101 Fed. Rep. 805, 4 Am. B. R. 319; *In re Baxter & Co.*, 154 Fed. Rep. 22, 18 Am. B. R. 450.

<sup>45</sup> *In re Pennell*, 159 Fed. Rep. 500, 18 Am. B. R. 909.

<sup>46</sup> *Kneeland v. Pennell* (City Ct. N. Y.), 18 Am. B. R. 538.

<sup>47</sup> *In re Ghiglione*, 93 Fed. Rep. 186, 1 Am. B. R. 580; *In re Phila.*

When an application to seize and hold the property of the bankrupt pending the hearing has been granted and the petition afterwards dismissed, the court may allow attorneys' fees as costs of the proceeding.<sup>48</sup>

A docket fee of twenty dollars may be taxed as costs in a proper case.<sup>49</sup> A court of bankruptcy has refused to dismiss a voluntary petition until the attorney for the trustee has been paid.<sup>50</sup> The court will not tax an attorney's fee against a defeated claimant.<sup>51</sup>

& Lewes Transp. Co., 127 Fed. Rep. 896, 11 Am. B. R. 444; *In re* Morris, 115 Fed. Rep. 591, 7 Am. B. R. 709.

<sup>48</sup> *In re* Abraham (C. C. A. 5th Cir.), 93 Fed. Rep. 767, 35 C. C. A. 592, 2 Am. B. R. 266.

<sup>49</sup> *In re* Todd, 109 Fed. Rep. 265, 6 Am. B. R. 88.

<sup>50</sup> *In re* Salaberry, 107 Fed. Rep. 95, 5 Am. B. R. 847.

<sup>51</sup> *In re* Rome, 162 Fed. Rep. 971, 19 Am. B. R. 820.



## CHAPTER IX.

## WHO MAY BE BANKRUPTS.

SEC.		SEC.	
114.	Voluntary bankrupts.	124.	Corporations as involuntary bankrupts since 1910.
115.	Corporations as voluntary bankrupts.	125.	Municipal corporations.
116.	Voluntary bankrupts must owe provable debts.	126.	Railroad corporations.
117.	Involuntary bankrupts — statutory provisions.	127.	Insurance corporations.
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119.	The date at which the status of a wage-earner or farmer is determined.	129.	The effect of proceedings to dissolve a corporation.
120.	Wage-earners.	130.	Corporations as involuntary bankrupts prior to 1910.
121.	Farmers.	131.	Estates of decedents.
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## § 114. Voluntary bankrupts.

Section 4, as originally enacted, provided that "any person who owes debts, except a corporation, is entitled to the benefits of the act as voluntary bankrupt."

By the amendment of 1910,<sup>1</sup> this provision was amended to read "any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." The effect of this amendment is to permit a corporation, with the exceptions specified, voluntarily to seek its own adjudication as a bankrupt, which was denied to it under the act as originally passed.<sup>2</sup>

Persons are defined by the act itself to include "corporations, except where otherwise specified, officers, partnerships, and women."<sup>3</sup> Any natural person or association or persons not incorporated, irrespective of business or profession or other vocation, or corporations not comprehended within the excepted classes, may become voluntary bankrupts. Partnerships

<sup>1</sup> Act of June 25, 1910, 36 Stat. at L, 838.

<sup>2</sup> As to corporations as voluntary bankrupts see Sec. 115, *post*.

<sup>3</sup> B. A. 1898, Sec. 1, clause 19.

are included among those who may become voluntary bankrupts.<sup>4</sup>

A wage earner or a person chiefly engaged in farming or the tillage of the soil may become a voluntary bankrupt, although not subject to be declared a bankrupt upon a creditor's petition.

The right of an alien, an infant, a lunatic, and a married woman to become voluntary bankrupts is considered in another place.<sup>5</sup>

### § 115. Corporations as voluntary bankrupts.

Prior to the amendment of 1910,<sup>6</sup> a corporation could not file a voluntary petition in bankruptcy. Section 4 of the bankrupt act expressly excluded corporations from the benefit of the act as voluntary bankrupts.

If a corporation, subject to be adjudicated an involuntary bankrupt, admitted in writing its inability to pay its debts and its willingness on that ground to be adjudged bankrupt, it thereby committed an act of bankruptcy.<sup>7</sup> It was not unusual for a corporation to do this and, with the co-operation of creditors owning sufficient claims, to institute involuntary proceedings in such cases.<sup>8</sup> The effect of such proceedings was substantially to permit a corporation to institute voluntary bankruptcy proceedings.

<sup>4</sup>*In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re Carleton*, 115 Fed. Rep. 246, 8 Am. B. R. 270.

B. A. 1898, Sec. 5a provides that a partnership during the continuation of the partnership business or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.

<sup>5</sup> See Secs. 132 to 135, *post*.

<sup>6</sup> Act of June 25, 1910, 36 Stat. at L. 838.

<sup>7</sup> B. A. 1898, Sec. 3, clause 5.

<sup>8</sup>*In re Moench & Sons Co.* (C. C. A. 2nd Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 12 Am. B. R. 240, affirming 123 Fed. Rep. 965, 10 Am. B. R. 656; *Cresson-Clearfield Coal & Coke Co. v. Stauffer* (C. C. A. 3rd Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573; *In re Lisk Mfg. Co.*, 169 Fed. Rep. 411, 21 Am. B. R. 674; *In re Mutual Mercantile Agency*, 111 Fed. Rep. 152, 6 Am. B. R. 607; *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re Marine Mach. & Conveying Co.*, 91 Fed.

The amendment of 1910<sup>9</sup> extended the right to file a voluntary petition to a corporation, except a municipal, railroad, insurance, or banking corporation. These corporations are expressly excepted from being entitled to the benefits of the act as voluntary bankrupts. Any other corporation is entitled to file a voluntary petition.

It will be observed that the privileges of voluntary bankruptcy are not restricted to "moneyed, business or commercial corporations," as in the case of involuntary bankruptcy. A corporation organized for charitable, religious, and other like purposes not for profit, may now invoke the jurisdiction of a bankruptcy court to wind up its affairs. It can not be forced into involuntary bankruptcy by creditors.

#### **§ 116. Voluntary bankrupts must owe provable debts.**

It may be observed that the words "who owe debts" in the original act are omitted in the amendment of 1910 quoted above.<sup>10</sup>

This does not have the effect of doing away with the necessity of owing debts as a condition to filing a voluntary petition. The object of the bankrupt act is to equitably distribute the property of a debtor among his creditors and release him from the unpaid balance of his debts. Unless a person owes debts, proceedings in bankruptcy would be barren of results. The court will not permit a useless thing to be done.

The statute fixes no limit to the number of debts or the amount of the indebtedness in case of voluntary bankruptcy.<sup>11</sup> The only condition is that the petitioner shall owe debts which a discharge in bankruptcy would release. A person who owes

Rep. 630, 1 Am. B. R. 421; *In re Peter Paul Book Co.*, 104 Fed. Rep. 786, 5 Am. B. R. 105; *In re International Coal Min. Co.*, 143 Fed. Rep. 665, 16 Am. B. R. 309; *In re Duplex Radiator Co.*, 142 Fed. Rep. 906, 15 Am. B. R. 324.

<sup>9</sup> Act of June 25, 1910, 36 Stat. at L. 838.

<sup>10</sup> See Sec. 114, *ante*.

<sup>11</sup> Under the act of 1867, (R. S. Sec. 5014), a person was required to owe debts, provable in bankruptcy, exceeding the sum of \$300.

one provable debt, which may be barred by a discharge, is entitled to file a voluntary petition.<sup>12</sup>

Where the only debts specified in the schedules are not provable in bankruptcy,<sup>13</sup> or would not be barred by a discharge, the court may in its discretion dismiss the petition, but it is not compelled in all cases to do so.<sup>14</sup> Creditors may be entitled to have the debtor's property distributed by a court of bankruptcy, where its jurisdiction has been invoked by the debtor, even though he may not be released from the unpaid balance of the debts by a discharge. A person whose only liability is a judgment for a tort which has been suspended by an appeal,<sup>15</sup> or a judgment for wilful and malicious injury,<sup>16</sup> can not demand the benefits of the act as a voluntary bankrupt.

The solvency or insolvency of a petitioner in voluntary bankruptcy is immaterial. A creditor can not resist a petition on the ground that the petitioner is solvent.<sup>17</sup>

### § 117. Involuntary bankrupts—statutory provisions.

Section 4*b* of the bankrupt act as amended June 25, 1910,<sup>18</sup> provides:

"Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be sub-

<sup>12</sup> *In re* Schwaninger, 144 Fed. Rep. 555, 16 Am. B. R. 427; *In re* Walbath, 175 Fed. Rep. 243, 24 Am. B. R. 243.

<sup>13</sup> *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

<sup>14</sup> *In re* Colaluca, 133 Fed. Rep. 255, 18 Am. B. R. 292; *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426.

<sup>15</sup> *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

<sup>16</sup> *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426; *In re* Colaluca, 133 Fed. Rep. 255, 18 Am. B. R. 292.

<sup>17</sup> *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270; *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608.

<sup>18</sup> 36 Stat. at L. 838.

ject to the provisions and entitled to the benefits of this act. 'The bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from any liability under the laws of a state or territory or of the United States.' "

As originally enacted this provision read, "any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

This provision was amended by the act of February 5, 1903,<sup>19</sup> by adding the word "mining" to the classes of corporations subject to involuntary bankruptcy.

The principal change made by this clause of the amendment of 1910 is to enlarge the classes of corporations subject to involuntary bankruptcy.<sup>20</sup> Any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, may now be forced into bankruptcy by its creditors. In other respects the amendment does not effect the persons subject to involuntary bankruptcy.

In any case the debtor must owe one thousand dollars or more in order to be subject to be adjudged an involuntary bankrupt.<sup>22</sup>

Involuntary bankrupts may be divided into three classes. *First*, natural persons not wage-earners or farmers. *Second*, unincorporated companies. *Third*, moneyed, business or commercial corporations, except a municipal, railroad, insurance or banking corporation. These different classes will be considered more fully in the sections immediately following.

<sup>19</sup> 32 Stat. at L. 797.

<sup>20</sup> See Sec. 124, *post*.

<sup>22</sup> B. A. 1898, Sec. 4b.

Cleage v. Laidley (C. C. A. 8th Cir.), 149 Fed. Rep. 346, 79 C. C. A. 284, 17 Am. B. R. 598.

**§ 118. Natural persons, except wage earners or farmers.**

Section 4*b* of the act declares that "any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, . . . owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

If a natural person is not a wage-earner or engaged chiefly in farming or the tillage of the soil, and he owes one thousand dollars and has committed an act of bankruptcy, he is liable to an adjudication as an involuntary bankrupt without regard to his business, profession or other vocation in life.<sup>23</sup> But a person can not bring himself within the exemption by ceasing to engage in a non-exempt occupation after having committed an act of bankruptcy and then become a wage-earner.<sup>24</sup>

It has been held that the petitioning creditors must aver and prove that the defendant is not a wage-earner or farmer to bring the case within the jurisdiction of a court of bankruptcy.<sup>25</sup> This is jurisdictional in the sense of a personal privilege which may be taken advantage of by the defendant or an intervening creditor<sup>27</sup> if objection is seasonably made. The defect, however, may be cured by amendment,<sup>28</sup> or may be waived by answering on the merits.<sup>29</sup>

<sup>23</sup> *In re* Crenshaw, 156 Fed. Rep. 638, 19 Am. B. R. 502; *In re* Burgin, 173 Fed. Rep. 726, 24 Am. B. R. 574; *In re* Naroma Chocolate Co., 178 Fed. Rep. 383, 24 Am. B. R. 154; *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514.

<sup>24</sup> Sec. 119, *post*.

<sup>25</sup> *In re* Taylor (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *In re* Bellah, 116 Fed. Rep. 69, 8 Am. B. R. 310; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 57 C. C. A. 150, 9 Am. B. R. 762; *In re* Pilger, 118 Fed. Rep. 206, 9 Am. B. R. 244; *In re* Mero, 128 Fed. Rep. 630, 12 Am. B. R. 171; *In re* Calli-

son, 130 Fed. Rep. 987, 12 Am. B. R. 344.

<sup>27</sup> *In re* Taylor (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515.

<sup>28</sup> *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514; *In re* Brett, 130 Fed. Rep. 981, 12 Am. B. R. 492; *Green River Deposit Bank v. Craig Bros.*, 110 Fed. Rep. 137, 6 Am. B. R. 381; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411; *In re* Plymouth Cordage Co., 135 Fed. Rep. 1000, 68 C. C. A. 343, 13 Am. B. R. 665.

<sup>29</sup> *Green River Deposit Bank v. Craig Bros.*, 110 Fed. Rep. 137, 6 Am. B. R. 381.

A trustee in bankruptcy, like any other person, may be adjudged a bankrupt.<sup>80</sup>

The right to force an alien, an infant, a lunatic and a married woman into involuntary bankrupt is considered in another place.<sup>81</sup>

**§ 119. The date at which the status of a wage earner or farmer is determined.**

The bankrupt act does not fix the time when the status of the individual as a wage-earner or farmer is to be determined.

The courts have differed somewhat as to the time when his status is fixed for purposes of bankruptcy. The idea runs through all the cases that Section 4*b* must be construed to prevent an insolvent from bringing to naught, by timely change of occupation to that of wage-earner or farmer, all efforts by creditors to have his debts and property administered in a court of bankruptcy.<sup>82</sup>

Whether a person is entitled to exemption from involuntary proceedings, because he is a wage-earner or a farmer, has been determined by his vocation at the time of the act of bankruptcy complained of.<sup>83</sup> This is a reasonable construction

<sup>80</sup> See *Merrick's Estate*, 5 Watts & S. (Penn.), 9.

<sup>81</sup> See Secs. 132 to 135, *post*.

<sup>82</sup> *Flickinger v. First Nat. Bank* (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678 (writ of *certiorari* denied, 203 U. S. 595, 51 L. Ed. 332). *In re Burgin*, 173 Fed. Rep. 726, 22 Am. B. R. 574; *In re Crenshaw*, 156 Fed. Rep. 638, 19 Am. B. R. 502; *In re Luckhardt*, 101 Fed. Rep. 807, 4 Am. B. R. 307; *In re Naroma Chocolate Co.*, 178 Fed. Rep. 383, 24 Am. B. R. 154; *In re Mackey*, 110 Fed. Rep. 361, 6 Am. B. R. 577; *In re Wakefield*, 182 Fed. Rep. 247, 25 Am. B. R. 118.

See also *Tiffany v. La Plume Condensed Milk Co.*, 141 Fed. Rep.

444, 15 Am. B. R. 413, where the English and American cases on this subject are reviewed.

*In re Matson*, 123 Fed. Rep. 743, 10 Am. B. R. 473, Judge Archibald referred the question of occupation to the time when he was passing upon it, but it does not appear that the question was debated before him.

<sup>83</sup> *Flickinger v. First Nat. Bank* (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678 (*certiorari* denied, 203 U. S. 595, 51 L. Ed. 332); *In re Crenshaw*, 156 Fed. Rep. 638, 19 Am. B. R. 502; *In re Luckhardt*, 101 Fed. Rep. 807, 4 Am. B. R. 307; *In re Mackey*, 110 Fed. Rep. 361, 6 Am. B. R. 577.

to defeat attempts which bankrupts may make to escape the consequences of their acts by running under the shelter of an excepted occupation. An act of bankruptcy committed by a person while engaged in one of the excepted occupations should not be the basis of bankruptcy proceedings. Congress evidently intended that no act of a wage-earner or a farmer should bring him within the operation of the involuntary provisions of the statute. But he can not avoid the consequences of acts committed in a non-exempt occupation by a timely change.

The debtor's status in this respect has been determined as of the period during which he was engaged in the business in which he contracted the debts and acquired the property to be administered, although he thereafter committed the act of bankruptcy which was the basis of the proceedings.<sup>84</sup> It has been held also that where a person contracted debts in a non-exempt occupation that he can not defeat bankruptcy proceedings, although the property to be administered was acquired and the act of bankruptcy committed and the petition filed while he was engaged in a non-exempt occupation.<sup>85</sup>

### § 120. Wage-earners.

A wage-earner can not be adjudged a bankrupt on a creditor's petition,<sup>86</sup> but he may file a voluntary petition.

The statute defines a wage-earner to be "an individual who works for wages, salary, or hire, at a rate of compensation not exceeding fifteen hundred dollars per year."<sup>87</sup>

Wage-earners may be said generally to be those persons who, not being engaged in business or trade, depend for a living upon the result of individual labor or effort without the aid of property or capital, and whose rate of compensation does not exceed fifteen hundred dollars per year. The work done must be such as is compensated by wages, salary, or hire.<sup>88</sup> These terms mean much the same thing and as used

<sup>84</sup> *In re Burgin*, 173 Fed. Rep. 726, 22 Am. B. R. 574.

<sup>85</sup> *In re Wakefield*, 182 Fed. Rep. 247, 25 Am. B. R. 118.

<sup>86</sup> See Sec. 118, *ante*.

<sup>87</sup> B. A. 1898, Sec. 1, clause 27.

<sup>88</sup> *In First Nat. Bank v. Barnum*, 160 Fed. Rep. 245, 20 Am. B. R. 439, Judge Archibald has considered the distinction between these terms citing a large number of cases.



in the statute evidently are intended to cover all different kinds of employment of workmen, clerks, employees and servants.

Wages is the term commonly applied to compensation for manual labor, skilled or unskilled, paid at stated times and measured by the week, month or season. Salary denotes a higher degree of employment and is suggestive of larger compensation for more important services than wages, which indicate inconsiderable pay. It is usually regarded as an annual compensation while wages are measured by the day, week or month, etc. Hire, as used in this clause, partakes of the nature of both wages and salary. If a distinction may be made, hire may be said to be the stipulated reward for a temporary service, not for a particular job but for fixed daily, weekly or monthly wages.

A person may be said to be a wage-earner who is employed as a bookkeeper and secretary of a corporation at a salary of less than \$1,500.00 per year,<sup>39</sup> or who works by the day for different employers with his team, wagons and plow,<sup>40</sup> or who works on piece work for which he is paid weekly,<sup>41</sup> or a traveling salesman receiving a salary or a percentage commission on the amount of his sales.<sup>42</sup>

The term wage-earner does not include professional men, like a lawyer, doctor, engineer, architect, minister or teacher,<sup>43</sup> or a contractor or others performing labor by the job, or those receiving profit on the services of others, or a person engaged or interested in a business or trade, although he receives salary of less than \$1,500.00 per year,<sup>44</sup> or a person engaged in manufacturing and trading who also earns wages

<sup>39</sup> *In re Pilger*, 118 Fed. Rep. 206, 9 Am. B. R. 244.

But see *Carpenter v. Cudd* (C. C. A. 4th Cir.), 174 Fed. Rep. 603, 98 C. C. A. 449, 23 Am. B. R. 463, where the president of the company was a large stockholder.

<sup>40</sup> *In re Yoder*, 127 Fed. Rep. 894, 11 Am. B. R. 445.

See also *In re Winton Lumber Co.*, 17 Am. B. R. 117.

<sup>41</sup> See *In re Gurewitz* (C. C. A. 2nd Cir.), 121 Fed. Rep. 982, 58 C. C. A. 320, 10 Am. B. R. 350.

<sup>42</sup> See *In re Lawler*, 110 Fed. Rep. 135, 6 Am. B. R. 184.

<sup>43</sup> *First Nat. Bank v. Barnum*, 160 Fed. Rep. 245, 20 Am. B. R. 439.

<sup>44</sup> *Carpenter v. Cudd* (C. C. A. 4th Cir.), 174 Fed. Rep. 603, 98 C. C. A. 449, 23 Am. B. R. 463.

by working for another in a different occupation,<sup>45</sup> or a person who ceases a non-exempt occupation to become a wage-earner.<sup>46</sup> A married woman, pursuing the usual and ordinary domestic duties and supported by a husband, does not become a wage-earner by performing services for others than the members of her own family.<sup>47</sup>

### § 121. Farmers.

A person engaged chiefly in farming or the tillage of the soil can not be adjudged bankrupt in an involuntary proceeding.<sup>48</sup> He may file a voluntary petition.

By farming or the tillage of the soil is meant the cultivation of the soil for food products or other useful and valuable growths of field or garden, and includes any industry practiced by a cultivator of the soil in connection with such cultivation as the breeding and rearing of stock, dairying, and the like.<sup>49</sup>

<sup>45</sup> *In re* Naroma Chocolate Co., 178 Fed. Rep. 383, 24 Am. B. R. 154.

<sup>46</sup> *In re* Naroma Chocolate Co., 178 Fed. Rep. 383, 24 Am. B. R. 154; *In re* Crenshaw, 156 Fed. Rep. 638, 19 Am. B. R. 502.

<sup>47</sup> *In re* Remaley (Ref.), 23 Am. B. R. 29.

<sup>48</sup> B. A. 1898, Sec. 4b. See Sec. 118, *ante*.

<sup>49</sup> *In Bank of Dearborn v. Matney*, 132 Fed. Rep. 75, 76, 12 Am. B. R. 482, Judge Philips said: "It is therefore reasonable to conclude that the term was not limited merely to the production of grains and grasses and the like. The farmer may cultivate all or a part of his lands. He may be general or special. He may devote his cultivation to the production of corn, or wheat, oats, or rye, or grasses, whichever, in his judgment, may be the more useful and profitable. He may include also with these breeding, feeding, and

rearing of live stock, embracing cattle, horses, mules, sheep, and hogs, for domestic use and for market. If he find it more profitable to feed his agricultural products or his grasses to live stock than to rely upon marketing the surplus, he may not be limited to the quantity of live stock for such purpose to what he may breed or rear on his farm. For this purpose he may rely entirely upon the purchase of such live stock from his neighbors or on the market, and utilize his farm products in feeding and fattening such 'feeders' for market. Neither, in my opinion, should the act be so construed as to restrict the farmer entirely, under all circumstances and conditions, to the corn and hay and grasses he may produce for rearing such feeders and preparing them for market. In other words, where he relies largely upon his pasture lands for grazing his cattle, and his crops of corn may not be

The courts are generally agreed that the term farming is not synonymous with tillage of the soil.<sup>50</sup> As observed by Judge Shiras:<sup>51</sup> "While it is true that both descriptions will, in the majority of instances, be applicable to those engaged in farming, yet this is not universally true, and the two descriptions are not strictly synonymous. Thus market gardeners, nurserymen, and the like are engaged in tilling the soil, but they are not engaged in the business of 'farming' as that term is now used."

The mere fact that a person owns a farm does not bring him within the exemption, unless he cultivates it in whole or in part.<sup>52</sup> It has been held that the owner of a farm, who had leased it to another, was liable to be adjudicated a bankrupt in involuntary bankruptcy,<sup>53</sup> but where he leased a part of his farm and cultivated a part of it through hired laborers, he could not be adjudged an involuntary bankrupt.<sup>54</sup> A farmer's wife who held the title of the farm, managed by her husband, was held not to be a farmer within the exemption

sufficient to carry them through the particular winter and the feeding season, he may supplement these by purchasing from without sufficient corn, and the like, to meet the requirement."

In *Gregg v. Mitchell* (C. C. A. 6th Cir.), 166 Fed. Rep. 725, 92 C. C. A. 415, 21 Am. B. R. 659, Judge Severens said: "In the vast majority of cases the keeping of a dairy is a mere incident, or, at most, a branch, of farming business; and in such cases it is a misdescription to classify the man as a dairyman, and not as a farmer. The general name of the latter includes the former."

*In re Thompson*, 102 Fed. Rep. 287, 4 Am. B. R. 340, farming was held to include stock raising.

See also *In re Johnson*, 149 Fed. Rep. 864, 18 Am. B. R. 74, and cases

reviewed in the opinion by Judge Ray.

<sup>50</sup> *In re Thompson* 102 Fed. Rep. 287, 4 Am. B. R. 340; *Bank of Dearborn v. Matney*, 132 Fed. Rep. 75, 12 Am. B. R. 482; *In re Hoffschlaeger* (Hawaii), 12 Am. B. R. 510.

<sup>51</sup> *In re Thompson* 102 Fed. Rep. 287, 289, 4 Am. B. R. 340.

<sup>52</sup> *In re Matson*, 123 Fed. Rep. 743, 10 Am. B. R. 473; *In re Johnson*, 149 Fed. Rep. 864, 18 Am. B. R. 74; *Wulbern v. Drake* (C. C. A. 4th Cir.), 120 Fed. Rep. 493, 56 C. A. 643; 9 Am. B. R. 695.

<sup>53</sup> *In re Matson*, 123 Fed. Rep. 743, 10 Am. B. R. 473.

<sup>54</sup> *Wulbern v. Drake* (C. C. A. 4th Cir.), 120 Fed. Rep. 493, 56 C. A. 643, 9 Am. B. R. 695.

from involuntary bankruptcy.<sup>55</sup> A partner in a firm engaged in farming can not be adjudged an involuntary bankrupt.<sup>56</sup>

Whether a person is a farmer or not is determined by his status at the time of the commission of the act of bankruptcy complained of.<sup>57</sup> If an assignment for the benefit of creditors is made by a farmer he can not be declared bankrupt in involuntary proceedings, although he is not engaged in farming thereafter.<sup>58</sup> If a person engaged in a non-exempt occupation commits an act of bankruptcy and thereafter changes his business to farming, he can not defeat an adjudication on the ground that he is a farmer.<sup>59</sup>

It is not every person engaged in farming or the tillage of the soil, who is exempt from being adjudged a bankrupt upon a petition filed by his creditors. The statute expressly limits the exemption to persons engaged *chiefly* in such occupation.<sup>60</sup> It is not necessary that farming be the sole occupation. A person may have other business or interests. If his principal occupation is that of an agriculturalist he is within the exemption.<sup>61</sup>

<sup>55</sup> *In re Johnson*, 149 Fed. Rep. 864, 18 Am. B. R. 74.

<sup>56</sup> *Olive v. Armour & Co.* (C. C. A. 5th Cir.), 167 Fed. Rep. 517, 93 C. C. A. 153, 21 Am. B. R. 901.

<sup>57</sup> *Olive v. Armour & Co.* (C. C. A. 5th Cir.), 167 Fed. Rep. 517, 93 C. C. A. 153, 21 Am. B. R. 901; *Flickinger v. First Nat. Bank* (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678; *In re Burgin*, 173 Fed. Rep. 726, 22 Am. B. R. 574.

<sup>58</sup> *Olive v. Armour & Co.* (C. C. A. 5th Cir.), 167 Fed. Rep. 517, 93 C. C. A. 153, 21 Am. B. R. 901; *Flickinger v. First Nat. Bank* (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678.

<sup>59</sup> See Sec. 119, *ante*. *In re Burgin*, 173 Fed. Rep. 726, 22 Am. B. R. 574; *In re Luckhardt*, 101 Fed. Rep. 807, 4 Am. B. R. 307;

*In re Mackey*, 110 Fed. Rep. 361, 6 Am. B. R. 577.

<sup>60</sup> B. A. 1898, Sec. 4b. *Bank of Dearborn v. Matney*, 132 Fed. Rep. 75, 12 Am. B. R. 482; *In re Brown*, 132 Fed. Rep. 706, 13 Am. B. R. 140.

<sup>61</sup> *Wulbern v. Drake* (C. C. A. 4th Cir.), 120 Fed. Rep. 493, 56 C. C. A. 643, 9 Am. B. R. 695; *Couts v. Townsend*, 126 Fed. Rep. 249, 11 Am. B. R. 126; *In re Hoy*, 137 Fed. Rep. 175, 14 Am. B. R. 648; *Rise v. Bordner*, 140 Fed. Rep. 566, 15 Am. B. R. 297.

In *Flickinger v. First Nat. Bank* (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678, Judge Severens said, "Prior to the time when the business of the wheel company went into the hands of the receiver (January, 1904), Flickinger was engaged in two kinds of business—manufacturing and

In which of several occupations a person is chiefly engaged depends upon the facts in each case. He may be said to be chiefly engaged in farming or the tillage of the soil if his chief occupation is farming. "The chief occupation or business of one," in the language of Judge Bradford,<sup>62</sup> "is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood, or as the means of acquiring wealth, great or small."

A person engaged chiefly in farming is within the exception, although as incident to or a branch of his farming business he keeps a dairy and retails milk,<sup>63</sup> or raises live stock on a large scale.<sup>64</sup> But if the incidental business becomes his principal business and not a branch or department of his farming he is not within the exception.<sup>65</sup>

One engaged chiefly in farming is within the exception, although at the same time he has separate distinct business of less importance, as a store yielding a small income compared with that of the farm,<sup>66</sup> or the business of a private

farming—of which the former was the chief; after that time he was not engaged in that business, and farming became his chief, in fact his only, occupation, and continued such until his assignment in May, 1904."

<sup>62</sup> *In re* Mackey, 110 Fed. Rep. 355-358, 6 Am. B. R. 577.

<sup>63</sup> *Gregg v. Mitchell* (C. C. A. 6th Cir.), 166 Fed. Rep. 725, 92 C. A. 415, 21 Am. B. R. 659.

<sup>64</sup> *In re* Thompson, 102 Fed. Rep. 287, 4 Am. B. R. 344.

See also *Bank of Dearborn v. Matney*, 132 Fed. Rep. 75, 12 Am. B. R. 482; *In re* Brown, 132 Fed. Rep. 706, 13 Am. B. R. 140.

<sup>65</sup> *Bank of Dearborn v. Matney*, 132 Fed. Rep. 75, 12 Am. B. R. 482; *In re* Brown, 132 Fed. Rep. 706, 13 Am. B. R. 140.

In *Gregg v. Mitchell* (C. C. A. 6th Cir.), 166 Fed. Rep. 725, 92 C. A. 415, 21 Am. B. R. 659, holding the dairy business in that case to be a branch of the farming business, Judge Severens said: "Doubtless a man might be a dairyman, and not a farmer, as if he were to build a barn, buy a herd of cows, and buy from others the grain and other forage to feed them, and sell their milk or other produce; and if this was his principal business, he would not be exempt from proceedings in bankruptcy because he was a farmer."

<sup>66</sup> *Rise v. Bordner*, 140 Fed. Rep. 566, 15 Am. B. R. 297; *Wulbern v. Drake* (C. C. A. 4th Cir.), 120 Fed. Rep. 493, 56 C. C. A. 643, 9 Am. B. R. 695; *Sutherland Medicine Co. v. Rich & Bailey* (Ref.), 22 Am. B. R. 85.

banker,<sup>67</sup> or an attorney at law conducting a collection and real estate business.<sup>68</sup> If the business other than farming becomes his principal business he can not claim exemption as a farmer.<sup>69</sup>

Corporations and partnerships engaged in farming are not within the excepted class, which is limited by the statute to natural persons.<sup>70</sup> Other provisions of the bankrupt act govern the right to force partnerships<sup>71</sup> and corporations<sup>72</sup> into bankruptcy.

### § 122. Unincorporated companies.

Any unincorporated company may be adjudged an involuntary bankrupt.<sup>73</sup> There is no restriction in respect to such companies as in the case of corporations.

This phrase includes partnerships<sup>74</sup> and also that class of unincorporated associations, recognized as legal, which are neither corporations nor partnerships. In this last class may be included mutual insurance societies,<sup>75</sup> labor and employers' unions, social and political clubs, building and loan associations, agricultural societies, stock and produce exchanges and the like, not incorporated, in which the members are not liable as partners.

A joint stock company may be adjudged a bankrupt under this provision if it is not a corporation.<sup>76</sup>

<sup>67</sup> *Couts v. Townsend*, 126 Fed. Rep. 249, 11 Am. B. R. 126.

<sup>68</sup> *In re Hoy*, 137 Fed. Rep. 175, 14 Am. B. R. 648.

<sup>69</sup> *In re Mackey*, 110 Fed. Rep. 355, 6 Am. B. R. 577; *Bank of Dearborn v. Matney*, 132 Fed. Rep. 75, 12 Am. B. R. 482; *In re Brown*, 132 Fed. Rep. 706, 13 Am. B. R. 140.

<sup>70</sup> *In re Lake Jackson Sugar Co.*, 129 Fed. Rep. 640, 11 Am. B. R. 458.

<sup>71</sup> B. A. 1898, Sec. 5. See Sec. 252, *et seq.*, *post*.

<sup>72</sup> B. A. 1898, Sec. 4b, clause 3. See Sec. 124, *post*.

<sup>73</sup> B. A. 1898, Sec. 4.

<sup>74</sup> See Sec. 254, *post*. *Burkhart v. German-American Bank*, 137 Fed. Rep. 958, 14 Am. B. R. 222. S. C. *sub nom.* *Dicas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566.

<sup>75</sup> *In re Seaboard Fire Underwriters*, 137 Fed. Rep. 987, 13 Am. B. R. 722; *In re Grand Lodge A. O. U. W. of Wisconsin* (District Court, West. Dist. of Wis. 1907).

<sup>76</sup> *In re Hercules Atkins Co.*, 133 Fed. Rep. 813, 13 Am. B. R. 369; *Burkhart v. German-American Bank*, 137 Fed. Rep. 958, 14 Am. B. R.

### § 123. What is a corporation.

The term "corporation" is used in the bankrupt act in its most comprehensive sense.

Corporations are defined by the act to mean "all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association."<sup>77</sup>

The word corporation as thus defined includes not only corporations strictly, but embraces what are commonly known as joint stock associations.<sup>78</sup>

### § 124. Corporations as involuntary bankrupts since 1910.

By the amendment of June 25, 1910,<sup>79</sup> congress enlarged very materially the jurisdiction of the courts of bankruptcy in respect to corporations.

The provision with respect to corporations being entitled to the benefits of the act as voluntary bankrupts has already been considered.<sup>80</sup>

Prior to 1910, corporations liable to be adjudged involuntary bankrupts upon a creditor's petition were limited to certain corporations enumerated in the statute.<sup>81</sup> By the amendment of 1910 all moneyed, business, and commercial

222, s. c. *sub nom.* Dicas v. Barnes (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566.

<sup>77</sup> B. A. 1898, Sec. 1, clause 6.

<sup>78</sup> *In re Hercules Atkin Co.*, 133 Fed. Rep. 813, 13 Am. B. R. 369, after quoting the definition of a corporation in the bankrupt act, Judge McPherson said:

"This is precisely descriptive of an association under the Pennsylvania statute, for the title declares it to be 'An act authorizing the formation of partnership associa-

tions, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances,' and its first section provides the method by which such an association, thus privileged, may be organized. Clearly, therefore, as it seems to me, the Hercules Atkin Company Limited, is within the scope of the bankrupt act, and the first defense must be overruled."

<sup>79</sup> 36 Stat. at L. 838.

<sup>80</sup> See Sec. 115, *ante*.

<sup>81</sup> See Sec. 130, *post*.



corporations, except municipal, railroad, insurance, and banking corporations were made subject to involuntary bankruptcy.

Section 4b of the bankrupt act as amended by the act of June 25, 1910,<sup>82</sup> declares that "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of \$1,000.00 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States."

The act of 1867 extended to all "moneyed, business or commercial corporations."<sup>83</sup> Under that act these words were construed to embrace all those classes of corporations that deal in or with money or property in the transactions of moneyed business or commerce for pecuniary gain.<sup>84</sup> They include not merely moneyed and commercial corporations but also business corporations. The word "business" has a broader meaning as applied to corporations.<sup>85</sup> A corporation carrying on and pursuing any lawful business defined by its charter, and clothed with power to do so, for the sake of gain is clearly a business corporation and amenable to the provisions of the present bankrupt act, unless comprehended within the exceptions named.

<sup>82</sup> 36 Stat. at L. 838.

<sup>83</sup> R. S. Sec. 5132. Sec. 37 of the Act of March 2, 1867, 14 Stat. at L. 535.

<sup>84</sup> *Adams v. Boston, H. & E. R. Co.*, No. 47, Fed. Cas., Holmes 30; *Alabama & C. R. Co. v. Jones*, No. 126, Fed. Cas., 5 N. B. R. 97; *Sweatt v. Boston, H. & E. R. Co.*, No. 13684, Fed. Cas., 3 Cliff. 339; *In re California Pac. R. Co.* No. 2315, Fed. Cas., 3 Saw. 240; *In re Southern Minn. R. Co.*, No. 13188, Fed. Cas., 10 N. B. R. 86; *In re*

*Merchants Ins. Co.*, No. 9441, Fed. Cas., 3 Biss. 162; *In re Manufacturers' Nat. Bank*, No. 9051, Fed. Cas., 5 Biss. 499; *Winter v. Iowa, etc., R. Co.*, No. 17800, Fed. Cas., 2 Dill. 487; *Thornhill v. Bank of Louisiana*, No. 13990, Fed. Cas., 3 N. B. R. 435, affirmed, No. 13992, Fed. Cas., 1 Woods 1, and appeal dismissed by supreme court; *Morgan v. Thornhill*, 11 Wall. 65, 20 L. Ed. 60.

<sup>85</sup> *Harris v. Amery*, L. R., 1 C. P. 148, 154.



A corporation engaged in farming is a business corporation liable to be adjudged an involuntary bankrupt,<sup>86</sup> although it could not prior to 1910.<sup>87</sup> The exemption to farmers is limited to natural persons and does not include corporations.<sup>88</sup>

Steamship and steamboat companies, when incorporated and engaged in accomplishing the purpose for which they are created, and a canal corporation not of a public character, are undoubtedly commercial corporations within the meaning of that phrase as employed in the bankrupt act, and as such are clearly liable to an adjudication in bankruptcy.<sup>89</sup> They are not included within the exceptions.

Corporations organized for religious, charitable or educational purposes are clearly not made subject to the involuntary provisions of the act.

### § 125. Municipal corporations.

The statute expressly excepts municipal corporations from the operation of the act either as voluntary or involuntary bankrupts.<sup>90</sup>

A municipal corporation would not be amenable to the provisions of the present act had it not been mentioned among the exceptions. It is a public corporation and the present statute limits its operation to private corporations.<sup>91</sup> Municipal corporations can not be said to be comprehended in either of the terms "moneyed, business or commercial." The act expressly mentions municipal corporations as not subject to bankruptcy.<sup>92</sup>

<sup>86</sup> In *Harris v. Amery*, L. R., 1 C. P. 148, 154, Judge Willes observed: "The earlier bankrupt acts did not embrace farmers: but it was never doubted that farming was a 'business' though not a 'trade.'"

<sup>87</sup> In *re Lake Jackson Sugar Co.*, 129 Fed. Rep. 640, 11 Am. B. R. 458.

<sup>88</sup> B. A. 1898, Sec. 4b. Sec. 121, *ante*. In *re Lake Jackson Sugar*

*Co.*, 129 Fed. Rep. 640, 11 Am. B. R. 458.

<sup>89</sup> See observation of Mr. Justice Clifford in *Sweatt v. Boston, H. & E. R. Co.*, No. 13, 684 Fed. Cas., 3 Cliff. 339.

<sup>90</sup> B. A. 1898, Sec. 4a and b as amended June 25, 1910, 36 Stat. at L. 838.

<sup>91</sup> B. A. 1898, Sec. 1, clause 6.

<sup>92</sup> B. A. 1898, Sec. 4a and b as amended June 25, 1910, 36 Stat. at L. 838.

**§ 126. Railroad corporations.**

The statutes expressly excepts railroad corporations from the operation of the act either as voluntary or involuntary bankrupts.<sup>93</sup>

Railroad corporations were held subject to be adjudged bankrupts as "moneyed, business, or commercial corporations" under the act of 1867.<sup>94</sup> Doubtless the same construction would be given to the same words used in the present statute had the statute not in terms excluded railroad corporations.

A reason for exempting these corporations from bankruptcy may be found in the fact that the law and practice with reference to winding up the affairs of insolvent railroad corporations became very largely settled under the existing statutes during the twenty-five years previous to the passage of the bankrupt act. To have extended the bankruptcy jurisdiction to them would to a large extent have unsettled the rules of law and practice thus established.

Whether an incorporated company is a railroad corporation within the meaning of the exception is determined by its charter and the laws under which it is incorporated. It will be observed that the phraseology of the amendment of 1910 makes the character of the corporation the test. Prior to that amendment it was the business in which it was chiefly engaged which determined whether a corporation was liable to be adjudged a bankrupt.

Railroads clearly include steam, electric and street railroad corporations. Steamship and steamboat and canal corporations are not included in the word "railroad." Not being included within the exception they are subject to an adjudication.

<sup>93</sup> B. A. 1898, Sec. 4a and b as amended June 25, 1910, 36 Stat. at L. 838.

<sup>94</sup> R. S. Sec. 5122. New Orleans, etc., R. Co. v. Delamore, 114 U. S. 501, 506, 29 L. Ed. 244, and cases there collated.

### § 127. Insurance corporations.

The statute expressly excepts insurance corporations from the operation of the act either as voluntary or involuntary bankrupts.<sup>95</sup>

Insurance corporations were held subject to be adjudged bankrupts as "moneyed, business, or commercial corporations" under the act of 1867.<sup>96</sup> Doubtless the same construction would be given to same words used in the present act had the statute not in terms excluded insurance corporations.

Whether an incorporated company is an insurance corporation within the meaning of the exception is determined by its charter and the laws under which it is incorporated. It will be observed that the phraseology of the amendment of 1910 makes the character of the corporation the test. Prior to that amendment it was the business in which it was chiefly engaged which determined whether a corporation was liable to be adjudged a bankrupt.

An insurance company to be entitled to the exemption must be a corporation. Clearly an unincorporated insurance company like a mutual insurance society may be adjudged a bankrupt since the amendment as well as before it.<sup>97</sup>

### § 128. Banking corporations.

The statute expressly excepts banking corporations from the operation of the act either as voluntary or involuntary bankrupts.<sup>98</sup>

It is plain that congress intended to exempt from the operation of the act all banks organized for the purpose of carrying

<sup>95</sup> B. A. 1898, Sec. 4a and b as amended June 25, 1910, 36 Stat. at L. 836.

<sup>96</sup> R. S. Sec. 5122. *In re* Independent Ins. Co., No. 7017, Fed. Cas., 1 Holmes 103; *In re* Hercules Mut. Ins. Co., No. 6402, Fed. Cas., 6 Ben. 35; *In re* Merchants' Ins. Co., No. 9441, Fed. Cas., 3 Biss. 162.

<sup>97</sup> *In re* Seaboard Fire Underwriters, 137 Fed. Rep. 987, 13 Am. B. R. 722; *In re* Grand Lodge A. O. U. W. of Wisconsin (district court of western district of Wisconsin, 1907).

<sup>98</sup> B. A. 1898, Sec. 4a and b as amended June 25, 1910, 36 Stat. at L. 838.

on a banking business and incorporated under the national banking act or under the law of a state or territory.

Congress has provided a method of winding up and settling the affairs of national banks.<sup>99</sup> It has never been conceived that a general bankruptcy act will supersede or repeal the special provisions of the national banking act for winding up insolvent national banks.<sup>1</sup>

State banks were held subject to be adjudged bankrupts as "moneyed, business, or commercial corporations" under the act of 1867.<sup>2</sup> Banks organized for the purpose of carrying on a banking business and incorporated under the law of a state or territory are not subject to adjudication under the present act.<sup>3</sup>

If the banking company is not incorporated under the laws of a state, territory, or the United States, it is not within the exception and may be adjudicated bankrupt.<sup>4</sup> A private banker or a partnership engaged in the banking business is liable to an adjudication, because the exceptions are limited to corporations.

### **§ 129. The effect of proceedings to dissolve a corporation.**

Where the bankrupt act reaches a corporation, that is, if it is not a municipal, railroad, insurance, or banking corporation, it can not defeat an adjudication on the ground that proceedings have been instituted in a state court to dissolve the corporation.<sup>5</sup>

<sup>99</sup> R. S. Secs. 5220 to 5243.

<sup>1</sup> *In re* Manufacturers Nat. Bank, No. 9051, Fed. Cas., 5 Biss. 499.

<sup>2</sup> *Thornhill v. Bank of Louisiana*, No. 13990, Fed. Cas., 3 N. B. R. 435, affirmed on appeal No. 13992, Fed. Cas., 1 Woods 1.

<sup>3</sup> *In re* Oregon Trust & Sav. Bank, 156 Fed. Rep. 319, 19 Am. B. R. 484.

<sup>4</sup> See *Davis v. Stevens*, 104 Fed. Rep. 235, 4 Am. B. R. 763; *Burkhart v. German-American Bank*,

137 Fed. Rep. 958, 14 Am. B. R. 222, same case on appeal *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566; *In re* Surety Guar. & T. Co. (C. C. A. 7th Cir.), 121 Fed. Rep. 73, 56 C. C. A. 654, 9 Am. B. R. 129.

<sup>5</sup> *Cresson & Clearfield Coal & Coke Co. v. Stauffer* (C. C. A. 3rd Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573, affirming *In re* International Coal Min. Co., 143 Fed.

If a corporation had been actually dissolved before the filing of the petition in bankruptcy, so that the corporation in fact and in law ceased to have any existence whatever, the bankruptcy court would have no jurisdiction.

In most, if not in all, the states provision is made for a decree of dissolution, but the corporation does not immediately on such decree cease to live. It continues a body corporate for the purpose of prosecuting and defending suits and to enable it to wind up its affairs and administer its property, although it must cease to do business.

A corporation does not cease to exist to the extent that it may defeat an adjudication in bankruptcy by the fact that it has ceased to do business,<sup>6</sup> or because its property has been placed in the possession of a receiver,<sup>7</sup> or a decree of dissolution has been entered by a state court for the purpose of winding up the concern and settling its affairs.<sup>8</sup>

A corporation under such circumstances may be adjudged bankrupt and is subject to the provisions and entitled to the benefits of the act.<sup>9</sup> Whether a court of bankruptcy can administer the property of the corporation depends upon whether

Rep. 665, 16 Am. B. R. 309; *In re* Munger Vehicle Tire Co. (C. C. A. 2nd Cir.), 159 Fed. Rep. 901, 87 C. C. A. 81, 19 Am. B. R. 785; *In re* Sterlingworth Ry. Supply Co., 164 Fed. Rep. 591, 21 Am. B. R. 340; *White Mountain Paper Co. v. Morse* (C. C. A. 1st Cir.), 127 Fed. Rep. 643, 62 C. C. A. 369, 11 Am. B. R. 633; *Scheuer v. Smith, etc., Stationery Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 407, 50 C. C. A. 312, 7 Am. B. R. 384; *In re* Storck Lumber Co., 114 Fed. Rep. 360, 8 Am. B. R. 86; *In re* Adams & Hoyt Co., 164 Fed. Rep. 489, 21 Am. B. R. 161.

<sup>6</sup> *Tiffany v. LaPlume Condensed Milk Co.*, 141 Fed. Rep. 444, 15 Am. B. R. 413.

<sup>7</sup> *In re* Sterlingworth Ry. Supply Co., 164 Fed. Rep. 591, 21 Am. B. R. 340; *In re* Belfast Mesh Underwear Co., 153 Fed. Rep. 224, 18 Am. B. R. 620; *In re* Storck Lumber Co., 114 Fed. Rep. 360, 8 Am. B. R. 86.

<sup>8</sup> *In re* Munger Vehicle Tire Co. (C. C. A. 2nd Cir.), 159 Fed. Rep. 901, 87 C. C. A. 81, 19 Am. B. R. 785; *In re* Storck Lumber Co., 114 Fed. Rep. 360, 8 Am. B. R. 86; *Cresson & Clearfield Coal & Coke Co. v. Stauffer* (C. C. A. 3rd Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573 affirming *In re* International Coal Min. Co., 143 Fed. Rep. 665, 16 Am. B. R. 309.

<sup>9</sup> *In re* Sterlingworth Ry. Supply Co., 164 Fed. Rep. 591, 21 Am. B. R. 340.

its property has been in the custody of another court, by its receiver or other officer, for more than four months at the time the petition in bankruptcy is filed.<sup>10</sup>

Where the dissolution of a corporation is decreed by the state court after the filing of the petition in bankruptcy the proceedings in bankruptcy will not abate, although the dissolution of the corporation shall be complete. It has been held that Section 8 of the act providing that proceedings in bankruptcy shall not abate upon the death of the defendant applies to corporations.<sup>11</sup>

### § 130. Corporations as involuntary bankrupts prior to 1910.

Prior to the amendment of June 25, 1910,<sup>12</sup> corporations subject to be adjudged involuntary bankrupts were limited to those "principally engaged in manufacturing, trading, printing, publishing, mining or mercantile pursuits." It was necessary to allege and prove that the corporation was engaged in one of these pursuits to give the court jurisdiction to adjudge it a bankrupt.<sup>13</sup>

Any corporation not falling within one of the enumerated classes was not subject to be adjudged a bankrupt in an involuntary proceeding prior to 1910. A corporation which had not in fact engaged in one of these pursuits, although its charter authorized it to do so, could not be adjudged an involuntary bankrupt.<sup>14</sup> But the fact that it had ceased to do business was not sufficient to prevent an adjudication.<sup>15</sup> A

<sup>10</sup> See Secs. 42 to 48, *ante*.

<sup>11</sup> *White Mountain Paper Co. v. Morse* (C. C. A. 1st Cir.), 127 Fed. Rep. 643, 62 C. C. A. 369, 11 Am. B. R. 633; *Scheuer v. Smith, etc. Stationery Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 407, 50 C. C. A. 312, 7 Am. B. R. 384.

<sup>12</sup> 36 Stat. at L. 838.

<sup>13</sup> *In re Elmira Steel Co.*, 109 Fed. Rep. 456, 4 Am. B. R. 484.

<sup>14</sup> *In re New York & W. Water Co.*, 98 Fed. Rep. 711, 3 Am. B. R. 508, affirmed *In re Morris* (C. C.

A. 2nd Cir.), 102 Fed. Rep. 1004; *In re Tontine Surety Co.*, 116 Fed. Rep. 401, 8 Am. B. R. 421; *In re Kingston Realty Co.* (C. C. A. 2nd Cir.), 160 Fed. Rep. 445, 87 C. C. A. 406, 19 Am. B. R. 845; *In re Toledo Portland Cement Co.*, 156 Fed. Rep. 83, 19 Am. B. R. 117.

<sup>15</sup> *Tiffany v. LaPlume Condensed Milk Co.*, 141 Fed. Rep. 444, 15 Am. B. R. 413; *In re Moench* (C. C. A. 2nd Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 12 Am. B. R. 240.

corporation has been held not to be subject to adjudication which was engaged in farming,<sup>16</sup> or in furnishing water for irrigation,<sup>17</sup> or in repairing automobiles,<sup>17\*</sup> or a common carrier "extensively engaged" in trading,<sup>18</sup> or a mercantile agency,<sup>19</sup> or a laundry,<sup>20</sup> or a social club,<sup>21</sup> or a public circulating library,<sup>22</sup> or a theatrical company,<sup>23</sup> or a building and loan association,<sup>24</sup> or a building company,<sup>24\*</sup> or an insurance brokerage company<sup>24\*\*</sup> or a cold storage warehouse.<sup>24†</sup>

MANUFACTURING COMPANIES.—As generally understood and defined by the lexicographers, a manufacturing company is one engaged in making goods or wares of any kind; producing articles for use from raw or prepared materials by giving to these materials new qualities, properties or combinations, whether by hand labor or by machinery.<sup>25</sup>

<sup>16</sup> *In re* Lake Jackson Sugar Co., 129 Fed. Rep. 640, 11 Am. B. R. 458.

<sup>17</sup> *In re* Bay City Irrigation Co., 135 Fed. Rep. 850, 14 Am. B. R. 370.

<sup>17\*</sup> *Cate v. Connell* (C. C. A. 1st Cir.), 173 Fed. Rep. 445, 23 Am. B. R. 73.

<sup>18</sup> *Philpot v. O'Brien*, 126 Fed. Rep. 167, 11 Am. B. R. 205.

<sup>19</sup> *Zugalla v. International Mercantile Agency* (C. C. A. 3rd Cir.), 142 Fed. Rep. 927, 74 C. C. A. 97, 16 Am. B. R. 67.

But see *In re* Mutual Mercantile Agency, 111 Fed. Rep. 152, 6 Am. B. R. 607.

<sup>20</sup> *In re* White Star Laundry, 117 Fed. Rep. 570, 9 Am. B. R. 30; *In re* Eagle Steam Laundry Co., 178 Fed. Rep. 308, 23 Am. B. R. 859.

<sup>21</sup> *In re* Fulton Club, 113 Fed. Rep. 997, 7 Am. B. R. 670.

<sup>22</sup> *In re* Parmelee Library (C. C. A. 7th Cir.), 120 Fed. Rep. 235, 56 C. C. A. 583, 9 Am. B. R. 568.

<sup>23</sup> *In re* Oriental Society, 104 Fed. Rep. 975, 5 Am. B. R. 219; *In re* Reisler Amusement Co., 171 Fed. Rep. 283, 22 Am. B. R. 501.

<sup>24</sup> *In re* New York Building, Loan Banking Co., 127 Fed. Rep. 471, 11 Am. B. R. 51.

<sup>24\*</sup> *In re* Kingston Realty Co. (C. C. A. 2nd Cir.), 160 Fed. Rep. 445, 87 C. C. A. 406, 19 Am. B. R. 845; *In re* New York Tunnel Co. (C. C. A. 2nd Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *Walker Roofing & Heating Co. v. Merchant & Evans Co.* (C. C. A. 4th Cir.), 173 Fed. Rep. 771, 97 C. C. A. 495, 23 Am. B. R. 185.

<sup>24\*\*</sup> *In re* Moore & Muir Co., 173 Fed. Rep. 732, 23 Am. B. R. 122.

<sup>24†</sup> *In re* Philadelphia Freezing Co., 174 Fed. Rep. 702, 23 Am. B. R. 508.

<sup>25</sup> *Friday v. Hall & Kaul Co.*, 216 U. S. 449, 54 L. Ed. 562, 23 Am. B. R. 610; *In re* Tecopa Mining & Smelting Co., 110 Fed. Rep. 120, 6

A corporation has been held to be a manufacturing company within this provision which was engaged in the construction of concrete bridges and arches,<sup>26</sup> or building ships,<sup>27</sup> or buying and selling ice,<sup>28</sup> or manufacturing and selling paper from wood pulp,<sup>5</sup> or brewing and selling malt liquors,<sup>6</sup> or manufacturing and trading in crockery,<sup>7</sup> or installing heat and power plants.<sup>8</sup>

TRADING COMPANIES.—A trading company is one whose business is buying or selling or barter, its object being to buy and sell again personal property for gain. What constitutes a trader under the bankrupt law has been the subject of judicial interpretation, both in this country and in England.<sup>29</sup> Thus the term trader has been held to include a miller,<sup>30</sup> a

Am. B. R. 250; *In re* Hudson River Electric Power Co., 173 Fed. Rep. 934, 23 Am. B. R. 191; *Columbia Iron Works v. Nat. Lead Co.*, 127 Fed. Rep. 99, 11 Am. B. R. 340.

<sup>26</sup> *Friday v. Hall & Kaul Co.*, 216 U. S. 449, 54 L. Ed. 562; *In re* First Nat. Bank of Belle Fourche (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 269; *In re* Niagara Contracting Co., 127 Fed. Rep. 782, 11 Am. B. R. 643.

But see *In re* MacNichol Const. Co., 134 Fed. Rep. 979, 14 Am. B. R. 188, affirmed (C. C. A. 4th Cir.), 140 Fed. Rep. 840, 72 C. C. A. 252, 15 Am. B. R. 515.

<sup>27</sup> *In re* Marine Const. & Dry Dock Co. (C. C. A. 2nd Cir.), 130 Fed. Rep. 446, 64 C. C. A. 648, 11 Am. B. R. 640; *Columbia Iron Wks. v. Nat. Lead Co.* (C. C. A. 6th Cir.), 127 Fed. Rep. 99, 62 C. C. A. 99, 11 Am. B. R. 340.

<sup>28</sup> *First Nat. Bank v. Wyoming Ice Co.*, 136 Fed. Rep. 466, 14 Am. B. R. 448.

But see *In re* New York & N. J. Ice Lines (C. C. A. 2nd Cir.), 147 Fed. Rep. 214, 77 C. C. A. 440, 16 Am. B. R. 832.

<sup>5</sup> *White Mountain Paper Co. v. Morse* (C. C. A. 1st Cir.), 127 Fed. Rep. 643, 62 C. C. A. 369, 11 Am. B. R. 633.

<sup>6</sup> *In re* Bloomsburg Brewing Co., 172 Fed. Rep. 174, 22 Am. B. R. 625; *In re* Duquesne Brewing Co. (C. C. A. 9th Cir.), 177 Fed. Rep. 609, 101 C. C. A. 235, 24 Am. B. R. 44.

<sup>7</sup> *Robertson v. Union Potteries Co.*, 177 Fed. Rep. 279.

<sup>8</sup> *United Surety Co. v. Iowa Mfg. Co., et al.*, 179 Fed. Rep. 55, 24 Am. B. R. 728.

<sup>29</sup> *In re* Eeles, No. 4302, Fed. Cas., 5 Law Rep. 273; *Wakeman v. Hoyt*, No. 17051, Fed. Cas., 5 Law Rep. 309, and cases cited in notes below.

<sup>30</sup> *Daniels v. Palmer*, 35 Minn. 347.



baker,<sup>31</sup> a butcher,<sup>32</sup> a stair-builder,<sup>33</sup> a furniture dealer,<sup>34</sup> a grocer,<sup>35</sup> a merchant tailor,<sup>36</sup> a theatrical manager,<sup>37</sup> but not a theatrical corporation,<sup>38</sup> a livery-stable keeper,<sup>39</sup> a druggist or a physician who dispenses and is paid for medicines administered to his own patients,<sup>40</sup> a smuggler or illegal trader,<sup>41</sup> or an electric light company whose principal business was furnishing electricity for power and light.<sup>42</sup>

On the other hand, the term trader has been held not to include a stock broker,<sup>43</sup> or a building association,<sup>44</sup> or railroad contractor,<sup>45</sup> or a mining company,<sup>46</sup> or a superintendent

<sup>31</sup> *In re* Cocks, No. 2933 Fed. Cas., 3 Ben. 260.

<sup>32</sup> *In re* Bassett, 8 Fed. Rep. 266; *Dally v. Smith*, 4 Burr 2148; *Sylvester v. Edgecomb*, 76 Me. 499.

<sup>33</sup> *In re* Garrison, No. 5254 Fed. Cas., 5 Ben. 430.

<sup>34</sup> *In re* Newman, No. 10175 Fed. Cas., 3 Ben. 20.

<sup>35</sup> *In re* Good, 78 Cal. 399.

<sup>36</sup> *Archenbrow*, No. 505 Fed. Cas., 12 N. B. R. 17.

<sup>37</sup> *In re* Duff, 4 Fed. Rep. 519.

<sup>38</sup> *In re* Oriental Society, 104 Fed. Rep. 975, 5 Am. B. R. 219; *In re* Reisler Amusement Co., 171 Fed. Rep. 283, 22 Am. B. R. 501.

<sup>39</sup> *Groves v. Kilgore*, 72 Me. 489; *In re* Odell, No. 10426 Fed. Cas., 9 Ben. 209; *Wright v. Bird*, 1 Price 20; *Martin v. Nightingale*, 3 Bing. 421; *In re* Morton Boarding Stables, 108 Fed. Rep. 791, 5 Am. B. R. 763. This case is, however, disapproved *In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173; and *In re* United States Hotel Co. (C. C. A. 6th Cir.), 134 Fed. Rep. 224, 67 C. C. A. 153, 13 Am. B. R. 403; *In re* Willis Cab & Automobile Co., 178 Fed. Rep. 113, 23 Am. B. R. 593.

<sup>40</sup> *Ex parte* Crabb, 8 De Gex, Mac. & G. 277; *Ex parte* Daubenny, 3 Mont. & Ayr, 16, 2 Deac. 72.

<sup>41</sup> *Cobb v. Symonds*, 5 B. & A. 516; *Ex parte* Meymot, 1 Atk. 196.

<sup>42</sup> *In re* Suburban Electric Co. (District of Kentucky, 1900, not reported.)

But see *In re* New York & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508; affirmed in *In re* Morris, 102 Fed. Rep. 1004; *In re* Hudson River Electric Power Co., 173 Fed. Rep. 934, 23 Am. B. R. 191.

<sup>43</sup> *In re* Surety, Guarantee & Trust Co. (C. C. A. 7th Cir.), 121 Fed. Rep. 73 56 C. C. A. 654, 9 Am. B. R. 129; *Ex parte* Conant, 77 Me. 275; *In re* Woodward, No. 18001 Fed. Cas., 8 Ben. 563; *In re* Moss, No. 9877 Fed. Cas., 19 N. B. R. 132.

But see *Leighton & Co.*, 147 Fed. Rep. 311, 17 Am. B. R. 275.

<sup>44</sup> *In re* New York Building Loan Banking Co., 127 Fed. Rep. 471, 11 Am. B. R. 51.

<sup>45</sup> *In re* Smith, No. 12981 Fed. Cas., 2 Low. 69.

<sup>46</sup> *In re* Woodside Coal Co., 105 Fed. Rep. 56, 3 Am. B. R. 186;

of a common carrier,<sup>47</sup> or a carrier,<sup>48</sup> or a teamster who buys and sells hay and straw for the purpose of keeping his teams,<sup>49</sup> or a fisherman who occasionally buys fish to make up for market a cargo otherwise deficient,<sup>50</sup> or a person who from time to time buys paintings, but not in the course of his regular business,<sup>51</sup> or a company engaged in the business of obtaining, transporting and supplying water, gas or electricity for municipal and domestic use for fixed rentals,<sup>52</sup> or an inn, hotel or boarding-house keeper,<sup>53</sup> or a saloon and restaurant,<sup>54</sup>

*In re* Elk Park Min. & Mill Co., 101 Fed. Rep. 422 4 Am. B. R. 131; *In re* Rollins Gold & Silver Min. Co., 102 Fed. Rep. 982 4 Am. B. R. 327; *In re* Chicago-Joplin Lead & Zinc Co., 104 Fed. Rep. 67, 4 Am. B. R. 712; *McNamara v. Helena Coal Co.*, 5 Am. B. R. 48; *In re* Keystone Coal Co., 109 Fed. Rep. 872, 6 Am. B. R. 377. By the amendment of 1903 a mining company may now be made an involuntary bankrupt.

<sup>47</sup>*In re* Merritt, 7 Fed. Rep. 853.

<sup>48</sup>*In re* Union Pac. R. Co., No. 14376 Fed. Cas., 10 N. B. R. 178; *In re* Philadelphia & Lewes Transp. Co., 114 Fed. Rep. 403, 7 Am. B. R. 707; *In re* Quimby Freight Forwarding Co., 121 Fed. Rep. 139, 10 Am. B. R. 424.

<sup>49</sup>*In re* Kimball, 7 Fed. Rep. 461; *In re* Quimby Freight Forwarding Co., 121 Fed. Rep. 139, 10 Am. B. R. 424.

<sup>50</sup>*Ex parte* Gallimore, 2 Rose, 424.

If he buys fish from other boats at sea and sells them on shore he is a trader. *Heaney v. Birch*, 1 Rose, 356, 3 Camp. 233.

<sup>51</sup>*In re* Chapman, No. 2601 Fed. Cas., 9 Ben. 311.

<sup>52</sup>*In re* New York & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508, affirmed in *In re* Morris (C. C. A. 2nd Cir.), 102 Fed. Rep. 1004, 43 C. C. A. 91; *In re* Hudson River Electric Co., 173 Fed. Rep. 934, 23 Am. B. R. 191.

<sup>53</sup>*Toxaway Hotel Co. v. Smathers*, 216 U. S. 439, 54 L. Ed. 558; *In re* United States Hotel Co. (C. C. A. 6th Cir.), 134 Fed. Rep. 225, 67 C. C. A. 153, 13 Am. B. R. 403; *In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173; *Sunderson v. Rowles*, 4 Burr, 2064; *Ex parte* Bowers, 2 Deac. 99; *Ex parte* National Deposit Bank, 26 W. R. 624.

*In re* San Gabriel Sanitorium Co., 95 Fed. Rep. 271, 2 Am. B. R. 408, a corporation which owned and maintained a private hospital for profit and not as a charity, has been adjudged an involuntary bankrupt.

<sup>54</sup>*In re* Chesapeake Oyster & Fish Co., 112 Fed. Rep. 960, 7 Am. B. R. 173; *In re* Wentworth Lunch Co. (C. C. A. 2nd Cir.), 159 Fed. Rep. 413, 86 C. C. A. 393, 20 Am. B. R. 29; *In re* Excelsior Cafe Co., 175 Fed. Rep. 294, 23 Am. B. R. 701.

or a social club,<sup>55</sup> or a laundry,<sup>56</sup> or a circulating library,<sup>57</sup> or a grain warehouse,<sup>58</sup> or a newspaper advertising company,<sup>59</sup> or an incorporated mercantile agency,<sup>60</sup> or a dealer in real estate,<sup>1</sup> or an insurance agency.<sup>2</sup>

**PRINTING AND PUBLISHING COMPANIES.**—A printing or publishing corporation to fall within the provisions of this act, was one principally engaged in printing or publishing; that is, the manufacture and issue from the press and putting upon the market for sale books and pamphlets as ordinarily understood by the use of these words. An incorporated mercantile agency, although it may print and publish matter incident to its principal business, was held not to be a printing or publishing company within the meaning of the bankrupt act.<sup>61</sup>

**MINING COMPANIES.**—Prior to the amendment of 1903 mining corporations were not subject to be adjudicated bankrupts in involuntary proceedings.<sup>62</sup> By that amendment mining companies were brought within the act by the addition of the word “mining” to the pursuits mentioned in the original act.<sup>63</sup> It has been held to include quarrying, as of slate or stone from a quarry.<sup>64</sup>

<sup>55</sup> *In re* Fulton Club, 113 Fed. Rep. 997, 7 Am. B. R. 670.

<sup>56</sup> *In re* White Star Laundry, 117 Fed. Rep. 570, 9 Am. B. R. 30. But see *In re* Troy Laundering Co., 132 Fed. Rep. 266, 13 Am. B. R. 97.

<sup>57</sup> *In re* Parmelee Library (C. C. A. 7th Cir.), 120 Fed. Rep. 235, 56 C. C. A. 583, 9 Am. B. R. 568.

<sup>58</sup> *Pacific Coast Warehouse Co.*, 123 Fed. Rep. 749, 10 Am. B. R. 474.

<sup>59</sup> *In re* Snyder & Johnson Co., 133 Fed. Rep. 806, 13 Am. B. R. 325; *In re* Humphrey Advertising Co. (C. C. A. 7th Cir.), 177 Fed. Rep. 187, 101 C. C. A. 1, 24 Am. B. R. 41.

<sup>60</sup> *Zugalla v. International Mercantile Agency*, 142 Fed. Rep. 927, 16 Am. B. R. 67.

<sup>1</sup> *In re* Kingston Realty Co., (C. C. A. 2nd Cir.), 160 Fed. Rep. 445, 87 C. C. A. 406, 19 Am. B. R. 845.

<sup>2</sup> *In re* Moore & Muir Co., 173 Fed. Rep. 732, 23 Am. B. R. 122.

<sup>61</sup> *Zugalla v. International Mercantile Agency*, 142 Fed. Rep. 927, 16 Am. B. R. 67.

<sup>62</sup> *In re* Woodside Coal Co., 105 Fed. Rep. 56, 5 Am. B. R. 186. See cases collected in note 40, *ante*.

<sup>63</sup> B. A. 1898, Sec. 4b, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>64</sup> *In re* Mathews Consolidated Slate Co., 144 Fed. Rep. 724, 16

**"MERCANTILE PURSUITS."**—Mercantile pursuits, as generally understood, are those which pertain to merchants or the traffic carried on by merchants, or having to do with trade or commerce.

The phrase "mercantile pursuits" may have a little broader signification than the word "trading." It signifies for the most part the same thing as the word "trading."<sup>65</sup> In the decisions it has usually been associated with the word "trading" in determining whether a corporation was subject to be adjudicated a bankrupt,<sup>66</sup> and the cases relating to trading companies are in point with reference to whether the corporation was engaged in mercantile pursuits.

### § 131. Estates of decedents.

The bankrupt statute does not authorize or warrant an adjudication in bankruptcy against the individual estate of a deceased person.<sup>67</sup>

An indispensable requisite to an adjudication in bankruptcy is the existence of a person, who owns in his own right, either severally or jointly with another, property which it is the purpose of the adjudicant to bring into the bankruptcy court. In the case of a deceased person there is no one *in esse* against whom the proceedings will lie. An administrator or executor can not be forced to bring decedent's estate into a

Am. B. R. 350; *In re* Quincy Granite Quarries Co., 147 Fed. Rep. 279, 16 Am. B. R. 823.

<sup>65</sup> *In re* New York & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508; *Zugalla v. International Mercantile Agency*, 142 Fed. Rep. 927, 16 Am. B. R. 67.

<sup>66</sup> *In re* New York & W. Water Co., 98 Fed. Rep. 711, 3 Am. B. R. 508; *In re* Surety, Guarantee & Trust Co. (C. C. A. 7th Cir.), 121 Fed. Rep. 73, 56 C. C. A. 654, 9 Am. B. R. 129; *In re* White Star Laundry Co., 117 Fed. Rep. 570, 9

Am. B. R. 30; *In re* Oriental Society, 104 Fed. Rep. 975, 5 Am. B. R. 219; *In re* Tontine Surety Co., 116 Fed. Rep. 401, 8 Am. B. R. 421.

But see *Troy Laundering Co.*, 132 Fed. Rep. 266, 13 Am. B. R. 97.

<sup>67</sup> *Adams v. Terrell*, 4 Fed. Rep. 802; *In re* Stevens, No. 13393, Fed. Cas., 1 Low. 397; *In re* Daggett, No. 3536, Fed. Cas., 8 N. B. R. 433. In these cases the question arose with reference to reaching the assets of a deceased person.

bankruptcy court, unless the court obtains jurisdiction during the lifetime of the decedent. In such case the proceedings once instituted do not abate by the death of the debtor.<sup>68</sup>

Where the court of bankruptcy acquires jurisdiction of the surviving partner or a firm, the partnership property may be administered by that court provided possession of the assets may be obtained without forcibly interfering with property in the legal custody of an administrator or executor.<sup>69</sup> But the trustee can not take possession of property of which the administrator of the deceased partner has custody without his consent.<sup>69</sup>

### § 132. Aliens.

The act does not limit the person who may be adjudged bankrupts to citizens or even to residents of the United States. Hence an alien may become either a voluntary or an involuntary bankrupt.<sup>70</sup>

A foreigner must either have had a principal place of business or residence within the United States for six months, or the greater portion thereof, or have property within the jurisdiction of the court of bankruptcy.<sup>71</sup>

"The governing principle," said Judge Brett,<sup>72</sup> "is that all legislation is *prima facie* territorial; that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who for the time being themselves within the allegiance of the legislating power." Hence it may

<sup>68</sup> B. A. 1898, Sec. 8.

<sup>69</sup> *In re* Pierce, 102 Fed. Rep. 977, 4 Am. B. R. 489.

<sup>70</sup> *In re* Goodfellow, No. 5536, Fed. Cas., 1 Low. 510; *In re* Boynton, 10 Fed. Rep. 277; *In re* Clisdell (Ref.), 2 Am. B. R. 424.

In *Judd v. Lawrence*, 1 Cush. (Mass.) 531. it was held that a foreigner residing within the commonwealth could take the benefit of the state insolvent law.

In *Cutter v. Folsom* 17 N. H. 139, under the bankrupt act of August 19, 1841, 5 Stat. at L. 440, it was held that one residing within the jurisdiction of the circuit court, who was a member of a foreign firm, was entitled to the provisions of the act.

<sup>71</sup> B. A. 1898, Sec. 2, clause 1.

<sup>72</sup> *Ex parte* Blain, 12 Chan. Div. 528.

be doubted if a foreigner would be adjudged a bankrupt unless he had assets or owed debts contracted in the United States.<sup>73</sup> Such would be an idle proceeding.

An Indian may be adjudicated a voluntary or an involuntary bankrupt.<sup>74</sup>

### § 133. Infants.

An infant is not generally liable for debt contracted by him during his infancy.<sup>75</sup>

The word infant, or minor, is not found in the bankrupt act. In order to support a bankruptcy petition there must be capacity in the infant to owe the debt.

If an infant is legally liable for debts owing by him under the laws of the state he may file a voluntary petition and obtain a discharge.<sup>76</sup> If an infant may repudiate his debts at majority a voluntary proceeding would be idle and the court may dismiss the petition in such case.<sup>77</sup>

<sup>73</sup> Consult *ex parte* Blain, 12 Chan. Div. 522.

<sup>74</sup> *In re* Russie, 96 Fed. Rep. 609, 3 Am. B. R. 6; *In re* Rennie (Ref.), 2 Am. B. R. 182.

<sup>75</sup> *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Dunnigan, 95 Fed. Rep. 428, 2 Am. B. R. 628; *In re* Duguid, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re* Eidemiller, 105 Fed. Rep. 595, 5 Am. B. R. 570; *In re* Walrath, 175 Fed. Rep. 243, 24 Am. B. R. 541.

See *In re* Derby, No. 3815, Fed. Cas., 6 Ben. 232; *In re* Book, No. 1637, Fed. Cas., 3 McLean 317, where an infant was allowed to claim the benefit of the bankrupt law of 1841; *In re* Cotton, No. 3269, Fed. Cas., 6 Law. Rep. 546, the petitioner who applied for an injunction was a minor, and this was one of the objections to his

seeking the benefit of the act. The court passed the question without deciding it.

<sup>76</sup> *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Walrath, 175 Fed. Rep. 243, 21 Am. B. R. 541.

<sup>77</sup> *In re* Derby, No. 3815, Fed. Cas., 6 Ben. 232, discussing the rights of an infant to be adjudged a bankrupt, Judge Blatchford said: "The general contracts of an infant having no force if disaffirmed by him after attaining his majority, it is idle for him to set forth, in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy, for the whole proceedings must be in vain if the debts are disaffirmed by him after he attains his majority."

An infant can not generally be adjudged an involuntary bankrupt. The debt of a petitioning creditor must be a debt provable at the time the petition is filed. If the infant is entitled to repudiate his debts at majority the petitioners would not be creditors in the sense of the bankrupt act entitled to maintain proceedings against him.<sup>78</sup> In involuntary proceedings against a partnership, the firm and the adult partners have been adjudged bankrupts and the proceedings dismissed as to an infant partner.<sup>79</sup>

If an infant can not disaffirm his obligations at majority, he may be adjudged an involuntary as well as a voluntary bankrupt. Whether a debt for necessities will support a petition by creditors seems to be an open question in England.<sup>80</sup>

After an infant has reached his majority he may become liable for a debt created during infancy. If he does become so liable he is subject to be adjudged a bankrupt.

### § 134. Lunatics.

Whether a lunatic can be adjudged either a voluntary or involuntary bankrupt is doubtful under the authorities.

In England the words of the statute are "a debtor,"<sup>81</sup> which may be considered equivalent to "~~any~~ person who owes debts" or "owing debts."<sup>82</sup> Under the English statutes it is an open question, and has been since the time of Lord Eldon.<sup>83</sup> It has been held that a person who is so unsound in mind as to be wholly incapable of managing his affairs, can not, in that condition, commit an act for which he can be forced into bank-

<sup>78</sup> *In re Dunnigan*, 95 Fed. Rep. 428, 2 Am. B. R. 628; *In re Eide-miller*, 105 Fed. Rep. 595, 5 Am. B. R. 570; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794.

In *Belton v. Hodges*, 9 Bing. 365, it was held that a commission of bankruptcy against an infant was void, not merely voidable.

<sup>79</sup> *In re Dunnigan*, 95 Fed. Rep. 428, 2 Am. B. R. 628; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794.

<sup>80</sup> *In re Soltykoff*, 1 Q. B. (1891) 415.

<sup>81</sup> 46 and 47 Vic. chap. 52, Sec. 4.

<sup>82</sup> B. A. 1898, Sec. 4 *a* and *b*.

<sup>83</sup> *In re Farham*, 2 Chan. Div. (1895) 805.

ruptcy by his creditors against the objection of his guardian.<sup>84</sup> It has also been held that an insane person can not become a voluntary bankrupt because he is not a "qualified" person within the meaning of Sec. 59a.<sup>85</sup> But if he commits an act of bankruptcy while sane he has been adjudged an involuntary bankrupt against the consent of his guardian.<sup>86</sup> The fact that a person has been adjudged a lunatic does not imply that he will always remain so.<sup>87</sup> A guardian *ad litem* may be appointed pending the determination of his sanity at the time the act of bankruptcy complained of was committed.<sup>88</sup>

Where a bankrupt becomes insane after the commencement of proceedings in bankruptcy they are not abated thereby, but may be conducted and concluded in the same manner, so far as possible, as though he had not become insane.<sup>89</sup>

A partnership may be adjudged a bankrupt after the insanity of a partner and the appointment of a conservator of his estate.<sup>90</sup>

### § 135. Married women.

Under the former bankrupt acts there was some doubt as to the power of the courts of bankruptcy to adjudge a married woman a bankrupt.<sup>91</sup> The laws of the several states have extended a married woman's rights with reference to property within the last quarter of the century.

<sup>84</sup> *In re Funk*, 101 Fed. Rep. 244, 4 Am. B. R. 96; *In re Marvin*, No. 9178, Fed. Cas., 1 Dill. 178; *In re Weitzel*, No. 17365, Fed. Cas., 7 Biss. 289; *In re Pratt*, No. 11371, Fed. Cas., 2 Low. 96.

<sup>85</sup> *In re Eisenberg*, 117 Fed. Rep. 786, 8 Am. B. R. 551.

<sup>86</sup> *In re Weitzel*, No. 17365, Fed. Cas., 7 Biss. 289; *In re Pratt*, No. 11371, Fed. Cas., 2 Low. 96; *Ex parte Stamp*, 1 De Gex, 345; Anon. 13 Ves. 590.

<sup>87</sup> *Saunders v. Mitchell*, 61 Miss. 321.

<sup>88</sup> *In re Burka*, 107 Fed. Rep. 674, 5 Am. B. R. 843.

<sup>89</sup> B. A. 1898, Sec. 8.

<sup>90</sup> *In re Stein & Co.* (C. C. A. 7th Cir.), 127 Fed. Rep. 547, 62 C. C. A. 272, 11 Am. B. R. 536.

<sup>91</sup> The cases are collected and considered in an article on married women as bankrupts, 13 American Law Register, N. S. (March, 1874) 129.



In order to come within the provisions of the bankrupt act a person must owe a debt. The true rule with reference to married women is that where a woman may owe a debt she may be adjudged a voluntary or involuntary bankrupt.<sup>92</sup> Her capacity to owe is determined by the laws of the state of her domicile, as interpreted by the highest court in the state.<sup>92</sup> She may be able to contract and owe debts and accordingly be adjudged a bankrupt in one state and not in another state.

<sup>92</sup> MacDonald v. Tefft-Weller Co. (C. C. A. 5th Cir.), 128 Fed. Rep. 381, 63 C. C. A. 123, 11 Am. B. R. 800; *In re* Collins, No. 3006, Fed. Cas., 3 Biss. 415; *In re* O'Brien, No. 10397, Fed. Cas., 1 N. B. R. 176; *In re* Lyons, No. 8649, Fed. Cas.,

2 Saw. 524, and note discussing the subject. *In re* Kinkead, No. 7824, Fed. Cas., 3 Biss. 405 and note; *In re* Goodman, No. 5540, Fed. Cas., 5 Biss. 401; *In re* Howland, No. 6791, Fed. Cas., 2 N. B. R. 357.

## CHAPTER X.

### ACTS OF BANKRUPTCY.

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|---|--|
| <b>SEC.</b>   | <b>SEC.</b>  |
| 136. Who may commit an act of bankruptcy.                               | 151. Assignment for the benefit of creditors as an act of bankruptcy.  |
| 137. What are acts of bankruptcy?                                       | 152. What constitutes a general assignment?  |
| 138. No act of bankruptcy relating to the person of the debtor.         | 153. The appointment of a receiver as an act of bankruptcy.  |
| 139. Insolvency as an element of an act of bankruptcy.                  | 154. The meaning of insolvency as applied to receiverships.  |
| 140. What constitutes insolvency.                                       | 155. Application for receiver or trustee by an insolvent as an act of bankruptcy.  |
| 141. Evidence admissible on question of solvency.                       | 156. A receiver put in charge of a debtor's property at the instance of another as an act of bankruptcy.                               |
| 142. Jury trial as to insolvency.                                       | 157. A voluntary petition as an act of bankruptcy.   |
| 143. Fraudulent transfers as an act of bankruptcy.                      | 158. Involuntary proceedings founded upon an admission in writing of inability to pay debts and willingness to be adjudged a bankrupt. |
| 144. Concealment or removal of property as an act of bankruptcy.        | 159. Four months' limitation to acts of bankruptcy.  |
| 145. Preference as an act of bankruptcy.                                |  |
| 146. Transfer of debtor's property to a creditor.                       |  |
| 147. The debtor's intent to prefer.                                     |  |
| 148. Preferences created by legal proceedings as an act of bankruptcy.  |  |
| 149. What are "legal proceedings?"                                      |  |
| 150. Vacating or discharging a preference created by legal proceedings. |  |

#### § 136. Who may commit an act of bankruptcy.

To support an adjudication of bankruptcy the debtor must have committed an act of bankruptcy within four months before the filing of the petition.<sup>1</sup>

Any person who may be adjudged a bankrupt may commit an act of bankruptcy. But the act must be committed by the person himself, or at least with his knowledge and consent. It is clear that a person can not commit an act of bankruptcy by the conduct of his agent without his knowledge or consent.<sup>2</sup>

**CORPORATIONS.**—Any corporation subject to be adjudged bankrupt may commit an act of bankruptcy.<sup>3</sup> To support

<sup>1</sup> B. A. 1898, Sec. 3b.

<sup>2</sup> Cotton v. James, M. & M. 273; *Ex parte* Blain, 12 Chan. Div. 522.

<sup>3</sup> See Corporations as voluntary bankrupts, Sec. 115, *ante*. Corpora-

tions as involuntary bankrupts since 1910, Sec. 123, *ante*. Corporations as involuntary bankrupts before 1910, Sec. 129, *ante*.

an adjudication against a corporation the act complained of must be the act of the corporation.

A corporation may commit an act of bankruptcy acting through its board of directors or stockholders or one of its corporate officers acting in the discharge of his official duties. Whether the power to commit a particular act charged, so as to make it a corporate act, resides in an officer or the board of directors or the stockholders is governed by the laws of the state under which the corporation is chartered.<sup>4</sup>

The power to make a fraudulent or preferential transfer or a general assignment for the benefit of creditors, or an admission in writing of inability to pay debts and willingness to be adjudged bankrupt on that ground, can be exercised by the same officers who have power under the state laws to convey or mortgage the property of the corporation. In the absence of statute or by-laws regulating the subject such power resides in the directors.<sup>5</sup> In some states this power resides in the stockholders.<sup>6</sup> A corporate officer, as a president, vice-president, secretary or treasurer, can not usually bind a corporation unless authorized by the board of directors.<sup>7</sup>

<sup>4</sup>*In re* Lisk Mfg. Co., 167 Fed. Rep. 411, 21 Am. B. R. 674; *In re* Bates Mach. Co., 91 Fed. Rep. 625, 1 Am. B. R. 129; *In re* Quartz Gold Min. Co., 157 Fed. Rep. 243, 19 Am. B. R. 667, affirmed in *Van Emon v. Veal* (C. C. A. 9th Cir.), 158 Fed. Rep. 1022, 85 C. C. A. 547; *In re* Riley, Talbot & Hunt (Ref.), 15 Am. B. R. 159.

<sup>5</sup>*In re* Lisk Mfg. Co., 167 Fed. Rep. 411, 21 Am. B. R. 674; *In re* Moench & Sons (C. C. A. 2nd Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 12 Am. B. R. 240; *In re* Mutual Mercantile Agency, 111 Fed. Rep. 152, 6 Am. B. R. 607; *Cresson, etc., Coke Co. v. Stauffer* (C. C. A. 3rd Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573; *In re* Marine Mach. & Conveyor Co., 91

Fed. Rep. 630, 1 Am. B. R. 421; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 526; *In re* Rollins Gold & Silver Min. Co., 102 Fed. Rep. 985, 4 Am. B. R. 327; *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105; *In re* Jefferson Casket Co., 182 Fed. Rep. 689, 25 Am. B. R. 663; *In re* Kenwood Ice Co., 189 Fed. Rep. 529, 26 Am. B. R. 499.

<sup>6</sup>*In re* Bates Mach. Co., 91 Fed. Rep. 625, 1 Am. B. R. 129; *In re* Quartz Gold Min. Co., 157 Fed. Rep. 243, 19 Am. B. R. 667, affirmed in *Van Emon v. Veal* (C. C. A. 9th Cir.), 158 Fed. Rep. 1022, 85 C. C. A. 547.

<sup>7</sup>*In re* Jefferson Casket Co., 182 Fed. Rep. 689, 25 Am. B. R. 663; *In re* Burbank Co., 168 Fed. Rep.

**PARTNERSHIPS.**—To support an adjudication of bankruptcy against a partnership formerly there must have been separate acts of bankruptcy by each partner.<sup>8</sup> The present act provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.<sup>9</sup> Under the present act a partnership has been adjudged bankrupt upon a petition charging an act of bankruptcy by one or more (but less than all) of the partners, where such act was within the scope of the partnership business so as to constitute in fact an act of the firm.<sup>10</sup>

The sale by one member of an insolvent firm of his interest to his partner is an act of bankruptcy, and the court will set it aside as fraudulent and proceed to distribute the property as firm property.<sup>11</sup> But a conveyance by a partner of his individual property, although with intent to prefer a firm cred-

719, 21 Am. B. R. 838; *In re Southern Steel Co.*, 169 Fed. Rep. 702, 22 Am. B. R. 476.

In *Cresson & Clearfield Coal & Coke Co. v. Stauffer* (C. C. A. 3rd Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573. The admission was made in writing by the Secretary of the Corporation, specially authorized by a vote of the board of directors, as set out in the petition and record. It was held to be sufficient to support an adjudication.

<sup>8</sup> *Allen v. Hartley*, 4 Doug. 20; *In re Redmond*, No. 11632, Fed. Cas., 9 N. B. R. 408, and cases cited in opinion. *In re Weaver*, No. 17307, Fed. Cas., 9 N. B. R. 132; *In re Waite*, No. 17044, Fed. Cas., 1 Low. 207; *In re Cook*, No. 3150, Fed. Cas., 3 Biss. 122.

It was held not evidence of an act of bankruptcy by three partners of a banking concern, where one of

them, who resided at the place where the banking-house was, and was the only partner who transacted business, the other two residing at a distance from it, absented himself from the banking-house, shut it up and stopped payment. *Mills v. Bennett*, 2 M. & S. 556; 2 Rose, 269.

<sup>9</sup> B. A. 1898, Sec. 5c. *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566.

<sup>10</sup> *In re Kersten*, 110 Fed. Rep. 929, 6 Am. B. R. 516; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re Shapiro*, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794. See also Sec. 257, *post*.

<sup>11</sup> *In re Waite*, No. 17044, Fed. Cas., 1 Low. 207; *In re Cook*, No. 3150, Fed. Cas., 3 Biss. 122; *In re Shapiro*, 106 Fed. Rep. 495, 5 Am. B. R. 839.

itor, does not constitute an act of bankruptcy by the firm, and will not sustain proceedings in bankruptcy against the partnership.<sup>12</sup>

### § 137. What are acts of bankruptcy?

The bankrupt statute, as amended Feb. 5, 1903, enumerates five acts of bankruptcy relating to the disposition of the debtor's property and to his circumstances and credit.<sup>13</sup>

A debtor can not commit any act, which will support an adjudication of bankruptcy, other than those specified in the statute. The court can not create an act of bankruptcy.<sup>14</sup> The acts of bankruptcy specified, which may be committed by a debtor, "consist of his having

*First*, "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

*Second*, "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

*Third*, "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

*Fourth*, "made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee

<sup>12</sup> Hartman v. Peters & Co., 146 Fed. Rep. 82, 17 Am. B. R. 61; Mills v. Fisher & Co. (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237; *In re* Stovall Grocery Co., 161 Fed. Rep. 882, 20 Am. B. R. 537.

<sup>13</sup> B. A. 1898, Sec. 3a, and 32 Stat. at L. 797.

<sup>14</sup> *In re* Empire Metallic Bedstead Co., 98 Fed. Rep. 981, 39 C. C. A.

372, 3 Am. B. R. 575. The circuit court of appeals for the second circuit, said: "When acts of bankruptcy are classified, as they are in the statute of 1898, it is not the province of the court to enlarge the classification because the omitted class seems to partake of the sin of the named class."

has been put in charge of his property under the laws of a state, of a territory, or of the United States; or

*Fifth*, "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

If a debtor has committed an act of bankruptcy he can not avoid the consequences of it by a subsequent rescission or undoing thereof.<sup>2</sup> A creditor can not complain of an act committed before he was a creditor.<sup>3</sup>

**§ 138. No act of bankruptcy relating to the person of the debtor.**

It may be observed that under the former bankrupt statutes there were acts of bankruptcy relating to the person of the debtor. Thus it constituted an act of bankruptcy to depart or be absent from the state, district or territory of which the debtor was an inhabitant, with intent to defraud his creditors,<sup>15</sup> or to conceal himself to avoid service of legal process.<sup>16</sup> There is no such act of bankruptcy under the present statute.

In case a debtor absconds or conceals himself to avoid the service of process and hinder, delay or defraud his creditors by so doing, the remedy under the present act is to commence a suit against his property. Under the laws of the several states this is a ground for attaching the property of the debtor, which may be sold to pay the debt. Hence a creditor may begin legal proceedings under the state law.

In case the debtor is solvent, creditors will secure their debts under such proceedings without resorting to bankruptcy. In case the property is insufficient to cover all claims made and satisfy all attachments issued, or one creditor is gaining a preference over another by such proceedings, if such attachments, or any one of them, are not released five days before

<sup>2</sup> *In re* Ryan, No. 12183, Fed. Cas., 2 Saw. 411.

<sup>3</sup> *Beers v. Hanlin*, 99 Fed. Rep. 695, 3 Am. B. R. 745; *In re* Brinckmann, 103 Fed. Rep. 65, 4 Am. B. R. 551.

<sup>15</sup> For acts of bankruptcy under the acts of 1800 and 1841 see historical sketch, Secs. 5 and 6, *ante*. For the acts of bankruptcy under the act of 1867, see R. S. Sec. 5021.

the sale of the property attached, an act of bankruptcy is committed. The creditors may file a petition to have the debtor adjudged a bankrupt. All attachments so levied, or liens of any nature gained by legal proceedings within four months before the filing of the petition, are null and void.<sup>16</sup> Thus creditors of every degree will come in equally for proportionate shares of the bankrupt's estate. If, however, an insolvent debtor absconds and takes property with him he commits an act of bankruptcy, as he conceals and removes his property.<sup>17</sup>

**§ 139. Insolvency as an element of an act of bankruptcy.**

It should be observed that insolvency of the debtor is an essential element of some acts of bankruptcy and is not a requisite element of other acts of bankruptcy.

It is not necessary that a person who transfers, conveys, etc., property should be insolvent at the time to constitute an act of bankruptcy under the first clause. He must be insolvent at the time the petition is filed. Actual solvency at the time of filing the petition is a complete defense to a petition charging an act of bankruptcy under the first clause and the burden of proving his solvency is on the alleged bankrupt.<sup>18</sup>

A person can not commit an act of bankruptcy under the second and third clauses while he is solvent. He must be insolvent at the time of the transfer or of permitting a preference through legal proceedings.<sup>19</sup> If the debtor takes issue on the question of his solvency at that time, the burden of proving

<sup>16</sup> B. A. 1898, Sec. 67*f*. See Sec. 447, *et seq.*, *post*.

<sup>17</sup> *In re Filer*, 108 Fed. Rep. 209, 5 Am. B. R. 332.

<sup>18</sup> B. A. 1898, Sec. 3*c*; *West v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re Schenkein*, 113 Fed. Rep. 421, 7 Am. B. R. 162; *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550; *Lansing Boiler Works v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep.

701, 63 C. C. A. 253, 11 Am. B. R. 558.

<sup>19</sup> *West v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re Rome Planing Mill*, 96 Fed. Rep. 813, 3 Am. B. R. 123; *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 15 Am. B. R. 550; *In re Hines*, 144 Fed. Rep. 142, 16 Am. B. R. 295; *Chicago Title & Trust Co. v. Roebeling's Sons Co.*, 107 Fed. Rep. 71, 5 Am. B. R. 368.

insolvency is on the petitioning creditors, except in case of his actual failure to attend with his books, papers and accounts and submit to an examination, as provided in Sec. 3*d*, in which case the burden of proving his solvency rests upon the debtor.<sup>20</sup> Under Sec. 3*a*, clauses 2 and 3, the solvency of the debtor at the time the petition in bankruptcy is filed is immaterial.<sup>21</sup>

Under clauses 4 and 5 as originally enacted the solvency or insolvency of the debtor either at the time of committing the act of bankruptcy or at the time of filing the petition is immaterial.<sup>22</sup> By the amendment of 1903<sup>23</sup> it is provided that in the case a receiver or trustee has been appointed to take charge of the property of a person, such person must be insolvent at the time he applied for the receiver or when the appointment was made upon the application of another than at the time the receiver or trustee took charge of his property.<sup>24</sup>

Insolvency, of the debtor, making a general assignment, at the time the petition in bankruptcy is filed is immaterial.<sup>25</sup>

Although the court of bankruptcy may be bound by the finding of the state court with respect to insolvency at the time of the appointment of the receiver for his property, it is incumbent upon the petitioning creditors to show that he is insolvent at the time the petition is filed.<sup>26</sup> A solvent debtor does not become insolvent upon the appointment of a receiver in a state court.<sup>27</sup> It does not follow that a debtor who is

<sup>20</sup> B. A. 1898, Sec. 3*d*. West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; Elliott v. Toepfner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Bogen & Trummel v. Protter (C. C. A. 6th Cir.), 129 Fed. Rep. 533, 64 C. C. A. 63, 12 Am. B. R. 288; Cummins Grocer Co. v. Talley (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. —, 26 Am. B. R. 484.

<sup>21</sup> West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>22</sup> West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>23</sup> 32 Stat. at L. 797.

<sup>24</sup> B. A. 1898, Sec. 3*a*, cl. 4, as amended Feb. 5, 1903; 32 Stat. at L. 797. The appointment of a receiver as an act of bankruptcy see Sec. 155, *post*.

<sup>25</sup> West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>26</sup> *In re* Pickens Mfg. Co., 158 Fed. Rep. 894, 20 Am. B. R. 202; *In re* Belfast Mesh Underwear Co., 153 Fed. Rep. 224, 18 Am. B. R. 620.

<sup>27</sup> *In re* Zeltner Brewing Co., 117 Fed. Rep. 799, 9 Am. B. R. 63.



insolvent at the time the receiver was put in charge of his property is insolvent at the time the petition in bankruptcy is filed.<sup>28</sup> The courts have allowed this question of insolvency to be tried to a jury<sup>29</sup> and by referring the question to the referee.<sup>30</sup>

#### § 140. What constitutes insolvency.

A person is deemed insolvent whenever the aggregate of his property exclusive of any property which may be conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.<sup>31</sup>

In determining whether a person is solvent or insolvent at a particular time the value of the assets at that time should be taken at a fair valuation.<sup>32</sup> A fair valuation means the actual value—its real or market value—and not the face value of commercial paper.<sup>33</sup> It is what property would sell for in the regular course of business, but not what the property would sell for at a forced sale.<sup>34</sup> Where the levy on the property of a

<sup>28</sup> *In re* Pickens Mfg. Co., 158 Fed. Rep. 894, 20 Am. B. R. 202, Judge Newman said: "It might well happen, not often perhaps, but sometimes, that a person insolvent at the time the act of bankruptcy was committed might be by a rise in the value of assets, or for other reasons, solvent at the time the petition in bankruptcy is filed, so that even if the action of the state court should conclude the Pickens Manufacturing Company as to its condition at the time the receivers were appointed it certainly could have no further effect, and prevent them from denying insolvency at the time the petition was filed, and have a hearing on the issue so made."

<sup>29</sup> *Blue Mt. Iron & Steel Co. v. Portner* (C. C. A. 4th Cir.), 131

Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 557.

<sup>30</sup> *In re* Belfast Mesh Underwear Co., 153 Fed. Rep. 224, 18 Am. B. R. 620; *In re* Pickens Mfg. Co., 158 Fed. Rep. 894, 20 Am. B. R. 202.

<sup>31</sup> B. A. 1898, Sec. 1, cl. 15.

<sup>32</sup> *In re* Coddington, 118 Fed. Rep. 281, 9 Am. B. R. 243; *In re* Hines, 144 Fed. Rep. 142, 16 Am. B. R. 295; *Duncan v. Landis* (C. C. A. 3rd Cir.), 106 Fed. Rep. 839, 858, 45 C. C. A. 666, 5 Am. B. R. 649.

<sup>33</sup> *In re* Bloch (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 48 C. C. A. 650, 6 Am. B. R. 300.

<sup>34</sup> *Duncan v. Landis* (C. C. A. 3rd Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649; *In re* Hines, 144 Fed. Rep. 143, 16 Am. B. R. 295; *Chicago Motor Co. v.*

debtor depreciates its value so that the debtor's assets are then less than his liabilities, he was not insolvent at the time of the judgment on which execution issued and no preference resulted.<sup>35</sup> The valuation for the test of solvency or insolvency in case of a preferential mortgage must relate to the conditions as a going concern when the alleged preference was given and not to the mere dead matter of a plant after bankruptcy intervenes.<sup>36</sup>

In computing the assets of the debtor to determine his solvency or insolvency all his property which has value should be included. In determining the question of solvency there should be included property exempt under the state law,<sup>37</sup> and property transferred in payment of or as security for a just debt irrespective of whether it constitutes a preference or not.<sup>38</sup> But where property is transferred in fraud of creditors the statute contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is solvent.<sup>39</sup> Presumptive profits on goods which have been ordered, but not received, are not considered as assets.<sup>40</sup> A note given by a bankrupt secured by a mortgage on the property of another, should be included as a liability.<sup>41</sup>

American Oak Leather Co. (C. C. A. 7th Cir.), 141 Fed. Rep. 518, 72 C. C. A. 576, 15 Am. B. R. 804; *In re* Marine Iron Works, 159 Fed. Rep. 753, 20 Am. B. R. 390.

<sup>35</sup> Chicago, etc., Co. v. Roebeling, 107 Fed. Rep. 71, 5 Am. B. R. 368; *In re* Hines, 144 Fed. Rep. 142, 16 Am. B. R. 295.

<sup>36</sup> Butler Paper Co. v. Goembel (C. C. A. 7th Cir.), 143 Fed. Rep. 295, 74 C. C. A. 433, 16 Am. B. R. 26.

<sup>37</sup> *In re* Baumann, 96 Fed. Rep. 946, 3 Am. B. R. 196; *In re* Crenshaw, 156 Fed. Rep. 638, 19 Am. B. R. 502; *In re* Hines, 144 Fed. Rep. 142, 16 Am. B. R. 295.

<sup>38</sup> *In re* Doscher, 120 Fed. Rep. 408, 9 Am. B. R. 547; Acme Food

Co. v. Meier (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550.

<sup>39</sup> Acme Food Co. v. Meier (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550; *In re* Doscher, 120 Fed. Rep. 408, 9 Am. B. R. 547; *In re* Shoemith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645; Lansing Boiler and Engine Co. v. Ryerson (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558.

<sup>40</sup> *In re* Bloch (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 48 C. C. A. 650, 6 Am. B. R. 300.

<sup>41</sup> *In re* Shoemith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645.

To support a charge of insolvency of a partnership it must appear that not only the firm is insolvent, but that each partner is individually insolvent.<sup>42</sup>

In determining the solvency or insolvency of a corporation its bonded indebtedness should be included as a liability, although the bonds are claimed to be invalid.<sup>43</sup> The liability of stockholders is not an asset.<sup>44</sup>

#### § 141. Evidence admissible on question of solvency.

Whether the debtor is solvent or insolvent is a question of fact. Where a jury is demanded this question should be submitted to the jury.<sup>45</sup>

Admissions of insolvency by the debtor are competent evidence on the question of his insolvency.<sup>46</sup> So also are offers of a composition to creditors.<sup>47</sup>

The record of a judgment is admissible unless it has been opened to let the bankrupt defend.<sup>48</sup> Evidence of an indebtedness for which notes are outstanding and not payable is competent to show the liability of the debtor.<sup>49</sup> But giving a postdated check or note is not evidence of insolvency.<sup>50</sup>

The books of a bankrupt are competent evidence on the question of his insolvency within four months of the date of

<sup>42</sup> *In re Shoesmith* (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645; *Vaccaro v. Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474; *In re Perley & Hays*, 138 Fed. Rep. 927, 15 Am. B. R. 54; *Davis v. Stevens*, 104 Fed. Rep. 235, 4 Am. B. R. 763; *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588. See also *In re Miller*, 104 Fed. Rep. 764, 5 Am. B. R. 140.

<sup>43</sup> *First National Bank v. Wyoming Valley Ice Co.*, 136 Fed. Rep. 466, 14 Am. B. R. 448.

<sup>44</sup> *First National Bank v. Wyoming Valley Ice Co.*, 136 Fed. Rep. 466, 14 Am. B. R. 448.

<sup>45</sup> *Blue Mountain Iron & Steel Co. v. Portner* (C. C. A. 8th Cir.),

131 Fed. Rep. 57, 65 C. C. A. 291, 12 Am. B. R. 559; *Cummins Grocer Co. v. Talley* (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. —, 26 Am. B. R. 484.

<sup>46</sup> *In re Dorscher*, 120 Fed. Rep. 408, 9 Am. B. R. 555.

<sup>47</sup> *In re Lang*, 97 Fed. Rep. 197, 3 Am. B. R. 231.

<sup>48</sup> *McGowan v. Knittel* (C. C. A. 3rd Cir.), 137 Fed. Rep. 453, 69 C. C. A. 595, 15 Am. B. R. 1.

<sup>49</sup> *Knittel v. McGowan*, 134 Fed. Rep. 498, 14 Am. B. R. 209, reversed on other grounds (C. C. A. 3rd Cir.), 137 Fed. Rep. 453, 69 C. C. A. 595, 15 Am. B. R. 1.

<sup>50</sup> *In re Chappell*, 113 Fed. Rep. 545, 7 Am. B. R. 618.

filing the petition, but are not conclusive on this subject.<sup>51</sup> The schedules and the inventories and appraisements are also evidence upon the same question.<sup>52</sup> Actual sales of property by a receiver is evidence of the market value of the property.<sup>53</sup>

The adjudication of bankruptcy raises no presumption of insolvency at a previous date, unless founded upon an act of bankruptcy involving insolvency as an element.<sup>54</sup> In such a case the adjudication is conclusive of insolvency at the date the act of bankruptcy was committed.<sup>55</sup>

A debtor is presumed to know his financial condition and he will be presumed to intend to prefer if in effect he was insolvent at the time he created the preference, but he may rebut this presumption with evidence.<sup>56</sup>

Proof that in July the debtor had property worth fifty dollars and owed more than twenty-five thousand dollars and that no part of which indebtedness was paid thereafter, is competent to show insolvency in the following October and December.<sup>57</sup>

#### § 142. Jury trial as to insolvency.

The statute provides that "a person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within

<sup>51</sup> *In re Docker, Foster & Co.*, 123 Fed. Rep. 190; 10 Am. B. R. 584; *Knittel v. McGowan*, 134 Fed. Rep. 498, 14 Am. B. R. 209, reversed on other grounds (C. C. A. 3rd Cir.), 137 Fed. Rep. 453, 69 C. C. A. 595, 15 Am. B. R. 1.

<sup>52</sup> *In re Docker-Foster Co.*, 123 Fed. Rep. 190, 10 Am. B. R. 534.

<sup>53</sup> *In re Bloch* (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 48 C. C. A. 650, 6 Am. B. R. 300. But see *Duncan v. Landis* (C. C. A. 3rd

Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649.

<sup>54</sup> *In re Rome Planing Mills*, 96 Fed. Rep. 812, 3 Am. B. R. 123; *In re Chappell*, 113 Fed. Rep. 545, 7 Am. B. R. 608.

<sup>55</sup> *De Graff v. Lang*, 87 N. Y. Supp. 78, 92 N. Y. Supp. Ct. App. Div. 564.

<sup>56</sup> *In re Gilbert*, 112 Fed. Rep. 951, 8 Am. B. R. 101.

<sup>57</sup> *Cleage v. Laidley* (C. C. A. 8th Cir.), 149 Fed. Rep. 346, 79 C. C. A. 284, 17 Am. B. R. 598.

which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.<sup>58</sup>

"If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance."<sup>58</sup>

This right of jury trial is confined to the debtor. Creditors are not entitled to demand a jury trial on the question of the bankrupt's solvency,<sup>59</sup> nor of the allowance of their claims.<sup>60</sup> The right to a trial by jury on written application of the alleged bankrupt is absolute and can not be withheld at the discretion of the court.<sup>61</sup> In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court can not, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common-law cases.<sup>61</sup> The judge and not the referee should preside at a jury trial.

The judgment of a court on a jury trial may be reviewed in a circuit court of appeals on writ of error.<sup>62</sup>

<sup>58</sup> B. A. 1898, Sec. 19a and b. See also R. S. Sec. 566; *Buffalo Milling Co. v. Lewisburg Dairy Co.*, 159 Fed. Rep. 319, 20 Am. B. R. 279.

As to the effect of a jury trial after being waived by bankrupt, see *In re Neasmith* (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128.

<sup>59</sup> *In re Herzikopf* (C. C. A. 9th Cir.), 121 Fed. Rep. 544, 57 C. C. A. 606, 9 Am. B. R. 745.

<sup>60</sup> *In re Christensen*, 101 Fed. Rep. 243, 4 Am. B. R. 99.

<sup>61</sup> *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50.

<sup>62</sup> *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; *Duncan v. Landis* (C. C. A. 3rd Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. Ed. 493.

**§ 143. Fraudulent transfers as an act of bankruptcy.**

The first act of bankruptcy consists of the debtor having conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property, with intent to hinder, delay or deprive his creditors, or any of them.<sup>63</sup>

The conveyances referred to in this clause are those conveyances, which, by the common law and the statute of Elizabeth, were held void, because fraudulent as against creditors.<sup>64</sup> Whether a conveyance is fraudulent or not is determined by the rules of the common law and not by the statute law of the several states.<sup>65</sup>

To constitute an act of bankruptcy under this clause it must be shown that the transaction is tainted with actual fraud.<sup>66</sup> "A conveyance made in good faith, whether for an antecedent or a present consideration, is not forbidden by such statutes, notwithstanding that the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."<sup>67</sup> "The question therefore in every case is whether the act done is a *bona fide* transaction or whether it is a trick or contrivance to defeat creditors."<sup>68</sup>

<sup>63</sup> B. A. 1898, Sec. 3a, clause 1.

<sup>64</sup> *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550; *Lansing Eng., etc., Co. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558; *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453.

<sup>65</sup> See *Barber v. Coit* (C. C. A. 6th Cir.), 144 Fed. Rep. 381, 75 C. C. A. 319, 16 Am. B. R. 419.

<sup>66</sup> *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550; *Lansing Eng., etc., Co. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558, approved in *Coder v. Arts*, 213 U. S. 233, 242, 53 L. Ed. 772, 22 Am. B. R. 1; *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453;

*In re Bloch* (C. C. A. 2nd Cir.), 142 Fed. Rep. 674, 48 C. C. A. 650, 6 Am. B. R. 300; *Merchants Nat. Bank v. Cole* (C. C. A. 6th Cir.), 149 Fed. Rep. 708, 79 C. C. A. 414, 18 Am. B. R. 44; *In re McLoon*, 162 Fed. Rep. 575, 20 Am. B. R. 719.

<sup>67</sup> Judge Severens in *Lansing Eng., etc., Co. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558, cited with approval in *Coder v. Arts*, 213 U. S. 223, 243, 53 L. Ed. 772, 22 Am. B. R. 1; *Tiffany v. Lucas*, 15 Wall. 421, 21 L. Ed. 198; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *In re Franklin*, No. 5053, Fed. Cas., 8 Ben. 233; *In re Pusey*, No. 11478, Fed. Cas., 7 Am. B. R. 45.

<sup>68</sup> Lord Mansfield in *Cadogan v. Kennett*, 2 Cowp. 435.

It is the fraudulent intent of the debtor alone that determines whether the act complained of is an act of bankruptcy or not.<sup>69</sup> An intent to prefer is not sufficient.<sup>70</sup> In determining the question of intent the court or jury should consider the necessary result of the acts done by the debtor, for every one is presumed to contemplate the necessary consequences of his conduct.<sup>71</sup> It is immaterial whether the purchaser acts in good faith or not.

Insolvency of the debtor at the time of the conveyance transfer, etc., is not essential to an act of bankruptcy under this clause.<sup>72</sup> The solvency or insolvency of the debtor at that time is immaterial. He must be insolvent at the time the petition is filed. Solvency at the time of filing the petition is a complete defense to a petition charging an act of bankruptcy under this clause and the burden of proving his solvency is on the alleged bankrupt.<sup>73</sup>

<sup>69</sup> *Merchants Nat. Bank v. Cole* (C. C. A. 6th Cir.), 149 Fed. Rep. 708, 79 C. C. A. 414, 18 Am. B. R. 44; *In re Wilmington Hosiery Co.*, 120 Fed. Rep. 179, 9 Am. B. R. 581; *Lansing Boiler & Eng. Co. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558; *In re McKibben*, No. 8859, Fed. Cas., 12 N. B. R. 97.

*In re Drummond*, No. 4093, Fed. Cas., 1 N. B. R. 231, the court said: "Drummond positively swears that he had no such intent. And there is nothing in the evidence that leads me to conclude that he swears falsely."

See also *In re Franklin*, No. 5053, Fed. Cas., 8 Ben. 233.

<sup>70</sup> *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re Maher*, 144 Fed. Rep. 503, 16 C. C. A. 340, 16 Am. B. R. 583; *In re Belknap*, 129 Fed. Rep. 646, 12 Am. B. R. 326.

<sup>71</sup> *Bean-Chamberlain Mfg. Co. v. Standard Spoke, etc., Co.* (C. C. A. 6th Cir.), 131 Fed. Rep. 215, 65 C. C. A. 201, 12 Am. B. R. 610.

As to the presumption resulting from a debtor's acts see also intent to prefer, Sec. 147, *post*.

<sup>72</sup> *In re Larkin*, 168 Fed. Rep. 100, 21 Am. B. R. 711; *In re Pease*, 129 Fed. Rep. 446, 12 Am. B. R. 66, Judge Swan said: "The giving of the mortgage, therefore, was an act of bankruptcy under subdivision 1, section 3, without regard to Pease's financial condition at the time. Insolvency of the debtor is not an element of that subdivision."

<sup>73</sup> B. A. 1898, Sec. 3c. *West v. Lea*, 174 U. S. 590, 43 L. Ed. 1090, 2 Am. B. R. 463; *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550; *In re Schenkein*, 113 Fed. Rep. 421, 7 Am. B. R. 162.



It has been held to be a transfer of property with intent to defraud creditors, where a debtor sold all of his property within a few days and shortly thereafter asserted that he had no property or money,<sup>74</sup> or where a manufacturing corporation transferred the greater part of its business and property to another corporation, organized largely of the same persons, in exchange for stock and bonds of the latter,<sup>75</sup> or where a debtor sold his property and invested the proceeds in distant states,<sup>76</sup> or where a partner withdrew money from the firm and secretly transferred it to a third person.<sup>77</sup>

Where the president of a corporation secretly purchased, through a third person, judgments against the corporation for less than their real value and resold the property, bid in at the sale on execution, at a profit, it was held to be a fraudulent transfer by the corporation, owing to the fiduciary relation between the president and the corporation.<sup>78</sup>

A sale may hinder, delay and defraud creditors, although the purchaser pays the full value for the property bought, if the seller intends thereby to perpetrate a fraud on his creditors.<sup>79</sup>

It is not an act of bankruptcy within the meaning of this clause to transfer property, where the only creditor is one holding an unliquidated claim for damages for a tort<sup>80</sup> or to sell certain property for nearly its full value to raise money to pay a creditor who is threatening criminal proceedings unless the debt is immediately paid,<sup>81</sup> or to use the proceeds of a sale of property to pay particular creditors in preference to

<sup>74</sup> *In re* Minard, 156 Fed. Rep. 377, 19 Am. B. R. 485.

<sup>75</sup> *Bean-Chamberlain Mfg. Co. v. Standard Spoke, etc., Co.* (C. C. A. 6th Cir.), 131 Fed. Rep. 215, 65 C. C. A. 201, 12 Am. B. R. 610.

<sup>76</sup> *In re* Shoesmith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645.

<sup>77</sup> *In re* Shapiro, 106 Fed. Rep. 495, 5 Am. B. R. 839.

<sup>78</sup> *Citizens Bank v. De Pauw Co.* (C. C. A. 7th Cir.), 105 Fed. Rep.

926, 45 C. C. A. 130, 5 Am. B. R. 345.

<sup>79</sup> *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66; *Clements v. Moore*, 6 Wall. 299, 312, 18 L. Ed. 786; *Walbrun v. Babbitt*, 16 Wall. 581, 21 L. Ed. 489.

<sup>80</sup> *Beers v. Hanlin*, 99 Fed. Rep. 695, 3 Am. B. R. 745.

<sup>81</sup> *In re* Belknap, 129 Fed. Rep. 646, 12 Am. B. R. 326.



others, although it may be a preference,<sup>82</sup> or to mortgage property to raise money to pay certain creditors intending to pay all other creditors later,<sup>83</sup> or to mortgage one's entire property for a debt where the equity in the property is sufficient to pay the other creditors,<sup>84</sup> or where a conveyance of real estate is made by a debtor to the only creditor that she knew, although she was liable under a guarantee for the debts of another.<sup>85</sup>

A general assignment for the benefit of creditors may have the effect to hinder and delay a creditor in the enforcement of his demand by the ordinary process of law, but, for that reason alone, it has never been regarded as hindrance and delay within the meaning of the statutes against fraudulent conveyances.<sup>86</sup> A voluntary procuring of the appointment of a receiver in proceedings for the dissolution of an insolvent corporation is not a transfer with intent to hinder, delay, etc.<sup>87</sup> This, however, is immaterial under the present act because an assignment for the benefit of creditors and the appointment of a receiver for an insolvent debtor is expressly declared to be an act of bankruptcy.<sup>88</sup>

<sup>82</sup> *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re Belknap*, 129 Fed. Rep. 646, 12 Am. B. R. 326.

<sup>83</sup> *In re McLoon*, 162 Fed. Rep. 575, 20 Am. B. R. 719.

<sup>84</sup> *In re Lansing Boiler, etc., Wks. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558.

<sup>85</sup> *Merchants Nat. Bank v. Cole* (C. C. A. 6th Cir.), 149 Fed. Rep. 708, 79 C. C. A. 414, 18 Am. B. R. 44.

<sup>86</sup> *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171; *Pickstock v. Lyster*, 3 Mau. & Sel. 371.

In *Reed v. McIntyre*, *supra*, Mr. Justice Harlan, after reviewing the authorities on this point, said: "Our conclusion, therefore, is that the

assignment of Combs could not, upon common-law principles, be impeached simply because it had the effect to prevent the appellant, by means of the execution levy, from securing priority over all other creditors."

<sup>87</sup> *In re Harper Bros.*, 100 Fed. Rep. 266, 3 Am. B. R. 804, 2 N. B. N. 605; *In re Baker-Ricketson Co.*, 97 Fed. Rep. 489, 4 Am. B. R. 605; *Vacarro v. Security Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474, 2 N. B. N. 103; *In re H. Zeltner Brewing Co.*, 117 Fed. Rep. 799, 9 Am. B. R. 63.

<sup>88</sup> B. A. 1898, Sec. 3a, clause 4 as amended February 5, 1903, 32 Stat. at L. 797.

**§ 144. Concealment or removal of property as an act of bankruptcy.**

In addition to fraudulent transfers, the first act of bankruptcy includes also the concealing or removing of the debtor's property with the same fraudulent intent and purpose.<sup>89</sup>

The first act of bankruptcy is intended to cover any act of the debtor to put his property beyond the reach of his creditors for the purpose of hindering, delaying or defrauding them. How a debtor may do this by transferring the title to his property is considered in the last section. The debtor may also accomplish the same result by removing or concealing the property itself, although he retains the real title or ownership of it.

Where an absconding debtor takes with him money or property not exempt, it is a concealment and removal of his property with intent to defraud his creditors.<sup>90</sup> Where the proceeds of a fraudulent conveyance are secretly invested in distant states, it is a concealment of assets within this provision.<sup>91</sup>

It is not necessary to physically remove or conceal the property, but the concealment of the actual title to the property by fictitious legal proceedings or otherwise, is considered a concealment or removal of property within this provision.<sup>92</sup> The statute defines conceal to "include secrete, falsify or mutilate."<sup>93</sup>

The removal or concealment must be by the debtor or with his knowledge or consent. It is not an act of bankruptcy

<sup>89</sup> B. A. 1898, Sec. 3, clause 1.

*In re Filer*, 108 Fed. Rep. 209, 5 Am. B. R. 332; *Citizens Nat. Bk. v. De Pauw Co.* (C. C. A. 7th Cir.), 105 Fed. Rep. 926, 45 C. C. A. 130, 5 Am. B. R. 345; *Anonymous*, No. 466 Fed. Cas., 1 Pac. Law Rep. 173; *Livermore v. Bagley*, 3 Mass. 487; *Fox v. Eckstein*, No. 5009, Fed. Cas., 4 N. B. R. 373.

<sup>90</sup> *In re Filer*, 108 Fed. Rep. 209, 5 Am. B. R. 332.

<sup>91</sup> *In re Shoesmith* (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645.

<sup>92</sup> *In re Shoesmith* (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645; *In re Hussman*, No. 6951, Fed. Cas., 2 N. B. R. 437; *In re Williams*, No. 17703, Fed. Cas., 3 N. B. R. 286; *O'Neil v. Glover*, 5 Gray 159; *Anonymous*, No. 466, Fed. Cas., 1 Pac. L. R. 173.

<sup>93</sup> B. A. 1898, Sec. 1, clause 22.

where the property is removed by a creditor in the absence of the debtor,<sup>94</sup> or his failure to take legal proceedings to recover possession of such goods removed by the creditor.<sup>95</sup> It is not a removal of property within this clause to permit a receiver appointed by a state court to take possession of the debtor's property.<sup>96</sup> The debtor can not prevent it.

It is only the property of the debtor which may be distributed *pro rata* among his creditors that may be removed or concealed. It is not concealing property within the meaning of this clause not to disclose property which is not properly assets of the bankrupt.<sup>97</sup>

### § 145. Preferences as an act of bankruptcy.

The second act of bankruptcy specified in the statute consists of a person having transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors.<sup>98</sup>

To constitute an act of bankruptcy within this provision three things must concur, namely: *First*, a transfer of the debtor's property to a creditor.<sup>99</sup> *Second*, the debtor's intent to prefer such creditor.<sup>1</sup> *Third*, the insolvency of the debtor at the date of the transfer.<sup>2</sup>

In order to succeed under this subdivision the petitioning creditors must allege and prove all three of these facts.<sup>3</sup>

It has been held sufficient to constitute an act of bankruptcy for a person to transfer all of his property to a part of his

<sup>94</sup> *In re* Belknap, 129 Fed. Rep. 646, 12 Am. B. R. 326.

<sup>95</sup> *In re* Belknap, 129 Fed. Rep. 646, 12 Am. B. R. 326.

<sup>96</sup> *In re* Wilmington Hosiery Co., 120 Fed. Rep. 179, 9 Am. B. R. 579.

<sup>97</sup> *In re* Scott, 11 Fed. Rep. 133; *In re* Shoesmith (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645.

<sup>98</sup> B. A. 1898, Sec. 3, clause 2.

<sup>99</sup> See Sec. 146, *post*.

<sup>1</sup> See Sec. 147, *post*.

<sup>2</sup> See Sec. 139, *ante*.

<sup>3</sup> *In re* Rome Planing Mill Co., 96 Fed. Rep. 812, 3 Am. B. R. 123; *In re* Ewing (C. C. A. 2nd Cir.), 115 Fed. Rep. 707, 53 C. C. A. 289, 8 Am. B. R. 269; *Clarke v. Henne & Meyer* (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 62 C. C. A. 172, 11 Am. B. R. 583; *In re* Flint Hill Stone & Const. Co., 149 Fed. Rep. 1007, 18 Am. B. R. 81; *In re* Hammond, 163 Fed. Rep. 548, 20 Am. B. R. 776.

creditors,<sup>4</sup> or to his wife,<sup>5</sup> or to mortgage all of his property to a creditor,<sup>6</sup> or to effect a composition with all of his creditors but one and pay him in full,<sup>7</sup> or to pay any creditor in full while insolvent,<sup>8</sup> or to pay a private debt out of partnership property,<sup>9</sup> or to give a creditor security for a pre-existing debt,<sup>10</sup> or to give security to a surety for money loaned to pay labor claims for which the surety was then liable,<sup>11</sup> or to pay an overdraft on a bank,<sup>12</sup> or to sell one's property to a person not a creditor and apply the proceeds in full payment of some creditors leaving others unpaid,<sup>13</sup> or to assign earnings to become due under a building contract.<sup>14</sup>

<sup>4</sup> *Johnson v. Wald* (C. C. A. 5th Cir.), 93 Fed. Rep. 640, 35 C. C. A. 522, 2 Am. B. R. 84; *Goldman v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re Drummond*, No. 4094, Fed. Cas., 4 Biss. 149; *In re House*, No. 6735, Fed. Cas., 1 N. Y. Leg. Obs. 348; *In re Foster*, No. 4964, Fed. Cas., 18 N. B. R. 64.

<sup>5</sup> *In re Alexander*, No. 161, Fed. Cas., 1 Low. 470.

*In re Pinson & Co.*, 180 Fed. Rep. 787, 24 Am. B. R. 804, the debtor paid to his wife in settlement of an alleged indebtedness and while he was insolvent, the proceeds of fire insurance policies, the indemnity for loss on his stock of goods.

<sup>6</sup> *In re Edelman* (C. C. A. 2nd Cir.), 130 Fed. Rep. 700, 65 C. C. A. 665, 12 Am. B. R. 238; *In re Riggs Restaurant Co.*, 130 Fed. Rep. 691, 11 Am. B. R. 508; *In re Ed. W. Wright Lumber Co.*, 114 Fed. Rep. 1011, 8 Am. B. R. 345; *Baldwin v. Rosseau*, No. 803, Fed. Cas., 1 N. Y. Leg. Obs. 391; *In re Waite*, No. 17044, Fed. Cas., 1 Low. 207; *In re Dunham*, No. 4143, Fed. Cas., 2 Ben. 488; *In re Rogers*, No. 12002, Fed. Cas., 2 N. B. R. 397.

<sup>7</sup> *Curran v. Munger*, No. 3487,

Fed. Cas., 6 N. B. R. 33.

<sup>8</sup> *Rex Buggy Co. v. Hearick* (C. C. A. 8th Cir.), 132 Fed. Rep. 310, 65 C. C. A. 676, 12 Am. B. R. 726; *In re Pinson & Co.*, 180 Fed. Rep. 787, 24 Am. B. R. 804; *In re Oregon Bulletin Printing and Publishing Co.*, No. 10559, Fed. Cas., 13 N. B. R. 503; *Silverman's Case*, No. 12855, Fed. Cas., 1 Saw. 410; *In re Dibblee*, No. 3884, Fed. Cas., 3 Ben. 283; *sub nom.*, *Clark v. Ise-lin*, 21 Wall. 350, 22 L. Ed. 568.

<sup>9</sup> *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re Mattot*, No. 9282, Fed. Cas., 16 N. B. R. 485.

<sup>10</sup> *Ex parte Shouse*, No. 12815, Fed. Cas., Crabbe, 482; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

<sup>11</sup> *United Surety Co. v. Iowa Mfg. Co.* (C. C. A. 8th Cir.), 179 Fed. Rep. 55, 102 C. C. A. 623, 24 Am. B. R. 726.

<sup>12</sup> *Payne v. Soloman*, No. 10856, Fed. Cas., 14 N. B. R. 162.

<sup>13</sup> *Boyd v. Lemon & Gale Co.* (C. C. A. 5th Cir.), 114 Fed. Rep. 647, 52 C. C. A. 343, 8 Am. B. R. 81. See also *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453.

<sup>14</sup> *In re O'Donnell*, 131 Fed. Rep. 150, 12 Am. B. R. 621.

On the other hand, it has been held not to constitute an act of bankruptcy where a payment is made under the belief that the debtor is solvent,<sup>15</sup> or where, at the time of payment, he had no other creditors,<sup>16</sup> or to make a change of securities,<sup>17</sup> or the payment of unearned premiums on policies of insurance,<sup>18</sup> or an executory agreement by a railway company to transfer certificates of stock to a creditor,<sup>19</sup> or to pay a percentage on claims of a part of his creditors when the others will receive the same percentage,<sup>20</sup> or the return of a piano ordered for a customer who refused to receive it,<sup>21</sup> or the payment of rent to preserve a valuable lease,<sup>22</sup> or to execute a conveyance or mortgages for a present consideration.<sup>23</sup>

The payment of the current expenses of a business concern, including the salaries of its officers, is not such a transfer of property as to be an act of bankruptcy.<sup>24</sup> If the salary of an

<sup>15</sup> *In re Bloch* (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 48 C. C. A. 650, 6 Am. B. R. 300; *Morgan v. Mastick*, No. 9803, Fed. Cas., 2 N. B. R. 521; *In re Munn*, No. 9925, Fed. Cas., 3 Biss. 442.

<sup>16</sup> *Brake v. Callison* (C. C. A. 5th Cir.), 129 Fed. Rep. 201, 63 C. C. A. 359, 11 Am. B. R. 797.

<sup>17</sup> *Clark v. Iselin*, 21 Wall, 360, 22 L. Ed. 568; *In re Cutting*, 145 Fed. Rep. 388, 16 Am. B. R. 751; *In re Weaver*, No. 17307, Fed. Cas., 9 N. B. R. 132; *In re Union Pac. R. Co.*, No. 14376, Fed. Cas., 10 N. B. R. 178. But see *Anniston Iron & Supply Co. v. Rolling Mill Co.*, 125 Fed. Rep. 974, 11 Am. B. R. 200, where it was held that the transaction amounted to more than a mere change of securities.

<sup>18</sup> *Knickerbocker v. Comstock*, No. 7879, Fed. Cas., 9 N. B. R. 484.

<sup>19</sup> *Winter v. Railway Co.*, No. 17890, Fed. Cas., 2 Dill. 487.

<sup>20</sup> *In re Hapgood*, No. 6044, Fed. Cas., 2 Low. 200; *Jones v. Sleeper*, No. 7496, Fed. Cas., 2 N. Y. Leg.

Obs. 131; *In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20 Am. B. R. 537; *Macon Grocery Co. v. Beach*, 156 Fed. Rep. 1009, 19 Am. B. R. 558.

<sup>21</sup> *Doan v. Compton*, No. 3940, Fed. Cas., 2 N. B. R. 607.

<sup>22</sup> *In re Pearson*, 95 Fed. Rep. 425, 2 Am. B. R. 282; *In re Merchants Insurance Co.*, No. 9441, Fed. Cas., 3 Biss. 162; *Contra*, *Smith v. Teutonia Ins. Co.*, No. 13115, Fed. Cas., 6 Am. Law Rev. 584.

*In re Lange*, 97 Fed. Rep. 197, 3 Am. B. R. 232, Judge Brown said: "Payment of rent by an insolvent is not necessarily a preference. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded," and held it an act of bankruptcy in that case.

<sup>23</sup> *Martin v. Hulen & Co.*, 149 Fed. Rep. 982, 17 Am. B. R. 510.

<sup>24</sup> *Richmond Standard Steel, etc., Co. v. Allen* (C. C. A. 4th Cir.), 148 Fed. Rep. 657, 78 C. C. A. 389, 17 Am. B. R. 583; *In re Union*

officer of a corporation has accumulated and thus becomes an existing debt, and the corporation being insolvent and in contemplation of such insolvency pays the debt with intent to prefer it over its other creditors it would clearly be an act of bankruptcy.<sup>25</sup>

**§ 146. Transfer of debtor's property to a creditor.**

An element of the second act of bankruptcy—giving a preference—is that the debtor has transferred property of his own to a creditor.<sup>26</sup>

A transfer by a person other than the bankrupt to a creditor does not constitute a preference,<sup>27</sup> as where the wife of the bankrupt pays his debts from her separate estate,<sup>28</sup> or where the directors of a corporation individually pay a debt of the corporation,<sup>29</sup> or where money is advanced to the bankrupt by a third person for a specific purpose and is not used for that purpose but returned to him.<sup>30</sup>

Where the transfer is made by the agent of the bankrupt,<sup>31</sup> or by the bankrupt as agent for an undisclosed principal, the equitable owner,<sup>32</sup> to a creditor it constitutes a preference. In determining the relation of debtor and creditor the court has applied "the principle that one who credits an agent, who, by the consent or with the knowledge of his principal, is trans-

Feather & Wool Mfg. Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 774, 50 C. C. A. 524, 7 Am. B. R. 472.

But see *Kenyon v. Fenton*, 6 N. B. R. 238. (Note to case No. 17780, Fed. Cas.)

<sup>25</sup> *Richmond Standard Steel, etc., Co. v. Allen* (C. C. A. 4th Cir.), 148 Fed. Rep. 657, 78 C. C. A. 389, 17 Am. B. R. 583.

<sup>26</sup> B. A. 1898, Sec. 3, clause 2. *In re Foster*, 126 Fed. Rep. 1014, 11 Am. B. R. 131.

<sup>27</sup> *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541; *Goode v. Elwood Lodge*, 160 Ind. 251; *Keegan v. Hamilton Nat. Bk.*, 163 Ind. 216; *Western Tie &*

*Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

<sup>28</sup> *Goode v. Elwood Lodge*, 160 Ind. 251.

<sup>29</sup> *Keegan v. Hamilton Nat. Bank*, 163 Ind. 216.

<sup>30</sup> *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541.

<sup>31</sup> *Rector v. City Deposit Bank*, 200 U. S. 405, 50 L. Ed. 527, 15 Am. B. R. 336; *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. Ed. 533, 15 Am. B. R. 347.

<sup>32</sup> *Calnan Co. v. Doherty* (C. C. A. 1st Cir.), 174 Fed. Rep. 222, 98 C. C. A. 130, 23 Am. B. R. 297.

acting the principal's business in his own name—that is, the name of the agent—may ordinarily pursue for payment the agent or the equitable owner who lies behind the agent.”<sup>83</sup>

A transfer to a person other than a creditor unless for his benefit<sup>84</sup> is not a preference.<sup>85</sup> A customer is not a creditor of a stock broker.<sup>86</sup> An endorser or surety is a creditor, who may receive a preference from his principal.<sup>87</sup>

By transfer is included the sale and every other mode of disposing or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.<sup>88</sup> It is clear that the word “transfer” is intended to include every disposition a debtor can make of his property to pay a creditor. But the transfer must be effective as such, and, if for any reason, it is inoperative as between the parties, it is not a transfer and hence can not constitute an act of bankruptcy.

It has been held that every trivial payment is not necessarily a preference.<sup>89</sup> It must be a substantial transaction to justify the institution of a proceeding in bankruptcy. It is impossible

<sup>83</sup> *Calnan Co. v. Doherty* (C. C. A. 1st Cir.), 174 Fed. Rep. 222, 98 C. C. A. 130, 23 Am. B. R. 297.

<sup>84</sup> *In re Wright Lumber Co.*, 114 Fed. Rep. 1011, 8 Am. B. R. 345; *Boyd v. Lemon & Gale Co.* (C. C. A. 5th Cir.), 114 Fed. Rep. 647, 52 C. C. A. 343, 8 Am. B. R. 81.

<sup>85</sup> *Richardson v. Shaw* (C. C. A. 2nd Cir.), 147 Fed. Rep. 659; 77 C. C. A. 643, 16 Am. B. R. 842, affirmed, 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717; *Lyon v. Clark*, 129 Mich. 381; *North v. Taylor*, 70 N. Y. Supp. 339, 6 Am. B. R. 233.

<sup>86</sup> *Richardson v. Shaw* (C. C. A. 2nd Cir.), 147 Fed. Rep. 659, 77 C. C. A. 643, 16 Am. B. R. 842, affirmed 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717.

<sup>87</sup> *Crandall v. Coats*, 133 Fed. Rep. 965, 13 Am. B. R. 712;

*Swarts v. Siegal* (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 54 C. C. A. 339, 8 Am. B. R. 689; *Huttig Mfg. Co. v. Edwards* (C. C. A. 8th Cir.), 160 Fed. Rep. 619, 87 C. C. A. 521, 20 Am. B. R. 849; *Kobush v. Hand* (C. C. A. 8th Cir.), 156 Fed. Rep. 660, 84 C. C. A. 372, 19 Am. B. R. 379.

<sup>88</sup> B. A. 1898, Sec. 1, clause 25.

<sup>89</sup> *In Macon Grocery Co. v. Beach*, 156 Fed. Rep. 1009, 9 Am. B. R. 558, it was held that the payment of sixty cents for soda water, coca-cola and one bar of soap, and \$2.15 for a dressed doll did not constitute preferences that would support bankruptcy proceedings.

*In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20 Am. B. R. 537, it was held that the payment of three dollars a week on a note to



to draw a line to say what amount is sufficient to make a preference. This depends upon the character of the payments and the intention of the debtor and must be determined upon the facts of each particular case.

**§ 147. The debtor's intent to prefer.**

Another element of the second act of bankruptcy—giving a preference—is that the debtor intended to prefer the creditor receiving the transfer over his other creditors.<sup>40</sup>

An intent to prefer is an intent that some particular creditor shall receive a greater percentage of his debt than other creditors of the same class.<sup>41</sup>

The intent of the debtor alone is to be considered in determining whether he has committed an act of bankruptcy within this provision.<sup>42</sup> It should be observed that giving a preference may be an act of bankruptcy by the debtor, although the trustee may not be able to avoid the preference.<sup>43</sup> The debtor may intend to prefer the creditor, although the creditor

a creditor was not a preference that would support bankruptcy proceedings.

*In re Ball*, 156 Fed. Rep. 682, 19 Am. B. R. 609, there were a large number of small transactions held to be preferences.

See also the observations of Judge Bellinger *In re Gilbert*, 112 Fed. Rep. 951, 955, 8 Am. B. R. 101.

<sup>40</sup> B. A. 1898, Sec. 3, clause 2. *In re Ewing* (C. C. A. 2nd Cir.), 115 Fed. Rep. 707, 53 C. C. A. 289, 8 Am. B. R. 269; *Goodlander-Robertson Lumber Co. v. Atwood* (C. C. A. 4th Cir.), 152 Fed. Rep. 978, 82 C. C. A. 109, 18 Am. B. R. 510; *In re Bloch* (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 52 C. C. A. 343, 6 Am. B. R. 300; *In re Gilbert*, 112 Fed. Rep. 951, 8 Am. B. R. 101.

<sup>41</sup> B. A. 1898, Sec. 60a. See also Sec. 492, *post*. *Goodlander-Robert-*

*son Lumber Co. v. Atwood* (C. C. A. 4th Cir.), 152 Fed. Rep. 978, 82 C. C. A. 109, 18 Am. B. R. 510; *Swarts v. Fourth Nat. Bank* (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 339, 8 Am. B. R. 673; *Brittan Dry Goods Co. v. Bertenshaw*, 68 Kan. 634.

<sup>42</sup> *Goodlander-Robertson Lumber Co. v. Atwood* (C. C. A. 4th Cir.), 152 Fed. Rep. 978, 82 C. C. A. 109, 18 Am. B. R. 510; *Macon Grocery Co. v. Beach*, 156 Fed. Rep. 1009, 9 Am. B. R. 558; *In re Douglas Coal & Coke Co.*, 131 Fed. Rep. 769, 12 Am. B. R. 539; *In re Gilbert*, 112 Fed. Rep. 951, 8 Am. B. R. 101; *Clark v. Henne & Meyer* (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 62 C. C. A. 172, 11 Am. B. R. 583.

<sup>43</sup> *In re Drummond*, No. 4093, Fed. Cas., 1 N. B. R. 231.



may not know or have cause to believe that he is receiving a preference. The statute prior to 1910 expressly provided that the trustee might avoid a preference only when the person to be benefited "shall have reasonable cause to believe that it was intended thereby to give a preference."<sup>44</sup> The intent of the person receiving the preference is immaterial in determining whether the transaction constitutes an act of bankruptcy, but is essential to a recovery of the property for the estate.

The intent of a debtor may be presumed from the nature of the transaction and his acts in connection with it. As observed by Mr. Justice Field,<sup>45</sup> "It is a general principle that every one must be presumed to intend the necessary consequences of his act." The transfer by an insolvent debtor of his property, or a considerable portion of it to one creditor in payment of or as a security for a pre-existing debt, without making provision for an equal distribution of its proceeds to all his creditors, operates as a preference to such creditor and must be taken as *prima facie* evidence that a preference was intended.<sup>46</sup>

Thus it has been held that the intent to prefer will be presumed from a transfer of a large portion of property by an insolvent to a part of his creditors,<sup>47</sup> or a transfer by an insolvent merchant of his entire stock to a single creditor,<sup>48</sup> or a transfer by an insolvent debtor to one of his creditors of

<sup>44</sup> B. A. 1898, Sec. 60.

See also Sec. 492, *post*.

<sup>45</sup> *In Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481.

<sup>46</sup> *Johnson v. Wald* (C. C. A. 5th Cir.), 93 Fed. Rep. 640, 35 C. C. A. 522, 2 Am. B. R. 84; *In re McGee*, 105 Fed. Rep. 895, 5 Am. B. R. 262; *Macon Grocery Co. v. Beach*, 156 Fed. Rep. 1009, 18 Am. B. R. 558; *Webb v. Sachs*, No. 17325, Fed. Cas., 15 N. B. R. 171; *In re Oregon Printing Co.*, No. 10559, Fed. Cas., 13 N. B. R. 503; *Miller v. Keys*, No. 9578, Fed. Cas., 3 N. B. R. 224; *In re Wright Lum-*

*ber Co.*, 114 Fed. Rep. 1011, 8 Am. B. R. 345; *In re Gilbert*, 112 Fed. Rep. 951, 8 Am. B. R. 101; *In re Bloch* (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 48 C. C. A. 650, 6 Am. B. R. 300.

<sup>47</sup> *In re Rome Planing Mill Co.*, 96 Fed. Rep. 812, 3 Am. B. R. 123; *Rex Buggy Co. v. Hearick* (C. C. A. 8th Cir.), 132 Fed. Rep. 310, 12 Am. B. R. 726; *Naylon & Co. v. Christiansen Harness Mfg. Co.* (C. C. A. 6th Cir.), 158 Fed. Rep. 290, 85 C. C. A. 522, 19 Am. B. R. 789.

<sup>48</sup> *Goldman v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266.

sufficient personal property to more than satisfy the debt in full, the surplus being returned to the debtor,<sup>49</sup> or the payment of rent by an insolvent debtor on a leasehold for the purpose of continuing the business with intent to defraud creditors by secreting the proceeds of the business,<sup>50</sup> or by the execution by an insolvent of a deed of trust or mortgage to a single creditor to secure a pre-existing debt,<sup>51</sup> or by a sale by an insolvent debtor of all his property to one not a creditor, and the application of the proceeds to the payment in full of a part of his creditors leaving the others unpaid,<sup>52</sup> or by a transfer to a bank of a large amount of accounts to secure a debt leaving other creditors unpaid.<sup>53</sup>

The evidence of intent resulting from the fact of a preference by an insolvent is very persuasive but may be overcome by proof on the part of the debtor.<sup>54</sup> The testimony of the

<sup>49</sup> *Johnson v. Wald* (C. C. A. 5th Cir.), 93 Fed. Rep. 640, 35 C. C. A. 522, 2 Am. B. R. 84.

<sup>50</sup> *In re Lange*, 97 Fed. Rep. 197, 3 Am. B. R. 232.

<sup>51</sup> *In re Wright Lumber Co.*, 114 Fed. Rep. 1011, 8 Am. B. R. 345; *In re Edelman* (C. C. A. 2nd Cir.), 130 Fed. Rep. 700, 12 Am. B. R. 238, 65 C. C. A. 665; *In re Riggs Restaurant Co.*, 130 Fed. Rep. 691, 11 Am. B. R. 508; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864.

<sup>52</sup> *Boyd v. Lemmon & Gale Co.* (C. C. A. 5th Cir.), 114 Fed. Rep. 647, 52 C. C. A. 343, 8 Am. B. R. 81.

<sup>53</sup> *Anniston Iron & Supply Co. v. Anniston Rolling Mill Co.*, 125 Fed. Rep. 974, 11 Am. B. R. 974,

<sup>54</sup> *In re Bloch* (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 48 C. C. A. 650, 6 Am. B. R. 300; *Goodlander-Robertson Lumber Co. v. Atwood*, 152 Fed. Rep. 978, 18 Am. B. R. 510; *Clark v. Henne & Meyer* (C. C. A. 5th Cir.), 127 Fed. Rep.

288, 62 C. C. A. 172, 11 Am. B. R. 583; *In re Gilbert*, 112 Fed. Rep. 951, 8 Am. B. R. 101.

*In Toof v. Martin*, 13 Wall. 48, 20 L. Ed. 481, Mr. Justice Field said the fact that a preference was given "must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy."

*In Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504, the court held that a preference was *prima facie* evidence of intent "unless the debtor or transferee can show that the debtor was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts."

debtor himself that he did not intend a preference' is entitled to very little weight where such intention is plainly presumable from his acts.<sup>55</sup>

The presumption of an intent to prefer may be overcome by showing that the debtor was at the time ignorant of his insolvency and that his affairs were such as that he could reasonably expect to pay all his debts,<sup>56</sup> or that the payment of bills as they matured were made in the ordinary course of business without any intent to give a preference or in contemplation of bankruptcy,<sup>57</sup> or that the preferred creditor did

<sup>55</sup> *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345; Oxford Iron Co. v. Slafter, No. 10637, Fed. Cas., 13 Blachf. 455; Macon Grocery Co. v. Beach, 156 Fed. Rep. 1009, 19 Am. B. R. 558; Naylor v. Christiansen Harness Mfg. Co. (C. C. A. 6th Cir.), 158 Fed. Rep. 290, 85 C. C. A. 522, 19 Am. B. R. 789.

*In re* Drummond, No. 4093, Fed. Cas., 1 N. B. R. 231, the court said: "Drummond positively swears that he had not such intent. And there is nothing in the evidence that leads me to conclude that he swears falsely."

*In re* Bloch (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 48 C. C. A. 650, 6 Am. B. R. 300, Judge Shipman said: "Inasmuch as testimony was given by F. E. Bloch to show the reasonableness of his expectation of being able to carry on the business, and an absence of intention to prefer a creditor, the question of intent should have been submitted to the jury."

<sup>56</sup> *Goodlander-Robertson Lumber Co. v. Atwood*, 152 Fed. Rep. 978, 18 Am. B. R. 510; *In re* Bloch (C. C. A. 2nd Cir.), 109 Fed. Rep. 790, 48 C. C. A. 650, 6 Am. B. R. 300; *In re* Gilbert, 112 Fed. Rep. 951, 8 Am. B. R. 101; *Morgan v.*

*Mastick*, No. 9803, Fed. Cas., 2 N. B. R. 521; *Martin v. Hulen & Co.*, 149 Fed. Rep. 982, 17 Am. B. R. 510.

*In Merchants Nat. Bank v. Cole* (C. C. A. 6th Cir.), 149 Fed. Rep. 708, 79 C. C. A. 414, 18 Am. B. R. 44, Mrs. Cole showed that she transferred property to her only creditor as she believed at the time, although she had executed several years before a guaranty of payment of her son's notes at the bank, which had for five years been paid as they fell due. The court held no intent to prefer the creditor.

<sup>57</sup> *Goodlander-Robertson Lumber Co. v. Atwood*, 152 Fed. Rep. 978, 18 Am. B. R. 510; *Clarke v. Henne & Mayer* (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 62 C. C. A. 172, 11 Am. B. R. 583.

*In Richmond Standard Steel, etc., Co. v. Allen* (C. C. A. 4th Cir.), 148 Fed. Rep. 657, 78 C. C. A. 389, 17 Am. B. R. 583, a corporation paid its officers' salaries, without creating a preference.

*In re* Ball, 156 Fed. Rep. 682, 19 Am. B. R. 609, the court said: "As to the other objection raised, that each of the payments was small in amount and made in the ordinary course of business, and

not receive a greater percentage of his claim than the other creditors of the same class will receive,<sup>58</sup> or that the payments are so trivial that the percentages of the other creditors will not be substantially affected,<sup>59</sup> or that the transfer was for a present consideration.<sup>60</sup>

**§ 148. Preferences created by legal proceedings as an act of bankruptcy.**

The third act of bankruptcy consists of a debtor having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference.<sup>61</sup>

Three elements are necessary to constitute an act of bankruptcy under this provision. *First*, the debtor must have been insolvent at the time the preference was created, *second*, he must have suffered or permitted a creditor to have obtained a preference through legal proceedings, and *third*, he must have failed to vacate or discharge it at least five days before the sale or final disposition of the property.

that this would indicate that the alleged bankrupt was attempting to pay his debts instead of creating a fraudulent preference, it is only necessary to say that the character of the payments and the smallness of their amounts, certainly do seem to indicate that the bankrupt was paying his current incidental debts, as he had the opportunity and funds to do so. Nevertheless, if he was insolvent, and if he made each of these respective payments with a knowledge that he could not at that time pay his other creditors whose claims were due, and with the additional knowledge that each of these payments was in effect a preference, although the bankrupt actually expected to defraud no one, and hoped to pay his debts in full, the acts alleged come within the

provision of the bankruptcy statute."

<sup>58</sup> *In re Hopgood*, 2 Low. 200; *Jones v. Sleeper*, No. 7496, Fed. Cas., 2 N. Y. Leg. Obs. 131.

<sup>59</sup> *Macon Grocery Co. v. Beach*, 156 Fed. Rep. 1009, 19 Am. B. R. 558; *In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20 Am. B. R. 537.

<sup>60</sup> *Martin v. Hulen & Co.*, 149 Fed. Rep. 982, 17 Am. B. R. 510; *In re Flint Hill Stone & Const. Co.*, 149 Fed. Rep. 1007, 18 Am. B. R. 81.

<sup>61</sup> B. A. 1898, Sec. 3, clause 3. *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142; *In re Reichman*, 91 Fed. Rep. 624, 1 Am. B. R. 17; *In re Elmira Steel Co.*, 109 Fed. Rep. 456, 5 Am. B. R. 484.

These elements should be alleged in the petition and supported by proofs to justify an adjudication.<sup>62</sup>

No intent on the part of the debtor to create a preference is required, as there was under the act of 1867,<sup>63</sup> which provided that a person commits an act of bankruptcy who "procures or suffers his property to be taken on legal process, with intent to give a preference to one or more of his creditors." The act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact.<sup>64</sup> In this respect it differs from the second act of bankruptcy, where the intent of the debtor to create a preference by transferring property to a creditor is essential.<sup>65</sup>

**INSOLVENCY.**—It is an essential element of this act of bankruptcy that the debtor be insolvent at the time the preference is obtained through legal proceedings.<sup>66</sup>

It is not an act of bankruptcy for a solvent debtor to suffer or permit an execution, levy and sale of his property under legal proceedings. Where a judgment is obtained against a person while he is solvent, it has been held that an execution may be subsequently issued when the person is insolvent.<sup>67</sup>

<sup>62</sup> *In re* Hammond, 163 Fed. Rep. 548, 20 Am. B. R. 776.

<sup>63</sup> R. S. Sec. 5021, par. 7, embracing a part of Sec. 39 of the act of March 2, 1867, 14 Stat. at L. 536, as amended June 22, 1874, 18 Stat. at L. 180.

In *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142, the supreme court points out the differences generally between the act of 1867 and that of 1898 with respect to preferences created by legal proceedings as an act of bankruptcy.

<sup>64</sup> *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142; *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123; *Bogen v. Protter* (C. C. A. 6th Cir.), 129 Fed. Rep. 533, 64 C. C. A. 63, 12

Am. B. R. 288; *Scheuer v. Smith & Montgomery Book & Stationery Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 407, 50 C. C. A. 312, 7 Am. B. R. 384; *In re* Moyer, 93 Fed. Rep. 188, 1 Am. B. R. 577.

<sup>65</sup> Sec. 147, *ante*.

<sup>66</sup> B. A. 1898, Sec. 3, clause 3. *In re* Hines, 144 Fed. Rep. 142, 16 Am. B. R. 295; *Chicago, etc., Co. v. Roebling*, 107 Fed. Rep. 71, 5 Am. B. R. 368.

As to insolvency as an element of an act of bankruptcy, see Sec. 139, *ante*.

<sup>67</sup> *Field v. Baker*, No. 4762, Fed. Cas., 12 Blach. 428.

See also *Owen v. Brown* (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 57 C. C. A. 180, 9 Am. B. R. 717.

Where a levy on property of the debtor depreciates its value so that his assets are then less than his liabilities he is not insolvent within the meaning of the statute.<sup>68</sup>

The solvency of a debtor at the time the petition in bankruptcy is filed is immaterial.<sup>69</sup>

**SUFFER OR PERMIT A PREFERENCE.**—An insolvent debtor commits an act of bankruptcy by “suffering or permitting” a preference through legal proceedings, unless he succeeds in vacating or discharging the preference at least five days before the sale or final disposition of the property affected by it.<sup>70</sup> It is immaterial whether he makes an active resistance to the judicial proceedings in which the judgment or levy upon his property is obtained. Mere passive non-resistance is sufficient. All that is necessary is that the enforcement of the judgment has the effect to enable the creditor to obtain a greater percentage of his debt than the other creditors in the same class.<sup>71</sup> If a preference is created by the legal proceedings within the meaning of section 60 of the act, such preference may be set aside. If no preference within the meaning of this section is created, the proceedings will be valid and the creditor protected. But whether it is a valid preference under that section has nothing to do with determining whether an act of bankruptcy has been committed or not.

It is not an act of bankruptcy unless the effect of the legal proceedings is to give one creditor a preference over the

<sup>68</sup> *Chicago, etc., Co. v. Roebbing*, 107 Fed. Rep. 71, 5 Am. B. R. 368.

<sup>69</sup> *West Co. v. Lea*, 174 U. S. 591, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>70</sup> *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142. See also *Bradley Timber Co. v. White* (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 58 C. C. A. 55, 10 Am. B. R. 329, affirming 119 Fed. Rep. 989, 9 Am. B. R. 441; *Parmenter Mfg. Co. v. Stoevers* (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 38 C. C. A. 200, 3 Am. B. R. 220;

*In re Reichman*, 91 Fed. Rep. 624, 1 Am. B. R. 17; *In re Moyer*, 93 Fed. Rep. 188, 1 Am. B. R. 577; *In re Thomas*, 103 Fed. Rep. 272, 4 Am. B. R. 571; *Bogen & Trummel v. Protter* (C. C. A. 6th Cir.), 129 Fed. Rep. 533, 64 C. C. A. 63, 12 Am. B. R. 288; *In re Rung Furniture Co.* (C. C. A. 2nd Cir.), 139 Fed. Rep. 526, 14 Am. B. R. 12.

<sup>71</sup> B. A. 1898, Sec. 60. *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142.

others. This does not result from suffering or permitting a levy upon a judgment to enforce a valid lien, which affects only the property bound by the lien,<sup>72</sup> or a landlord's levy under a distress warrant,<sup>73</sup> or proceedings under a state statute for the dissolution of a corporation or partnership and the appointment of a receiver to wind up the affairs and distribute the assets.<sup>74</sup> If such a proceeding should create a preference an act of bankruptcy is committed.<sup>75</sup>

**FAILURE TO DISCHARGE A PREFERENCE FIVE DAYS BEFORE A SALE.**—A preference in favor of a creditor created by legal proceedings against an insolvent debtor does not in itself constitute an act of bankruptcy. It is essential that the debtor fail to vacate or discharge the preference five days before a sale or final disposition of the property.<sup>76</sup>

A sale is the ordinary method of enforcing a judgment, attachment or execution. The words "or final disposition" are intended to cover every other method of passing the control or dominion of the property, absolutely or as a security, to a preferred creditor to the exclusion of all his other creditors.<sup>77</sup> Congress did not intend that a creditor should obtain

<sup>72</sup> *In re Chapman*, 99 Fed. Rep. 395, 3 Am. B. R. 607; *Owen v. Brown* (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 57 C. C. A. 180, 9 Am. B. R. 717; *In re Mero*, 128 Fed. Rep. 630, 12 Am. B. R. 171.

<sup>73</sup> *Richmond Standard Steel Co. v. Allen* (C. C. A. 4th Cir.), 148 Fed. Rep. 657, 78 C. C. A. 389, 17 Am. B. R. 583; *In re Belknap*, 129 Fed. Rep. 646, 12 Am. B. R. 326.

<sup>74</sup> *In re Empire Metallic Bedstead Co.* (C. C. A. 2nd Cir.), 98 Fed. Rep. 981, 3 Am. B. R. 575, 39 C. C. A. 372; *In re Harper Bros.*, 100 Fed. Rep. 266, 3 Am. B. R. 804; *Vacarro v. Security Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474.

Receivership proceedings are now made an act of bankruptcy under Sec. 3a, cl. 4. 32 Stat. at L. 797.

<sup>75</sup> *In re Kersten*, 110 Fed. Rep. 929, 6 Am. B. R. 516.

<sup>76</sup> *In re Vastbinder*, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re Rung Furniture Co.* (C. C. A. 2nd Cir.), 139 Fed. Rep. 526, 71 C. C. A. 342, 14 Am. B. R. 12; *Holmes v. Baker & Hamilton*, 160 Fed. Rep. 922, 20 Am. B. R. 252.

<sup>77</sup> *In re Tupper*, 163 Fed. Rep. 766, 20 Am. B. R. 824; *Scheuer v. Smith, etc., Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 107, 50 C. C. A. 312, 7 Am. B. R. 384; *In re Harper*, 105 Fed. Rep. 900, 5 Am. B. R. 567; *In re Miller*, 104 Fed. Rep. 764, 5 Am. B. R. 140.



a lien through legal proceedings on property of an insolvent person by a judgment and then lie still until such judgment had become unimpeachable under the bankrupt act, thereby gaining a preference, an absolute security for the debt thus excluding other creditors from any share in that property. It has been held that an advertised or even a proposed sale is not in all cases necessary.<sup>77</sup>

The act of bankruptcy can not be committed until the time is fixed for the sale or final disposition of the property.<sup>78</sup> It is consummated five days before the sale or final disposition of the property.<sup>79</sup> It can not be completed before that date, for the debtor may at any time prior thereto vacate or discharge the preference.<sup>80</sup> In that case no act of bankruptcy is committed.

The right to file a petition exists as soon as the act of bankruptcy is completed. It may be filed within the five days' period prior to the sale.<sup>81</sup> The limitation of four months regularly begins to run from the five days prior to the sale or final disposition of the property.<sup>82</sup> It has been held that the failure to discharge a lien on each succeeding day, including the day of sale, constitutes distinct acts of bankruptcy, and

<sup>78</sup> *Seaboard Steel Castings Co. v. Trigg*, 124 Fed. Rep. 75, 10 Am. B. R. 594; *In re Vetterman*, 135 Fed. Rep. 443, 14 Am. B. R. 245; *In re Windt*, 177 Fed. Rep. 584, 24 Am. B. R. 536; *In re Meyers* (Ref.) 1 Am. B. R. 1.

But see *In re Harper*, 105 Fed. Rep. 900, 5 Am. B. R. 567.

<sup>79</sup> *In re National Hotel & Cafe Co.*, 138 Fed. Rep. 937, 15 Am. B. R. 69.

<sup>80</sup> *Pittsburg Laundry Co. v. Imperial Laundry Co.* (C. C. A. 3rd Cir.), 154 Fed. Rep. 662, 83 C. C. A. 486, 18 Am. B. R. 756.

<sup>81</sup> *In re National Hotel & Cafe Co.*, 138 Fed. Rep. 947, 15 Am. B.

R. 69; *In re Rome Planing Mill*, 96 Fed. Rep. 812, 3 Am. B. R. 123; *Parmenter Mfg. Co. v. Stover* (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 38 C. C. A. 200, 3 Am. B. R. 220.

<sup>82</sup> *In re Ferguson*, 95 Fed. Rep. 429, 2 Am. B. R. 586; *Parmenter Mfg. Co. v. Stover* (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 38 C. C. A. 200, 3 Am. B. R. 220; *Owen v. Brown* (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 57 C. C. A. 180, 9 Am. B. R. 717; *Bradley Timber Co. v. White* (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 58 C. C. A. 55, 10 Am. B. R. 329; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142.



a petition filed within four months of the sale but more than four months after the fifth day prior to the sale is in time.<sup>83</sup>

**§ 149. What are "legal proceedings?"**

The phrase "legal proceedings," as used in the bankrupt law, refers to any proceedings had in a court of justice, either state or federal. It is equivalent to the words "legal process" used in the act of 1867<sup>84</sup> as construed by the courts.<sup>85</sup>

It is not confined to any particular form of writ, execution or attachment. It is rather a writ, mandate or order of the court taking hold of the property and withdrawing it from the possession and control of the debtor and from the ordinary reach of creditors for the payment of what is due to them. Each and any such proceeding is within the intent and true meaning of the term "legal proceedings" as used in this provision.<sup>86</sup> Thus it may be by an attachment proceeding,<sup>87</sup> or by an execution upon judgment,<sup>88</sup> or by levying execution on judgment upon a note containing a warrant of attorney to confess judgment.<sup>89</sup>

**§ 150. Vacating or discharging a preference created by legal proceedings.**

It is sufficient to defeat an adjudication founded upon a preference created by legal proceedings to show that the preference was vacated or discharged five days before a sale or final disposition of the property.

<sup>83</sup> *In re* Nusbaum, 152 Fed. Rep. 835, 18 Am. B. R. 598.

<sup>84</sup> R. S. Sec. 5021.

<sup>85</sup> *In re* Merchants' Insurance Co., No. 9441, Fed. Cas., 3 Biss. 162; *In re* New Amsterdam Fire Ins. Co., No. 10140, Fed. Cas., 6 Ben. 368; *In re* Bininger, No. 1420, Fed. Cas., 7 Blatch. 270; *In re* Washington Marine Ins. Co., No. 17246, Fed. Cas., 2 Ben. 292.

<sup>86</sup> *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123.

<sup>87</sup> *Parmenter Mfg. Co. v. Stoevers* (C. C. A. 1st Cir.), 97 Fed. Rep.

330, 38 C. C. A. 200, 3 Am. B. R. 220; *In re* Windt, 177 Fed. Rep. 584, 24 Am. B. R. 536; *In re* Reichman, 91 Fed. Rep. 624, 1 Am. B. R. 17; *In re* Harper, 105 Fed. Rep. 900, 5 Am. B. R. 567.

<sup>88</sup> *In re* Nusbaum, 152 Fed. Rep. 835, 18 Am. B. R. 598; *In re* Ferguson, 95 Fed. Rep. 429, 2 Am. B. R. 586; *In re* Storm, 103 Fed. Rep. 618, 4 Am. B. R. 601.

<sup>89</sup> *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142; *In re* Moyer, 93 Fed. Rep. 188, 1 Am. B. R. 577.

An act of bankruptcy under the third clause of Section 3 of the act can not be committed until the time is fixed for the sale or final disposition of the property.<sup>1</sup> It can not be consummated until five days before such date, for the debtor may at any time prior to that date vacate or discharge the preference.<sup>2</sup> It has been held that a sale is not necessary in cases, where a final disposition of the property is to be made otherwise than by a sale.<sup>3</sup>

A preference created by legal proceedings may be vacated or discharged by the debtor filing a voluntary petition in bankruptcy, because a judicial lien created within four months of the filing of such petition is dissolved by an adjudication in bankruptcy.<sup>4</sup> The debtor is not compelled to file a voluntary petition.<sup>5</sup> If he fails to do so his creditors may institute bankruptcy proceedings and rely upon his failure to vacate or discharge the preference as an act of bankruptcy.<sup>6</sup>

It has been held sufficient to defeat an adjudication that the sale was stayed the day before it was to take place and before a petition was filed.<sup>7</sup>

The payment of the debt by the debtor will vacate the preference created by legal proceedings, but this may be another act of bankruptcy—namely, a preferential transfer of property, which will support an adjudication in bankruptcy.

<sup>1</sup> *Seaboard Steel Castings Co. v. Trigg*, 124 Fed. Rep. 75, 10 Am. B. R. 594; *In re Vetterman*, 135 Fed. Rep. 443, 14 Am. B. R. 245; *In re Windt*, 177 Fed. Rep. 584, 24 Am. B. R. 536; *In re Meyers* (Ref.), 1 Am. B. R. 1.

<sup>2</sup> *Pittsburg Laundry Co. v. Imperial Laundry Co.* (C. C. A. 3d Cir.), 154 Fed. Rep. 662, 83 C. C. A. 486, 18 Am. B. R. 756.

<sup>3</sup> *In re Tupper*, 163 Fed. Rep. 766, 20 Am. B. R. 824; *Scheuer v. Smith, etc., Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 107, 50 C. C. A. 312, 7 Am. B. R. 384; *In re Harper*, 105 Fed. Rep. 900, 5 Am. B. R. 567;

*In re Miller*, 104 Fed. Rep. 764, 5 Am. B. R. 140.

<sup>4</sup> B. A. 1898, Sec. 65*f*. *In re Tupper*, 163 Fed. Rep. 766, 20 Am. B. R. 824.

<sup>5</sup> *Wilson v. City Bank*, 17 Wall. 473, 46 L. Ed. 147; *Summers v. Abbott* (C. C. A. 8th Cir.), 122 Fed. Rep. 36, 58 C. C. A. 352, 10 Am. B. R. 254; *Richmond Standard Steel, etc., Co. v. Allen* (C. C. A. 4th Cir.), 148 Fed. Rep. 657, 78 C. C. A. 389, 17 Am. B. R. 583.

<sup>6</sup> *In re Tupper*, 163 Fed. Rep. 766, 20 Am. B. R. 824.

<sup>7</sup> *In re Duddy-Jourdan & Co.*, 127 Fed. Rep. 771, 11 Am. B. R. 344.

**§ 151. Assignment for the benefit of creditors as an act of bankruptcy.**

An act of bankruptcy may consist of a debtor having made a general assignment for the benefit of creditors.<sup>1</sup>

Whether an assignment for the equal benefit of all creditors constituted an act of bankruptcy under the act of 1867 was the cause of much discussion. There is a conflict in the reported opinions of the district and circuit courts on this subject. The weight of authority is in favor of holding a general assignment to be an act of bankruptcy.<sup>2</sup> The general ground upon which the courts proceeded was that a voluntary assignment was fraudulent, not at common law or under the statute of Elizabeth, but because it defeated the rights of creditors secured by the bankrupt law. It was therefore a fraud upon the act and upon creditors' rights. Undoubtedly an assignment for the benefit of creditors was made an act of bankruptcy in the present statute for the purpose of definitely settling the question.

A general assignment for the benefit of creditors in itself constitutes an act of bankruptcy. The solvency or insolvency of the assignor at the time he executed the assignment, or at the time the petition was filed, is immaterial.<sup>3</sup> If a petition

<sup>1</sup> B. A. 1898, Sec. 3, clause 4. *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re Gutwillig*, 90 Fed. Rep. 475, 1 Am. B. R. 78, affirmed 92 Fed. Rep. 337, 34 C. C. A. 377, 1 Am. B. R. 388; *Davis v. Bohle* (C. C. A. 8th Cir.), 92 Fed. Rep. 325, 34 C. C. A. 372, 1 Am. B. R. 12; *In re Thomlinson Co.* (C. C. A. 8th Cir.), 154 Fed. Rep. 834, 83 C. C. A. 550, 18 Am. B. R. 691; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383.

<sup>2</sup> *In re Gutwillig*, 90 Fed. Rep. 475, 478, 1 Am. B. R. 78, Judge Ad-

dison Brown reviews the result of a deed of general assignment under all our previous bankruptcy acts as well as under the English bankrupt laws.

<sup>3</sup> *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 645, 37 C. C. A. 210, 2 Am. B. R. 383; *Day v. Beck & Gregg Hardware Co.* (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 52 C. C. A. 468, 8 Am. B. R. 175; *Green River Deposit Bank v. Craig*, 110 Fed. Rep. 137, 6 Am. B. R. 381.

is filed within four months after the date of the assignment an adjudication follows and the property may be administered by the court of bankruptcy.<sup>4</sup> Such assignments are not in themselves illegal or objectionable, and can avail as acts of bankruptcy only in case proceedings are begun within four months.<sup>5</sup>

Creditors may be estopped by their own consent from alleging a general assignment as an act of bankruptcy. A creditor who assents to the making of an assignment or becomes a party to such proceeding may not ordinarily join as a petitioning creditor in the bankruptcy proceedings.<sup>6</sup>

**§ 152. What constitutes a general assignment.**

A general assignment for the benefit of creditors, within the meaning of the bankrupt act, embraces any conveyance by a debtor of substantially all his property to a party in trust to collect the amounts owing to him, to sell and convey the property, to distribute the proceeds of the property among his creditors, and to return the surplus, if any, to the debtor.<sup>1</sup>

<sup>4</sup> See Secs. 38 and 39, *ante*.

<sup>5</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *In re Farrell* (C. C. A. 6th Cir.), 176 Fed. Rep. 505, 100 C. C. A. 63, 23 Am. B. R. 826; *Boese v. King*, 108 U. S. 379, 27 L. Ed. 760.

<sup>6</sup> *Moulton v. Coburn* (C. C. A. 1st Cir.), 131 Fed. Rep. 203, 66 C. C. A. 90, 12 Am. B. R. 553; *Simonson v. Sinsheimer* (C. C. A. 6th Cir.), 95 Fed. Rep. 948, 37 C. C. A. 337; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re Miner*, 104 Fed. Rep. 520, 4 Am. B. R. 710; *Dunham Paper Co. v. Seaboard Knitting Mills*, 121 Fed. Rep. 179, 10 Am. B. R. 29; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210,

2 Am. B. R. 383; *In re Curtis* (C. C. A. 7th Cir.), 94 Fed. Rep. 630, 36 C. C. A. 430, 2 Am. B. R. 226; *Canner v. Webster Tapper Co.* (C. C. A. 1st Cir.), 168 Fed. Rep. 519, 93 C. C. A. 541, 21 Am. B. R. 872; *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695.

This subject is further considered in connection with petitioning creditors in involuntary bankruptcy, Secs. 188, *post*.

<sup>1</sup>*In re Thomlinson Co.* (C. C. A. 8th Cir.), 154 Fed. Rep. 834, 83 C. C. A. 550, 18 Am. B. R. 691; *Missouri-American Elec. Co. v. Hamilton-Brown Shoe Co.* (C. C. A. 8th Cir.), 165 Fed. Rep. 283, 91 C. C. A. 251, 21 Am. B. R. 270.

A general assignment includes the ordinary form of conveyance to an assignee for the benefit of creditors, a deed of trust, or a bill of sale for the benefit of creditors.<sup>2</sup> A judgment confessed by a debtor to a trustee for all his creditors' amounts to a general assignment for the benefit of creditors under the law of Pennsylvania.<sup>3</sup> Where the property of a private banking partnership is in charge of a special agent in a state proceeding to wind up its affairs, and the insolvent partners transfer their individual property in trust for the payment of firm debts, the legal effect is a general assignment for the benefit of creditors.<sup>4</sup> A bill of sale or a mortgage of all the debtor's property is treated in many states as a general assignment. In such cases it is clearly an act of bankruptcy.

The bankrupt act does not make a distinction between strictly valid instruments and those which may be invalid for certain purposes. An assignment may constitute an act of bankruptcy, although it is invalid for certain purposes,<sup>5</sup> or is defectively executed.<sup>6</sup> It has been held that a deed of assignment, which is not stamped in accordance with the revenue

<sup>2</sup> *In re Thomlinson* (C. C. A. 8th Cir.), 154 Fed. Rep. 834, 83 C. C. A. 550, 18 Am. B. R. 691.

<sup>3</sup> *In re Green*, 106 Fed. Rep. 313, 5 Am. B. R. 848.

<sup>4</sup> *In re Salmon & Salmon*, 143 Fed. Rep. 395, 16 Am. B. R. 122.

<sup>5</sup> *Dutton v. Griffin* (C. C. A. 1st Cir.), 165 Fed. Rep. 626, 91 C. C. A. 614, 21 Am. B. R. 449; *Canner v. Webster Tapper Co.* (C. C. A. 1st Cir.), 168 Fed. Rep. 519, 93 C. C. A. 541, 21 Am. B. R. 872; *In re Mendelsohn*, No. 9420, Fed. Cas., 3 Saw. 342.

<sup>6</sup> *Griffin v. Dutton* (C. C. A. 1st Cir.), 165 Fed. Rep. 626, 91 C. C. A. 614, 21 Am. B. R. 449; *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B.

R. 559; *In re Lawrence*, No. 8133, Fed. Cas., 10 Ben. 1.

*In re Meyer, supra*, the assignment of the firm was executed by one partner. Speaking for the court of appeals for the second circuit Judge Wallace said: "Apparently the partner who did not join has ratified, by acquiescence, the act of the partner who executed it. However this may be, in denominating the making of a general assignment for the benefit of creditors an act of bankruptcy, congress did not make any distinction between valid or invalid instruments, but used terms which would reach the execution of any instrument which is, or purports to be, a general assignment."

law, can not be offered in evidence and therefore can not support an allegation that the deed of assignment is an act of bankruptcy.<sup>7</sup>

A conveyance of his property by a debtor directly to his creditors, for their benefit, is not a general assignment, because it raises no trust.<sup>8</sup> The action of stockholders authorizing the sale of the property of a corporation, valued at twenty-five thousand dollars for not less than twenty-two thousand five hundred dollars has been held not to be a general assignment for the benefit of creditors.<sup>9</sup>

**§ 153. The appointment of a receiver as an act of bankruptcy.**

The amendment of 1903 added to the fourth act of bankruptcy, relating to assignments for the benefit of creditors, two new grounds or acts of bankruptcy.

An act of bankruptcy may now be committed by a debtor, *first*, if he, being insolvent, has applied for a receiver or trustee for his property, or *second*, because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, or a territory, or the United States.<sup>1</sup>

Prior to this amendment it was held that the fact that a receiver was put in charge of a debtor's property did not constitute an assignment for the benefit of creditors and was not an act of bankruptcy.<sup>2</sup> In view of these decisions the practice grew up of securing the appointment of a receiver for

<sup>7</sup> *In re* Dunham, No. 4143, Fed. Cas., 2 Ben. 488.

But see *Ponsford v. Walton*, 3 L. J. C. P. Cas. 167.

<sup>8</sup> *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.* (C. C. A. 8th Cir.), 165 Fed. Rep. 283, 91 C. C. A. 251, 21 Am. B. R. 270; *Anniston Iron & Supply Co. v. Anniston Rolling Mill Co.*, 125 Fed. Rep. 974, 11 Am. B. R. 200; *Mussey v. Noyes*, 26 Vt. 462, 474.

<sup>9</sup> *In re* Hartwell Oil Mills, 165 Fed. Rep. 555, 21 Am. B. R. 586.

<sup>1</sup> B. A. 1898, Sec. 3, clause 4, as amended February 5, 1903, 32 Stat. at L. 797.

<sup>2</sup> *In re* Burrell (C. C. A. 2d Cir.), 123 Fed. Rep. 414, 59 C. C. A. 508, 9 Am. B. R. 625; *Vaccaro v. Security Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474; *In re* Empire Metallic Bedstead Co. (C. C. A. 2d Cir.), 98 Fed. Rep. 981, 3 C. C. A. 575, 3 Am. B. R. 575; *In re* Harper Bros., 100 Fed. Rep. 266, 3 Am. B. R. 804.

insolvent estates, instead of the debtor making a general assignment, for the purpose of evading the bankrupt statute.

The object of the amendment in this respect was to give creditors an opportunity to have the debtor's property administered according to the national bankrupt act, if they institute proceedings in bankruptcy within four months thereafter.<sup>3</sup> If they do not do so the estate may be administered by the receiver.<sup>3</sup>

#### **§ 154. The meaning of insolvency as applied to receiverships.**

The fact that a receiver or trustee has been appointed and put in charge of the property of a debtor is not in itself an act of bankruptcy. The insolvency at the time is essential.<sup>1</sup>

The question as to whether the debtor's insolvency in such cases is to be determined by the state rule or the definition in the bankrupt act has perplexed lawyers, referees, and judges. The answer depends upon whether the insolvent or another person applies for the receiver or trustee.

Where the debtor applies for a receiver or trustee of his property the question of his insolvency at the time is governed by the definition in the bankrupt act.<sup>2</sup> If his property was not sufficient at a fair valuation to pay his debts at that time he was insolvent and committed an act of bankruptcy by applying for a receiver or trustee.<sup>3</sup>

Where a creditor or other person procures the appointment of a receiver or trustee, because of the debtor's insolvency,

<sup>3</sup> Secs. 43 and 44, *ante*.

<sup>1</sup> *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 76 C. C. A. 409, 16 Am. B. R. 664; *In re Zeltner Brewing Co.*, 117 Fed. Rep. 799, 9 Am. B. R. 63; *Moss Nat. Bank v. Arend* (C. C. A. 6th Cir.), 146 Fed. Rep. 351, 76 C. C. A. 629, 16 Am. B. R. 867; *In re Douglas Coal Co.*, 131 Fed. Rep. 769, 12 Am. B. R. 539; *Blue Mt. Iron & Steel Co. v. Portner* (C. C. A. 4th Cir.),

131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 559; *In re Ellsworth*, 173 Fed. Rep. 699, 23 Am. B. R. 284.

<sup>2</sup> B. A. 1898, Sec. 1, clause 15.

<sup>3</sup> *Exploration Mercantile Co. v. Pacific Hdwe. & Steel Co.* (C. C. A. 9th Cir.), 177 Fed. Rep. 825, 101 C. C. A. 39, 24 Am. B. R. 216; *In re Milbury Co.* (Ref.), 11 Am. B. R. 523.

“under the laws of a state, or a territory, or the United States,” the statute contemplates that the proceeding, leading to the appointment of the receiver, shall be governed by those laws.

A state court may appoint a receiver to take charge of a debtor's property on many grounds. One of them may be the debtor's insolvency or inability to pay his debts. The state court is governed by the law of the state in determining the debtor's insolvency. It may not be, and frequently is not, the same rule as that prescribed by the bankrupt act. By adding the words “under the law of a state, or a territory, or the United States” to this clause, congress clearly intended that those laws, and not the bankrupt act, should govern in determining the question of insolvency, as well as any other ground, which may lead a state court to appoint a receiver for a debtor's property. The words “law of a state” are not limited to the statute law, but include the general law of the state as administered by its courts.<sup>4</sup>

**§ 155. Application for receiver or trustee by an insolvent as an act of bankruptcy.**

A person commits an act of bankruptcy, if, being insolvent, he applies for a receiver or trustee for his property.<sup>1</sup>

It will be observed that an act of bankruptcy is committed when an insolvent applies for a receiver or trustee. It is not necessary that the receiver or trustee be actually appointed.

<sup>4</sup>*In re Kennedy Tailoring Co.*, 175 Fed. Rep. 871, 23 Am. B. R. 656, Judge Sanford said: “I find no authority holding that in order to constitute an act of bankruptcy under this section of the act, the appointment of a receiver must be made by the state court under a state statute. On the contrary, the fact that a receiver has been put in charge by a state court, although acting under its general equity power, seems to be recognized,

implicitly at least, as constituting an appointment under the laws of the state, in *Lowenstein v. Mfg. Co.*, 130 Fed. 1007, *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. 865, 76 C. C. A. 409, and *Beatty v. Andersen Coal Mining Co.* (C. C. A. 1st Cir.), 150 Fed. 293, 80 C. C. A. 181, 17 Am. B. R. 738.”

<sup>1</sup> B. A. 1898, Sec. 3, clause 4, as amended February 5, 1903, 32 Stat. at L. 797.



The reason for the appointment, or whether the court appointing the receiver or trustee is authorized by law to do so is immaterial.<sup>2</sup> If he makes the application while insolvent, he commits an act of bankruptcy.

It is not necessary that an application be made to a court.<sup>3</sup> A corporation organized under the laws of Connecticut was held to commit an act of bankruptcy where, because of its insolvency, its stockholders signed an agreement for its dissolution and transfer of its property to its directors, as trustees, to wind up its affairs.<sup>4</sup> It was held to be an act of bankruptcy by an association organized under the laws of Pennsylvania, where a majority of its members in number and value voted a dissolution of the corporation and elected three liquidating members, who had full power to settle the affairs of the association and distribute the assets after the payments of its debts, among the members.<sup>5</sup>

Where the debtor has applied for a receiver or trustee of his property, the only question is whether he was insolvent at the time. The act defines when a person is deemed to be insolvent.<sup>6</sup> This is a fact to be tried and determined by the bankruptcy court. Upon the determination of that court rests the question as to whether the debtor was insolvent when the application for a receiver was made.<sup>7</sup> It does not depend upon the state of facts disclosed upon the record in the case before the court making the appointment of the receiver or trustee.

If the court of bankruptcy finds that the debtor's property was not sufficient at a fair valuation to pay his debts at the

<sup>2</sup> *In re* Electric Supply Co., 175 Fed. Rep. 612, 23 Am. B. R. 647; *Exploration Mercantile Co. v. Pacific Hdwe. & Steel Co.* (C. C. A. 9th Cir.), 177 Fed. Rep. 825, 101 C. C. A. 39, 24 Am. B. R. 216.

<sup>3</sup> *In re* Hercules Atkin Co., 133 Fed. Rep. 813, 13 Am. B. R. 369; *In re* Bennett Shoe Co., 140 Fed. Rep. 687, 15 Am. B. R. 497.

<sup>4</sup> *In re* Bennett Shoe Co., 140 Fed. Rep. 867, 15 Am. B. R. 497.

<sup>5</sup> *In re* Hercules Atkin Co., 133 Fed. Rep. 813, 13 Am. B. R. 369.

<sup>6</sup> B. A. 1898, Sec. 1, clause 15.

<sup>7</sup> *Exploration Mercantile Co. v. Pacific Hdwe. & Steel Co.* (C. C. A. 9th Cir.), 177 Fed. Rep. 825, 101 C. C. A. 39, 24 Am. B. R. 216.

time he applied for a receiver or trustee, he was insolvent and committed an act of bankruptcy.<sup>8</sup>

A solvent debtor does not commit an act of bankruptcy by applying for the appointment of a receiver or trustee.<sup>9</sup> Nor does a debtor who is solvent in fact, become insolvent in contemplation of the bankrupt law upon the appointment of a receiver by a state court.<sup>10</sup>

**§ 156. A receiver put in charge of a debtor's property at the instance of another as an act of bankruptcy.**

A person, corporation, or partnership commits an act of bankruptcy if, because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, or a territory, or the United States.<sup>1</sup>

It is immaterial whether the receiver is a temporary or a permanent receiver.<sup>2</sup>

Whether the receiver or trustee was put in charge of the debtor's property "because of insolvency" depends upon the state of facts disclosed upon the record in the case before the court appointing the receiver.<sup>3</sup> If the order of the court

<sup>8</sup> *In re* Milbury Co. (Ref.), 11 Am. B. R. 523.

<sup>9</sup> *In re* Zeltner Brewing Co., 117 Fed. Rep. 799, 9 Am. B. R. 63.

<sup>10</sup> *In re* Zeltner Brewing Co., 117 Fed. Rep. 799, 9 Am. B. R. 63.

<sup>1</sup> B. A. 1898, Sec. 3, clause 4 as amended February 5, 1903, 32 Stat. at L. 797. *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 76 C. C. A. 409, 16 Am. B. R. 664; *In re* Belfast Mesh Underwear Co., 153 Fed. Rep. 224, 18 Am. B. R. 620; *In re* Pickens Mfg. Co., 158 Fed. Rep. 894, 20 Am. B. R. 202; *Blue Mt. Iron & Steel Co. v. Portner* (C. C. A. 4th Cir.), 131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 559; *Zugalle v. International Mercantile Agency*, 142 Fed. Rep.

927, 16 Am. B. R. 67; *In re* International Coal Min. Co., 143 Fed. Rep. 665, 16 Am. B. R. 309; *Beatty v. Andersen Coal Min. Co.* (C. C. A. 1st Cir.), 150 Fed. Rep. 393, 80 C. C. A. 181, 17 Am. B. R. 738.

<sup>2</sup> *Blue Mt. Iron & Steel Co. v. Portner* (C. C. A. 4th Cir.), 131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. A. 559; *In re* Milbury Co. (Ref.), 11 Am. B. R. 523; *In re* Kennedy Tailoring Co., 175 Fed. Rep. 871, 23 Am. B. R. 656.

But see *Zugalle v. International Mercantile Co.*, 142 Fed. Rep. 927, 16 Am. B. R. 67.

<sup>3</sup> *In re* Spalding (C. C. A. 2d Cir.), 139 Fed. Rep. 244, 71 C. C. A. 370, 14 Am. B. R. 129; *In re* Ellsworth Co., 173 Fed. Rep. 699,

recites the grounds for putting a receiver or trustee in charge of the property, the recital can not be contradicted without impeaching the record and this is not admissible.<sup>4</sup>

If the order of the court does not recite the grounds for its judgment, the record may be resorted to for the purpose of ascertaining them. It is sufficient if the record shows that the appointment was in effect, though not in name, made "because of insolvency."<sup>5</sup> But where the record does not assert or claim that the debtor was insolvent the court of bankruptcy is precluded from considering evidence *aliunde* to show his insolvency.<sup>6</sup>

Insolvency at the time the receiver or trustee is put in charge of the property is an essential element of this act of bankruptcy. By insolvency is meant insolvency as understood and applied by the court appointing the receiver under the law of the state, territory, or the United States, and not necessarily as defined by the bankrupt act.<sup>7</sup>

23 Am. B. R. 284; *In re* Douglas Coal Co., 131 Fed. Rep. 769, 12 Am. B. R. 539; *In re* Kennedy Tailoring Co., 175 Fed. Rep. 871, 23 Am. B. R. 656; *Blue Mt. Iron & Steel Co. v. Portner* (C. C. A. 4th Cir.), 131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 557; *In re* Belfast Mesh Underwear Co., 153 Fed. Rep. 224, 18 Am. B. R. 620; *Beatty v. Andersen Min. Co.* (C. C. A. 1st Cir.), 150 Fed. Rep. 293, 80 C. C. A. 181, 17 Am. B. R. 738; *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 76 C. C. A. 409, 16 Am. B. R. 664.

<sup>4</sup> *In re* Spalding (C. C. A. 2nd Cir.), 139 Fed. Rep. 244, 71 C. C. A. 370, 14 Am. B. R. 129; *In re* Ellsworth Co., 173 Fed. Rep. 699, 23 Am. B. R. 284; *In re* Watts & Sachs, 190 U. S. 1, 35, 47 L. Ed. 933, 10 Am. B. R. 113.

<sup>5</sup> *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 76 C. C.

A. 409, 16 Am. B. R. 664; *Blue Mt. Iron & Steel Co. v. Portner*, (C. C. A. 4th Cir.), 131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 557; *Beatty v. Andersen Min. Co.* (C. C. A. 1st Cir.), 150 Fed. Rep. 293, 80 C. C. A. 181, 17 Am. B. R. 738; *In re* Belfast Mesh Underwear Co., 153 Fed. Rep. 224, 18 Am. B. R. 620; *In re* Kennedy Tailoring Co., 175 Fed. Rep. 871, 23 Am. B. R. 656.

<sup>6</sup> *In re* Ellsworth Co., 173 Fed. Rep. 669, 23 Am. B. R. 284.

In *Blue Mt. Iron & Steel Co. v. Portner* (C. C. A. 4th Cir.), 131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 577, testimony by a judge appointing a receiver was held not admissible in the bankruptcy proceedings to prove the ground on which the appointment of the receiver was made.

<sup>7</sup> See Sec. 154, *ante*.

It is not necessary that the insolvency of the debtor be the sole ground for putting a receiver or trustee in charge of a debtor's property.<sup>8</sup> It is essential that it be one of the substantial reasons for such appointment.<sup>9</sup>

It is not an act of bankruptcy that a receiver or trustee is put in charge of a debtor's property on some ground other than the insolvency of the debtor at the time. It is not sufficient to support an adjudication in bankruptcy that a receiver was appointed by a state court on the ground of breaches of covenants, tending to show insolvency but which justified the appointment of a receiver regardless of insolvency,<sup>10</sup> or because the debtor was threatening to dispose of his property with intent to defraud the plaintiff in the action and other creditors,<sup>11</sup> or where a debtor was solvent at the time the receiver was appointed,<sup>12</sup> or at the suit of a stockholder who alleged fraud and mismanagement by the officers and that the corporation was in danger of insolvency,<sup>13</sup> or to

<sup>8</sup> *In re Electric Supply Co.*, 175 Fed. Rep. 612, 23 Am. B. R. 647; *In re Kennedy Tailoring Co.*, 175 Fed. Rep. 871, 23 Am. B. R. 656.

In *Beatty v. Andersen Coal Min. Co.* (C. C. A. 1st Cir.), 150 Fed. Rep. 293, 80 C. C. A. 181, 17 Am. B. R. 738, there were other grounds in the petition except insolvency, Judge Putnam said: "If insolvency, either as a distinct ground of proceeding or as coupled with others, was one of the substantial reasons for the appointment of a receiver, the case would come within the reasonable construction of the statute."

<sup>9</sup> *Moss Nat. Bank v. Arend* (C. C. A. 6th Cir.), 146 Fed. Rep. 351, 76 C. C. A. 629, 16 Am. B. R. 867; *In re Golden Malt Cream Co.* (C. C. A. 7th Cir.), 164 Fed. Rep. 326, 90 C. C. A. 258, 21 Am. B. R. 36; *In re Spalding* (C. C. A. 2d Cir.), 139 Fed. Rep. 244, 71 C. C. A. 370,

14 Am. B. R. 129; *In re Boston & Oaxaca Min. Co.*, 181 Fed. Rep. 422, 24 Am. B. R. 923.

<sup>10</sup> *In re Douglass Coal & Coke Co.*, 131 Fed. Rep. 769, 12 Am. B. R. 539.

<sup>11</sup> *In re Spalding* (C. C. A. 2d Cir.), 139 Fed. Rep. 244, 71 C. C. A. 370, 14 Am. B. R. 129.

<sup>12</sup> *In re Zeltner Brewing Co.*, 117 Fed. Rep. 799, 9 Am. B. R. 63; *Zugalla v. International Mercantile Agency* (C. C. A. 3d Cir.), 142 Fed. Rep. 927, 74 C. C. A. 97, 16 Am. B. R. 67; *In re Golden Malt Cream Co.* (C. C. A. 7th Cir.), 164 Fed. Rep. 326, 90 C. C. A. 258, 24 Am. B. R. 36.

<sup>13</sup> *In re Aldrich Co.*, 165 Fed. Rep. 249, 21 Am. B. R. 244; *In re Golden Malt Cream Co.* (C. C. A. 7th Cir.), 164 Fed. Rep. 326, 90 C. C. A. 258, 21 Am. B. R. 36; *In re Boston v. Oaxaca Mining Co.*, 181 Fed. Rep. 422, 24 Am. B. R. 923.

wind up the affairs of a partnership because of the death of a partner,<sup>14</sup> or to continue a receiver in charge after the amendment, when he was appointed before the amendment,<sup>15</sup> or the appointment of a receiver by a circuit court of the United States as custodian to protect and preserve property *pendente lite* without any adjudication as to insolvency of the debtor.<sup>16</sup>

It has been held to be an act of bankruptcy, where a sheriff under an execution pursuant to the law of Pennsylvania takes all the property of a corporation, except real estate held in fee, to be sold and the proceeds to be distributed by the sheriff among all of its creditors, on the ground that the property of an insolvent corporation was put in charge of the sheriff as a trustee or receiver.<sup>17</sup>

### § 157. A voluntary petition as an act of bankruptcy.

An act of bankruptcy by a person may consist of his having admitted in writing his inability to pay his debts and a willingness to be adjudged a bankrupt on that ground.<sup>1</sup>

This is the act of bankruptcy upon which an adjudication in voluntary bankruptcy is founded. The filing of a voluntary petition in bankruptcy praying to be adjudged a bankrupt is in itself an act of bankruptcy.

Prior to 1910 a voluntary petition could be filed by an individual or a partnership.<sup>2</sup> Section 4a as originally enacted expressly excepted a corporation from being entitled to the benefits of the act as a voluntary bankrupt. It was not

<sup>14</sup> Moss Nat. Bank v. Arend (C. C. A. 6th Cir.), 146 Fed. Rep. 351, 76 C. C. A. 629, 16 Am. B. R. 867.

<sup>15</sup> Seaboard Steel Casting Co. v. Trigg, 124 Fed. Rep. 75, 10 Am. B. R. 594; *In re* Milbury Co., 11 Am. B. R. 523, a permanent receiver was appointed after the amendment. It was held to be an act of bankruptcy.

<sup>16</sup> *In re* Hudson River Electric Power Co., 173 Fed. Rep. 934, 943,

23 Am. B. R. 191. *In re* Edward Ellsworth Co., 173 Fed. Rep. 699, 23 Am. B. R. 191.

<sup>17</sup> *In re* International Coal Min. Co., 143 Fed. Rep. 665, 16 Am. B. R. 309.

<sup>1</sup> B. A. 1898, Sec. 3, clause 5.

<sup>2</sup> B. A. 1898, Sec. 4a; *In re* Kersten, 110 Fed. Rep. 929, 6 Am. B. R. 516.

unusual for a corporation to admit in writing its inability to pay its debts and its willingness on that ground to be adjudged a bankrupt, and with the co-operation of creditors owing sufficient claims, to institute involuntary proceedings.<sup>3</sup>

By the amendment of June 25, 1910,<sup>4</sup> the voluntary provisions of the bankrupt act were extended to corporations, except municipal, railroad, insurance, and banking corporations.<sup>5</sup> Since that time any corporation, not comprehended within the excepted classes, may file a voluntary petition. Such corporation may now exercise that right to the same extent and in the same manner as a natural person unless restricted by its charter or some statutory provision.

The power of a corporation to execute and file a voluntary petition may be exercised by the same officers, who have power under the laws of the state in which it is chartered to make a general assignment for the benefit of creditors or to convey or mortgage corporate property.<sup>6</sup> In the absence of statute or by-laws regulating the subject such power resides in the board of directors.<sup>7</sup> It may be said generally

<sup>3</sup> See Sec. 158, *post*.

<sup>4</sup> 36 Stat. at L. 838.

<sup>5</sup> B. A. 1898, Sec. 4a as amended by the Act of June 25, 1910, 36 Stat. at L. 838.

<sup>6</sup> *In re C. Moench & Sons Co.* (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 12 Am. B. R. 240; Judge Lacombe said, "It would also seem to be reasonable to hold that the power to make the admission in writing could be exercised by the same officers who have the power to make a general assignment, and, in the absence of statute or by-law regulating the subject, such power resides in the directors."

*In re Lisk Mfg. Co.*, 167 Fed. Rep. 411, 21 Am. B. R. 674, Judge Hazel said, "Officers who have power to make a gen-

eral assignment under the laws of the state have power to make the specific admission. Neither the state statute nor the by-laws of the corporation prohibit the directors from making a general assignment for the benefit of creditors." A written admission authorized by the board of directors was held sufficient in New York.

<sup>7</sup> *In re Jefferson Casket Co.*, 182 Fed. Rep. 689, 25 Am. B. R. 663; *In re Lisk Mfg. Co.*, 167 Fed. Rep. 411, 21 Am. B. R. 674; *In re Moench & Sons* (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 12 Am. B. R. 240; *In re Mutual Mercantile Agency Co.*, 111 Fed. Rep. 152, 6 Am. B. R. 607; *Cresson, etc., Coke Co. v. Stauffer* (C. C. A. 3d Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609,

that the president or other officer of a corporation has not the power on his own authority to execute a voluntary petition, but the board of directors may authorize the corporate officer to execute and file a petition on behalf of the corporation.<sup>8</sup>

In some states the general power of alienation is restrained either by the particular act creating the corporation or by general statute.<sup>9</sup> In states where a vote of the stockholders is required to authorize a general assignment, or to convey or mortgage corporate property, a vote of the stockholders is necessary to authorize the corporation to file a voluntary petition in bankruptcy.

**§ 158. Involuntary proceedings founded upon an admission in writing of inability to pay debts and willingness to be adjudged a bankrupt.**

An act of bankruptcy by a person may consist of his having admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.<sup>1</sup>

Involuntary as well as voluntary proceedings may be founded upon this act of bankruptcy. It is not essential to the commission of the act of bankruptcy that a petition be filed in court.<sup>2</sup> All that is required is that the admission be in writing and signed by the debtor. The admission in a letter by a debtor that he can not pay his debts and his willingness to be declared a bankrupt is sufficient to constitute an act of bankruptcy under this provision.

17 Am. B. R. 573; *In re* Marine Machine & Conveyor Co., 91 Fed. Rep. 630, 1 Am. B. R. 421; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re* Rollins Gold & Silver Min. Co., 102 Fed. Rep. 982, 4 Am. B. R. 327; *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105; *In re* Riley, Talbot & Hunt (Referee), 15 Am. B. R. 159.

<sup>8</sup> *In re* Jefferson Casket Co., 182 Fed. Rep. 689, 25 Am. B. R. 663; *In* Cresson Clearfield Coal & Coke Co. v. Stauffer (C. C. A. 3rd Cir.),

148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573, an admission was held sufficient when made by the secretary specially authorized by and for the board of directors.

<sup>9</sup> *In re* Bates Machine Co., 91 Fed. Rep. 625, 1 Am. B. R. 129; *In re* Quartz Gold Min. Co., 157 Fed. Rep. 243, 19 Am. B. R. 667, affirmed in *Van Emon v. Veal*, (C. C. A. 9th Cir.), 158 Fed. Rep. 1022, 85 C. C. A. 547.

<sup>1</sup> B. A. 1898, Sec. 3, clause 5.

<sup>2</sup> *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514.



It is essential that the admission of insolvency and willingness to be adjudged a bankrupt be in writing<sup>3</sup> and be made and signed before the petition is filed.<sup>4</sup> The petitioners can not avail themselves of an act committed after the proceedings are commenced as a ground for instituting them.

The mere fact that a natural person or a corporation makes the requisite written admission and thereupon requests certain creditors to file an involuntary petition constitutes no ground of defense to the proceeding by a creditor who opposes the adjudication.<sup>5</sup> It has been held that the petition will not be heard until the other creditors have been notified,<sup>6</sup> and if there is such collusion as to amount to a fraud on the act it will be denied.<sup>7</sup>

In case of involuntary proceedings under this section the solvency or insolvency of the defendant is immaterial.<sup>8</sup>

A corporation, as well as an individual or a partnership, may be adjudged a bankrupt upon a petition filed by its creditors and founded upon an admission in writing of its insolvency and willingness to be adjudged a bankrupt.<sup>9</sup> Whether the power to make the admission on behalf of the corporation

<sup>3</sup> *Conway v. German* (C. C. A. 4th Cir.), 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527.

<sup>4</sup> *In re Baker-Ricketson Co.*, 97 Fed. Rep. 489, 4 Am. B. R. 605.

<sup>5</sup> *In re Duplex Radiator Co.*, 142 Fed. Rep. 906, 15 Am. B. R. 324; *In re Moench & Sons Co.* (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 12 Am. B. R. 240.

But see *In re Independent Thread Co.*, 113 Fed. Rep. 998, 7 Am. B. R. 704.

<sup>6</sup> *In re Humbert*, 100 Fed. Rep. 439, 4 Am. B. R. 76.

<sup>7</sup> *In re Independent Thread Co.*, 113 Fed. Rep. 998, 7 Am. B. R. 704.

<sup>8</sup> *In re Moench & Sons Co.* (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 10 Am. B. R. 240; *In re Northampton Portland Ce-*

*ment Co.*, 179 Fed. Rep. 726, 24 Am. B. R. 61; *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>9</sup> *In re Moench & Sons Co.* (C. C. A. 2d Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 12 Am. B. R. 240; affirming 123 Fed. Rep. 965, 10 Am. B. R. 656; *Cresson & Clearfield Coal & Coke Co. v. Stauffer* (C. C. A. 3d Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573; *In re Lisk Mfg. Co.*, 167 Fed. Rep. 411, 21 Am. B. R. 674; *In re Mutual Mercantile Agency*, 111 Fed. Rep. 152, 6 Am. B. R. 607; *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re Marine Mach. & Conveying Co.*, 91 Fed. Rep. 630, 1 Am. B. R. 421; *In re Peter Paul Book Co.*, 104 Fed. Rep.



resides in an officer or the board of directors or the stockholders of the corporation is governed by the laws of the state under which the corporation is chartered.<sup>10</sup> The power to make the admission may be exercised by the same officers who have power under the state laws to convey or mortgage the property of the corporation or to make a general assignment for the benefit of creditors, and in the absence of statute or by-laws regulating the subject, such power resides in the board of directors.<sup>11</sup> In some states this power resides in the stockholders.<sup>12</sup> A corporate officer, as a president, vice-president, secretary or treasurer, can not usually bind a corporation, unless authorized by the board of directors or stockholders.<sup>13</sup>

786, 5 Am. B. R. 105; *In re* International Coal Min. Co., 143 Fed. Rep. 665, 16 Am. B. R. 309; *In re* Duplex Radiator Co., 142 Fed. Rep. 906, 15 Am. B. R. 324.

<sup>10</sup> *In re* Lisk Mfg. Co., 167 Fed. Rep. 411, 21 Am. B. R. 674; *In re* Bates Mach. Co., 91 Fed. Rep. 625, 1 Am. B. R. 129; *In re* Quartz Gold Min. Co., 157 Fed. Rep. 243, 19 Am. B. R. 667, affirmed in *Van Emon v. Veal* (C. C. A. 9th Cir.), 158 Fed. Rep. 1022, 85 C. C. A. 547; *In re* Riley, Talbot & Hunt (Ref.), 15 Am. B. R. 159.

<sup>11</sup> *In re* Lisk Mfg. Co., 167 Fed. Rep. 411, 21 Am. B. R. 674; *In re* Moench & Sons (C. C. A. 2nd Cir.), 130 Fed. Rep. 685, 66 C. C. A. 37, 12 Am. B. R. 240; *In re* Mutual Mercantile Agency Co., 111 Fed. Rep. 152, 6 Am. B. R. 607; *Cresson & Clearfield Coal & Coke Co., v. Stauffer* (C. C. A. 3d Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573; *In re* Marine Mac. & Conveyor Co., 91 Fed. Rep. 630, 1 Am. B. R. 421; *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re* Rollins Gold & Silver Min. Co., 102 Fed. Rep.

982, 4 Am. B. R. 327; *In re* Peter Paul Book Co., 104 Fed. Rep. 786, 5 Am. B. R. 105.

*In re* Riley, Talbot & Hunt (Ref.), 15 Am. B. R. 159, it was held that directors holding over because of failure to elect their successors were *de facto* officers and might execute such an admission.

<sup>12</sup> *In re* Bates Mach. Co., 91 Fed. Rep. 625, 1 Am. B. R. 129; *In re* Quartz Gold Min. Co., 157 Fed. Rep. 243, 19 Am. B. R. 667, affirmed in *Van Emon v. Veal* (C. C. A. 9th Cir.), 158 Fed. Rep. 1022, 85 C. C. A. 547.

<sup>13</sup> *In re* Burbank, 168 Fed. Rep. 719, 21 Am. B. R. 838; *In re* Southern Steel Co., 169 Fed. Rep. 702, 22 Am. B. R. 476.

In *Cresson & Clearfield Coal & Coke Co. v. Stauffer* (C. C. A. 3d Cir.), 148 Fed. Rep. 981, 78 C. C. A. 609, 17 Am. B. R. 573, the admission was held sufficient when made in writing by the secretary of the corporation specially authorized by a vote of the board of directors as set out in the petition and record.

An admission by the board of directors of a corporation after it had been enjoined by a court, having jurisdiction of the parties and property, from commencing or prosecuting any proceeding involving in any way the property or property rights of the corporation, or encumbering or embarrassing the same was unauthorized and did not constitute an act of bankruptcy.<sup>14</sup>

Whether a debtor can make a legal contract not to make a declaration in writing admitting insolvency and willingness to be adjudged a bankrupt on that ground is doubtful.<sup>15</sup>

**§ 159. Four months' limitation to acts of bankruptcy.**

Any act of bankruptcy mentioned in this chapter will support an adjudication, if a petition is filed within four months after the commission of the act of bankruptcy upon which it is founded.<sup>1</sup> An act of bankruptcy will not support an adjudication unless the petition is filed within the four months' period.<sup>2</sup>

It is the time the petition is filed and not the date a subpoena is issued or served, which limits the life of an act of bankruptcy for the purpose of an adjudication.<sup>3</sup>

Such time does not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference, or a general assignment for the benefit of his creditors, if by law such recording

<sup>14</sup> *In re* Hudson River Electric Power Co., 173 Fed. Rep. 934, 943, 23 Am. B. R. 191.

<sup>15</sup> See *Hill v. Cowery*, 25 L. J. Ex. 285.

<sup>1</sup> B. A. 1898, Sec. 3b; *In re* Romanow, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re* Edelman (C. C. A. 2d Cir.), 130 Fed. Rep. 700, 65 C. C. A. 665, 12 Am. B. R. 238.

<sup>2</sup> *In re* Mingo Valley Creamery Co., 100 Fed. Rep. 282, 4 Am. B. R. 67.

<sup>3</sup> *In re* Lewis, 91 Fed. Rep. 632, 1 Am. B. R. 458; *In re* Stein (C. C. A. 2d Cir.), 105 Fed. Rep. 749, 45 C. C. A. 29, 5 Am. B. R. 288; *Shute v. Patterson* (C. C. A. 8th Cir.), 147 Fed. Rep. 509, 78 C. C. A. 75, 17 Am. B. R. 99; *In re* Appel, 103 Fed. Rep. 931, 4 Am. B. R. 722.

or registering is required or permitted.<sup>4</sup> If the state statute provides for recovering or registering the four months' period will not begin to run until the paper is actually filed for record. The words "or permitted" are omitted in the section 60*b* relating to voidable preferences.<sup>5</sup> If registering or recording is not required or permitted, the four months' period begins to run from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.<sup>6</sup>

Where the act of bankruptcy is created by legal proceedings the four months' period begins to run from five days before the date of sale if at that time the bankrupt had failed to dissolve it.<sup>7</sup>

In computing the four months the first day is excluded and the last included, unless the last day falls on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.<sup>8</sup>

<sup>4</sup> B. A. 1898, Sec. 3*b*; *In re* Mingo Valley Creamery Ass., 100 Fed. Rep. 282, 4 Am. B. R. 67.

<sup>5</sup> For a history of the amendment of 1903 and its effect, see *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416, and *Loeser v. Bank* (C. C. A. 6th Cir.), 148 Fed. Rep. 975, 78 C. C. A. 597, 17 Am. B. R. 628. See Secs. 441 to 446, *post*.

<sup>6</sup> *In re* Bogen, 134 Fed. Rep. 1019, 13 Am. B. R. 529. B. A. 1898, Sec. 3*b*.

<sup>7</sup> *Parmenter Mfg. Co. v. Stoevers* (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 3 C. C. A. 220, 3 Am. B. R. 220, *Owen v. Brown* (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 57 C. C. A. 180, 9 Am. B. R. 717; *In re* National

*Hotel & Cafe Co.*, 138 Fed. Rep. 947, 15 Am. B. R. 69; *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123.

*In re* Nusbaum, 153 Fed. Rep. 835, 10 Am. B. R. 598, it was held that the failure to discharge the levy on each succeeding day including the day of sale constituted distinct acts of bankruptcy and that a petition filed within four months of the sale and more than four months after five days before the sale was in time.

<sup>8</sup> B. A. 1898, Sec. 31; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *In re* Hill, 140 Fed. Rep. 984, 15 Am. B. R. 499; *In re* Stevenson, 94 Fed. Rep. 110, 2 Am. B. R.

Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the congress of the United States as a holiday or as a day of public fasting or thanksgiving.<sup>9</sup> Fractions of a day are not considered.<sup>10</sup>

66; *In re* Dupree, 97 Fed. Rep. 28, 8 Am. B. R. 321, note; Jones v. Stephens, 94 Me. 582, 5 Am. B. R. 571; *In re* Lang, No. 8056 Fed. Cas., 2 N. B. R. 480.

<sup>9</sup> B. A. 1898, Sec. 1, clause 14.

<sup>10</sup> *In re* Tonawanda Street Planning Mill Co. (Ref. op.), 6 Am. B. R. 38.

## CHAPTER XI.

## VOLUNTARY BANKRUPTCY.

SEC.		SEC.	
160.	Who may file a voluntary petition.	168.	The order of adjudication.
161.	Filing a second petition.	169.	Order of reference.
162.	In what court the petition is to be filed.	170.	Amendments to petition and schedules.
163.	The petition.	171.	The dismissal of a voluntary petition.
164.	Petition by a corporation.	172.	Proceedings subsequent to the adjudication.
165.	Of filing the petition and schedules.		
166.	Deposit for fees and expenses.		
167.	Defenses to a voluntary petition.		

**§ 160. Who may file a voluntary petition.**

The statute declares that any qualified person may file a petition to be adjudged a voluntary bankrupt.<sup>1</sup>

Any person except a municipal, railroad, insurance, or banking corporation is entitled to the benefits of the statute as a voluntary bankrupt.<sup>2</sup> A person is defined by the act itself to include corporations, partnerships and women.<sup>3</sup> Any natural person or association of persons, not incorporated, irrespective of trade, business or profession, or any corporation except a municipal, railroad, insurance, or banking corporation, may file a petition to be adjudged a voluntary bankrupt.<sup>4</sup> A farmer or wage-earner may file a voluntary petition in bankruptcy.<sup>4\*</sup>

A person, however, who wishes to file a petition must have certain qualifications before he can do so. *First*: He must owe debts, but no limit is fixed to the amount of the debts.<sup>5</sup>

<sup>1</sup> B. A. 1898, Sec. 59a. Compare R. S. Sec. 5014.

<sup>2</sup> B. A. 1898, Sec. 4a as amended by the act of June 25, 1910, 36 Stat. at L. 838. See who may be voluntary bankrupts, Sec. 114, *ante*.

<sup>3</sup> B. A. 1898, Sec. 1, clause 19.

<sup>4</sup> As to the right of an alien, an infant, a lunatic and a married

woman to be adjudged bankrupts, see Secs. 132 to 135, *ante*.

<sup>4\*</sup> See *Olive v. Armour Co.* (C. A. 5th Cir.), 167 Fed. Rep. 517, 93 C. C. A. 153, 21 Am. B. R. 90.

<sup>5</sup> B. A. 1898, Sec. 4. Under the act of 1867, R. S. Sec. 5014, a person was required to owe debts, provable in bankruptcy, exceeding the sum of \$300.

A person owing one debt only and having no assets may file a petition,<sup>6</sup> unless that debt be one not provable or not released by a discharge.<sup>7</sup> A solvent person may file a petition in bankruptcy if he owes debts.<sup>8</sup> The court will accept the petitioners statement that he "owes debts which he is unable to pay in full" and "that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law."<sup>9</sup>

*Second:* He must have had his principal place of business, resided or had his domicile within the United States for the period of six months, or the greater portion thereof, or if he has not had his principal place of business, resided or had his domicile within the United States, he must have had property within the jurisdiction of a court of bankruptcy, or have been adjudged a bankrupt by a court of competent jurisdiction without the United States and have property within jurisdiction of a court of bankruptcy.<sup>10</sup>

A voluntary petition is itself an act of bankruptcy.<sup>10\*</sup> A voluntary petition by a partner to have the firm adjudged

<sup>6</sup> *In re* Schwaninger, 144 Fed. Rep. 555, 16 Am. B. R. 427; *In re* Walrath, 175 Fed. Rep. 243, 24 Am. B. R. 541; *In re* Frank (Ref.), 6 Am. B. R. 156.

<sup>7</sup> *In re* Maples, 105 Fed. Rep. 919, 5 Am. B. R. 426; *In re* Colaluca, 133 Fed. Rep. 255, 13 Am. B. R. 292; *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

<sup>8</sup> *In re* Chappell, 113 Fed. Rep. 545, 7 Am. B. R. 608; *In re* Carleton, 115 Fed. Rep. 246, 8 Am. B. R. 270.

<sup>9</sup> *In* Hanover Nat. Bank v. Moy-  
ses, 186 U. S. 181, 190, 46 L. Ed. 1113, 8 Am. B. R. 1, Mr. Chief Justice Fuller said that "the petition must state that 'petitioner owes debts which he is unable to pay in full,' and 'that he is willing to surrender all his property for the bene-

fit of his creditors, except such as is exempt by law.' This establishes those facts so far as a decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition. These are not issuable facts and notice is unnecessary, unless dismissal is sought, when notice is required."

<sup>10</sup> B. A. 1898, Sec. 2, clause 1, See Sec. 162, *post*.

<sup>10\*</sup> *In* Hanover Nat. Bank v. Moy-  
ses, 186 U. S. 181, 190, 46 L. Ed. 1113, 8 Am. B. R. 1, Mr. Chief Justice Fuller speaking of a voluntary bankrupt said: "He has committed an act of bankruptcy in filing the petition."

See also *In re* Forbes, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re* Fowler, No. 4998 Fed. Cas., 1 Low. 161.

bankrupt is an act of bankruptcy and dispenses with proof of any other act of bankruptcy, but the non-assenting partner is entitled to a trial upon the issue of insolvency.<sup>10\*\*</sup>

An insolvent debtor can not be compelled and is under no obligation to file a voluntary petition in bankruptcy.<sup>10†</sup> But if he desires to do so a state court has no power to enjoin him from applying to a court of bankruptcy to be adjudged a voluntary bankrupt, and to obtain the benefit of the statute.<sup>11</sup>

### § 161. Filing a second petition.

There was a difference of opinion under the former bankrupt acts with reference to the right of a person to file a voluntary petition after an involuntary petition had been filed against him.

It was held that the pendency of a creditors' petition, on which no decree of bankruptcy had been granted, was not a bar to the right of voluntary petition.<sup>12</sup> It was also held that in such cases the voluntary petition was nugatory and void, and would be set aside on motion.<sup>13</sup>

Under the present act where a voluntary petition is filed after involuntary proceedings are begun it should not in all cases be either granted or stayed until the involuntary proceedings are disposed of, but notice should be given to the creditors who filed the involuntary petition and such action taken as is for the best interest of the estate.<sup>14</sup> If the volun-

<sup>10\*\*</sup> *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

But see *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459.

<sup>10†</sup> *Richmond Standard Steel & Iron Co. v. Allen* (C. C. A. 4th Cir.), 148 Fed. Rep. 657, 78 C. C. A. 389, 17 Am. B. R. 583.

<sup>11</sup> *Fillingin v. Thornton*, 49 Ga. 384.

<sup>12</sup> *In re Flanagan*, No. 4850 Fed. Cas., 5 Saw. 312; *In re Canfield*,

No. 2380 Fed. Cas., 5 Law Rep. 415.

The same rule was recognized in *In re Davidson*, No. 3599 Fed. Cas., 4 Ben. 10, although the question does not seem to have been raised in that case.

<sup>13</sup> *In re Stewart*, No. 13419 Fed. Cas., 3 N. B. R. 108.

<sup>14</sup> *In re Dwyer*, 112 Fed. Rep. 777, 7 Am. B. R. 532; *In re Waxelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392; *In re Stegar*, 113 Fed. Rep. 978, 7 Am. B. R. 665.

tary proceedings are not stayed the rights of the creditors should be protected.<sup>15</sup> The court may consolidate the two proceedings.<sup>16</sup>

A debtor, who has made an assignment for the benefit of his creditors in the state court, may subsequently take the benefit of the bankrupt act as a voluntary bankrupt.<sup>17</sup> If one petition has been filed and proceedings had thereon, the petitioner may subsequently file a second petition,<sup>18</sup> irrespective of whether he obtained or was refused a discharge in the former proceedings. But it has been held that a person is not entitled to file a second petition for the sole purpose of obtaining a discharge, when he has failed to apply for one in season or has been refused a discharge in a former proceeding.<sup>19</sup>

### § 162. In what court the petition is to be filed.

The debtor may file his petition in the court of bankruptcy for the district in which he has had his principal place of business, resided or had his domicile for the greater portion of the preceding six months.<sup>20</sup>

<sup>15</sup> *In re Stegar*, 113 Fed. Rep. 978, 7 Am. B. R. 665.

<sup>16</sup> *In re Knight*, 125 Fed. Rep. 35 at 37, 11 Am. B. R. 1.

<sup>17</sup> This was done *In re Dunbar*, in the district court for the southern district of Ohio, 1899 (not reported). The question of his right to do so was not raised. Both the court and counsel appear to have assumed that such a right existed.

<sup>18</sup> *In re Little* (C. C. A. 7th Cir.), 137 Fed. Rep. 521, 70 C. C. A. 105, 13 Am. B. R. 640; *In re Haase*, 155 Fed. Rep. 553, 17 Am. B. R. 528; *In re Jordan*, 142 Fed. Rep. 292, 15 Am. B. R. 449; *In re Kuffler* (C. C. A. 2nd Cir.), 151 Fed. Rep. 12, 80 C. C. A. 508, 18 Am. B. R. 16; *In re Drisko*, No. 4090 Fed. Cas., 2 Low. 430; *Fisher v. Currier*, 7 Met. (Mass.) 424.

See also R. S. Sec. 5116, which provided that under the act of 1867 a second discharge should not be granted a bankrupt unless his estate should be sufficient to pay 70 per centum, or three-fourths of his creditors consented to it. No such provision is contained in the present act.

<sup>19</sup> *Kuntz v. Young* (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 65 C. C. A. 477, 12 Am. B. R. 506; *In re Fiegenbaum* (C. C. A. 2nd Cir.), 121 Fed. Rep. 69, 57 C. C. A. 409, 9 Am. B. R. 595; *In re Weintraub*, 133 Fed. Rep. 1000, 13 Am. B. R. 711; *In re Silverman* (C. C. A. 2d Cir.), 157 Fed. Rep. 675, 85 C. C. A. 224, 19 Am. B. R. 460.

<sup>20</sup> B. A. 1898, Sec. 2.



Where the debtor has had his domicile, resided and had his principal place of business in the same district there is but one court in which he can file his petition. Where he has resided or had his domicile in one district and his principal place of business in another he has an election, and may file his petition in either district.

A debtor may have a domicile in one district and reside in another.<sup>21</sup> In such case he has an election of three districts within which to institute voluntary proceedings; namely, the district of his residence, the district of his domicile or the district in which he has had his principal place of business.

Where a debtor has several places of business in different districts he must file his petition in the district in which he has his principal place of business. This limits his right to file a petition on this ground of jurisdiction to one district. The phrase "principal place of business" implies that the debtor is carrying on what is commonly known as business, as distinguished from other vocations or employment. He must provide the money that is needed or have an interest in the business by contributing his labor, or, if the capital is borrowed, the business must be done in the debtor's name.

<sup>21</sup> As to the distinction between "domicile" and residence, see *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 403, 11 Am. B. R. 679.

*In re Williams*, 99 Fed. Rep. 544, 3 Am. B. R. 677, the bankrupt had resided abroad for many years. Judge Hanfords said: "Under the law, as I find it declared by the highest court of this country, the petitioner did not change his domicile when he went to British Columbia in 1893, nor afterwards, because he did not have the intention to remain there, and he did have a definite intention to return to this state. The order made by the referee that the petition be dismissed

will be vacated, and the case will proceed in the usual course."

Consult *In re Watson*, No. 17272 Fed. Cas., 4 N. B. R. 613; *In re Walker*, No. 17061 Fed. Cas., 1 Low. 237; *In re Kinsman*, No. 7832 Fed. Cas., 1 N. Y. Leg. Obs. 309; *Stiles v. Lay*, 9 Ala. 795; *Penfield v. C. & O. R. Co.*, 29 Fed. Rep. 494; *Chambers v. Prince*, 75 Fed. Rep. 176; *Krone v. Cooper*, 43 Ark. 547; *Tipton v. Tipton*, 87 Ky. 243; *Rhodes v. Farish*, 16 Mo. App. 434; *Tazewell County v. Davenport*, 40 Ill. 197; *Dorsey v. Kyle*, 30 Md. 512; *Wheeler v. Cobb*, 75 N. C. 21.

As to where a corporation may have its domicile and principal place of business, see Sec. 194 *et seq.*, *post*.

Thus it may be doubted if a debtor is entitled to claim a place of business where he merely superintends the business of another or is employed as a clerk,<sup>22</sup> or where he is engaged in winding up the affairs of an insolvent concern to which he belonged,<sup>23</sup> or where he is engaged in any vocation not properly included in the word business.

Where length of time that the bankrupt has resided or had his place of business before filing a voluntary petition is challenged the burden is on him to prove it.<sup>24</sup> A ward may change his residence and domicile with his guardian's consent.<sup>24\*</sup>

The time during which the debtor has had his principal place of business, resided or had his domicile in the district must also be considered. Where he has had his principal place of business, resided or had his domicile within the district during the whole period of the six months immediately preceding his application no question can arise. Where he has had his principal place of business, resided or had his domicile (according to the ground of jurisdiction on which he claims) in different districts during such six months, then the petition must be filed in the district in which he has had his principal place of business, resided or had his domicile for the greater portion of six months, or for more than three months. If he has not had a principal place of business, resided or had a domicile for more than three months in any district, he is not subject to be adjudged a bankrupt.<sup>24\*\*</sup>

In case the debtor has not had a principal place of business, resided or had a domicile within the United States, but is entitled to the benefits of the statute under section 2, he must file his petition in the district within which he has property.

<sup>22</sup> *In re* Brice, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re* Magie, No. 8951 Fed. Cas., 2 Ben. 369; *In re* Kinsman, No. 7832 Fed. Cas., 1 N. Y. Leg. Obs. 309.

<sup>23</sup> *In re* Little, No. 8391 Fed. Cas., 3 Ben. 25.

<sup>24</sup> *In re* Waxelbaum, 3 Am. B. R. 267, 97 Fed. Rep. 562; *In re*

Scott, 111 Fed. Rep. 144, 7 Am. B. R. 39; *In re* Berner (Ref.), 3 Am. B. R. 325.

<sup>24\*</sup> *In re* Kingsley, 160 Fed. Rep. 275, 20 Am. B. R. 427.

<sup>24\*\*</sup> *In re* Williams, 120 Fed. Rep. 34, 9 Am. B. R. 736.

If he has property in more than one district, he may elect in which of such districts to institute proceedings in voluntary bankruptcy.

When proceedings have been commenced by a debtor in one district he is not entitled to institute similar proceedings in other districts. The jurisdiction is exclusive in the court where it first attaches.<sup>24†</sup>

### § 163. The petition.

The application for the benefit of the bankrupt statute is made by petition.<sup>25</sup> A schedule of the debtor's property, list of his creditors and claim for exemptions are required to be filed with the petition.<sup>26</sup>

The petition should be entitled in the court for the proper district. The caption is not strictly a part of the petition. Any defect in the caption will not affect the jurisdiction where the body of the petition is sufficient.<sup>26\*</sup> It is regularly addressed to the judge of the district by name, as "To the Hon. A. B., judge of the district court of the United States for the ——— district of ———."

The petition should set forth the petitioner's name in full and his place of residence. It should be alleged that he has had his principal place of business, resided or had his domicile (as may be) within the district for the preceding six months or the greater portion thereof. This averment is jurisdictional and necessary. It should also aver that he is unable to pay all of his debts; that he is willing to be adjudged a bankrupt, to surrender all his estate and effects, except such as is exempt, for the benefit of his creditors, and desires to obtain the benefit of the statute.

<sup>24†</sup> *Ex parte* Hall, No. 5919 Fed. Cas., 5 Law Rep. 269.

<sup>25</sup> B. A. 1898, Sec. 59a. Official Form No. 1, Official Form No. 1, *post*.

<sup>26</sup> B. A. 1898, Sec. 7, clause 8. See also "Schedules," Sec. 165, *post*.

<sup>26\*</sup> *In re* Gorman (Haw.), 15 Am. B. R. 587.

The petition should be signed by the petitioner and be verified under oath,<sup>27</sup> which includes an affirmation.<sup>28</sup> The oath or affirmation may be administered by a referee, an officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the same are to be taken, or a diplomatic or consular officer of the United States in any foreign country.<sup>29</sup>

The supreme court has provided a form for petitions which should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case.<sup>30</sup> Printed blanks may usually be had from dealers in law stationery. All the petitions and schedules filed therewith must be printed or written out plainly without abbreviation or interlineation, except where an abbreviation or interlineation may be for the purpose of reference.<sup>31</sup> Ditto words should not be used to indicate anything which is necessary to be stated.<sup>32</sup>

The petition should be endorsed with the style of the court, the name of the petitioner, and a brief statement of the character of the petition, as "Debtor's petition."

<sup>27</sup> B. A. 1898, Sec. 18c. Official Form No. 1, Form No. 1, *post*. *In re Nelson*, 98 Fed. Rep. 76, 1 Am. B. R. 63; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383.

<sup>28</sup> B. A. 1898, Sec. 1, clause 17; and Sec. 20b.

<sup>29</sup> B. A. 1898, Sec. 20. The verification may be taken before the attorney for the bankrupt as notary public. *In re Kindt*, 98 Fed. Rep. 403, 3 Am. B. R. 443.

<sup>30</sup> Gen. Ord. 38. See Official Form No. 1, Form No. 1, *post*.

<sup>31</sup> Gen. Ord. 5. *Sutherland v. Lasher* (N. Y. Sup. Ct.), 11 Am. B. R. 780. See also *In re Malcolm*,

No. 8986 Fed. Cas., 4 Law Rep. 488; *Anon.* No. 458 Fed. Cas., 1 N. B. R. 216.

*In Mahoney v. Ward*, 100 Fed. Rep. 278, 3 Am. B. R. 770, Judge Purnell said: "Several proceedings of late have made necessary the adoption of a rule, which will be enforced, that petitions in bankruptcy will not be filed or considered unless they are on the prescribed printed forms. Written or typewritten petitions and schedules will be returned to parties without action."

<sup>32</sup> *In re Orne*, No. 10582 Fed. Cas., 1 Ben. 420; *In re Mackey & Co.* (Ref. op.), 1 Am. B. R. 593.

### § 164. Petition by a corporation.

The form of petition by a corporation is substantially the same as the debtor's petition provided by the supreme court.<sup>33</sup>

That form was prepared for natural persons at a time when corporations were not entitled to file a voluntary petition.<sup>34</sup> It may, however, be readily adapted for use by a corporation.

The petition should state the name of the corporation and the state chartering it, and that it is not within the excepted classes. This may be in these words: "The A. B. Company, a corporation organized under the laws of the State of . . . ., and having its principal place of business at . . . ., in the State of . . . ., and not a municipal, railroad, insurance, or banking corporation."

It should allege that it has had its principal place of business or its domicile within the district for the preceding six months or the greater portion thereof. The domicile of a corporation is the state in which it was originally created and it can not change its domicile by filing its charter or being incorporated in another state.<sup>35</sup> Where there is more than one district in a state, the domicile of the corporation is that district within which the general business of the corporation is done and where it has its headquarters and general offices.<sup>36</sup>

The filing of a petition in bankruptcy must be the act of the corporation and not the act of an officer, unless authorized to act on behalf of the corporation.<sup>37</sup> It is better practice to state in the petition that it is filed pursuant to a resolution passed by the board of directors or stockholders, or other

<sup>33</sup> See Sec. 163, *ante*, and Official Form No. 1, Form No. 1, *post*, and Form of Petition by a Corporation, Form No. 2, *post*.

<sup>34</sup> As to corporation as voluntary bankrupts, see Sec. 115, *ante*.

<sup>35</sup> *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. Ed. 802; *Southern Ry. Co. v. Allison*, 190 U. S. 326, 47 L. Ed. 1078; *White Mt. Paper Co. v. Morse* (C. C. A.

1st Cir.), 127 Fed. Rep. 643, 62 C. A. 369, 11 Am. B. R. 633; *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 434.

<sup>36</sup> *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248; *Harvey v. Richmond, etc., R. Co.*, 64 Fed. Rep. 19.

<sup>37</sup> See Secs. 136 and 157, *ante*.

*In re Jefferson Casket Co.*, 182 Fed. Rep. 689, 25 Am. B. R. 663.

officers, who may have power, under the laws of the state in which the corporation is chartered, to make a general assignment, or to convey or mortgage the corporate property.<sup>38</sup> If the petition fails to set out the particular corporate act authorizing the voluntary petition, it may be cured by amendment, or by proof where the allegation of inability to pay debts and willingness to be adjudged a bankrupt is sufficiently positive and comprehensive to admit such proof.<sup>39</sup>

The petition should aver that the corporation is unable to pay all of its debts: that it is willing to be adjudged a bankrupt, to surrender all its property and effects for the benefit of its creditors, and desires to obtain the benefit of the statute.

It should recite that fact that the schedules of creditors and property are annexed to the petition and pray for an adjudication in the same manner as in the petition by an individual.

The petition and schedules may be executed by the president or other officer of the corporation and verified by him

<sup>38</sup> As to the power of corporate officers to file a voluntary petition for the corporation, see Sec. 157, *ante*.

*In re Jefferson Casket Co.*, 182 Fed. Rep. 689, 692, 25 Am. B. R. 663, after referring to the general corporation law of New York, Judge Ray said: "In view of this statutory requirement, I think a petition in this court, in order to justify an adjudication in voluntary bankruptcy and a consequent transfer of all the property of the corporation, real and personal, to a trustee, should at least allege and show corporate action by the board of directors authorizing the petition and its execution by the officer signing the name of the corporation thereto. Such an act is not within the general scope of the duties of the president of such a corporation." See

also *In re Kenwood Ice Co.*, 189 Fed. Rep. 525.

<sup>39</sup> *In re Kenwood Ice Co.*, 189 Fed. Rep. 529, 26 Am. B. R. —, Judge Willard said: "Here we have a case where there is evidence that the directors had in fact authorized the filing of a petition in bankruptcy. The petition does not show that upon its face. The referee, however, accepted that petition and made the adjudication. It is now sought to set aside the adjudication, not because there was no authority on the part of the board of directors to ask for that adjudication, but simply because at that time that authority did not appear on the face of the petition. The adjudication having been made, the court should not set it aside for this reason."

under oath, if authorized by the corporation to do so. The affidavit to the petition and schedules should show the authority of the officer who executes them. This may be as follows:

"I, A. B., president of the A. B. Company, the petitioning debtor mentioned and described in the foregoing petition, do make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief, and in pursuance of a resolution passed by the board of directors at a regular meeting held on the . . . . day of . . . ., and I have signed the corporate name and affixed the corporate seal to said petition."

### **§ 165. Of filing the petition and schedules.**

The petition and schedules must be filed in the office of the clerk of a court of bankruptcy, and not with a referee or judge.<sup>40</sup>

The statute provides that the petition shall be in duplicate, one copy for the clerk and one for service on the bankrupt.<sup>41</sup> In voluntary bankruptcy it would seem that one copy of the petition is all that is required. It is not necessary to serve on the bankrupt a copy of his own petition. Three copies of the schedule are required to be filed, one copy for the clerk, one for the referee, and one for the trustee.<sup>42</sup>

The petition may be filed by the bankrupt in person in his own behalf, or he may appear and conduct the proceedings by attorney, who must be an attorney or counselor authorized to practice in the circuit or district court.<sup>43</sup> The name of the attorney or counselor, with his place of business, should be entered upon the docket with the date of the entry.<sup>43</sup>

As soon as the petition and schedules are deposited with the clerk, he endorses on each paper the day and hour of filing.<sup>44</sup> He thereupon enters the case upon a docket which is

<sup>40</sup> See *In re Sykes*, 106 Fed. Rep. 669, 6 Am. B. R. 264.

<sup>41</sup> B. A. 1898, Sec. 59c.

<sup>42</sup> B. A. 1898, Sec. 7, clause 8.

<sup>43</sup> Gen. Ord. 4.

<sup>44</sup> Gen. Ord. 2.

This is conclusive of the particular time at which the papers were filed. *Ala. & C. R. Co. v. Jones*, No. 127 Fed. Cas., 7 N. B. R. 145.

kept for that purpose, together with a memorandum of the filing of the petition.<sup>45</sup> The cases are entered and numbered in the order in which they are commenced.<sup>45</sup> He also makes a similar endorsement upon any subsequent paper filed with him, except such papers as have been previously filed with the referee.<sup>46</sup> The papers in each case should be kept in a file by themselves.

### § 166. Deposit for fees and expenses.

At the time of filing the petition the petitioner must deposit \$30 with the clerk as costs in the case. Of this amount the clerk is to receive \$10, the referee \$15, and the trustee \$5.

Where a partnership files a voluntary petition in which the individual partners join, it is a single proceeding and only one deposit fee of thirty dollars is required.<sup>47</sup> If separate petitions are filed by the firm and the individual partners, it has held to constitute separate cases and a fee was required in each case.<sup>48</sup>

No deposit is required upon the filing of a petition by a voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and can not obtain, money with which to pay such fees.<sup>49</sup> In such cases the bankrupt is permitted to proceed *in forma pauperis*.

The statute does not mean that the party shall have the benefit of this provision, because it is inconvenient to obtain the money or because he is willing to take the pauper's oath to avoid any effort to obtain it, but it means only that he shall be in such circumstances that it is reasonable to conclude that he really can not obtain the money with which to pay the official fees.<sup>50</sup> He will not be required to solicit gifts or loans

<sup>45</sup> Gen. Ord. 1.

<sup>46</sup> Gen. Ord. 1 and 2.

<sup>47</sup> *In re Gay*, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re Langslow*, 98 Fed. Rep. 869, 3 Am. B. R. 529n.

<sup>48</sup> *In re Barden*, 101 Fed. Rep. 553, 4 Am. B. R. 31; *In re Farley*, 115 Fed. Rep. 359, 8 Am. B. R. 266.

<sup>49</sup> B. A. 1898, Sec. 51, clause 2; *In re Levy*, 101 Fed. Rep. 247, 4 Am. B. R. 108.

<sup>50</sup> *In re Collier*, 93 Fed. Rep. 191, 1 Am. B. R. 182; *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 817, 36 C. C. A. 502, 2 Am. B. R. 529.



from his friends for that purpose,<sup>51</sup> or to make the deposit as a condition to receiving a discharge.<sup>52</sup>

The statutory affidavit is *prima facie* evidence of the bankrupt's inability to make the deposit.<sup>53</sup> It is always open to the court to protect itself against any imposition by proper inquiry.<sup>54</sup> General Order 35 provides that "the judge may at any time during the pendency of the proceedings in bankruptcy, may order the regular fees to be paid out of the estate; or may, after notice to the bankrupt and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed."

If the court is satisfied upon inquiry that the bankrupt can make the deposit it will require him to do so.<sup>55</sup> A petitioner has been required to make the deposit where it appeared that he was receiving thirty dollars per month,<sup>56</sup> or where his schedules showed thirty-two dollars cash assets.<sup>57</sup> A petitioner has been required to make the deposit out of exempt property,<sup>58</sup> and out of pension money.<sup>59</sup>

<sup>51</sup> *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 817, 36 C. C. A. 502, 2 Am. B. R. 529; *In re Mason*, 181 Fed. Rep. 899, 25 Am. B. R. 73.

<sup>52</sup> *In re Plimpton*, 103 Fed. Rep. 775, 4 Am. B. R. 614.

But see *In re fees payable by a voluntary bankrupt*, 95 Fed. Rep. 120, where it was held that a bankrupt should be required to make the deposit before he receives his discharge or show "by reason of ill health or circumstances of peculiar misfortune he is a worthy object of charity."

<sup>53</sup> *In re Levy*, 101 Fed. Rep. 247, 4 Am. B. R. 108; *In re Collier*, 93 Fed. Rep. 191, 1 Am. B. R. 182; *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801-817, 36 C. C. A. 502, 2 Am. B. R. 529; *In re Mason*, 181 Fed. Rep. 899, 25 Am. B. R. 73.

<sup>54</sup> *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801-817, 36 C. C. A. 502, 2 Am. B. R. 529; *In re Collier*, 93 Fed. Rep. 191, 1 Am. B. R. 182; *In re Mason*, 181 Fed. Rep. 899, 25 Am. B. R. 73.

<sup>55</sup> *In re Mason*, 181 Fed. Rep. 899, 25 Am. B. R. 73; *In re Collier*, 93 Fed. Rep. 191, 1 Am. B. R. 182; *In re Bean*, 100 Fed. Rep. 262, 4 Am. B. R. 63.

<sup>56</sup> *In re Collier*, 93 Fed. Rep. 191, 1 Am. B. R. 182.

<sup>57</sup> *In re Mason*, 181 Fed. Rep. 899, 25 Am. B. R. 73.

<sup>58</sup> *In re Hines*, 177 Fed. Rep. 790, 9 Am. B. R. 27; *In re Bean*, 100 Fed. Rep. 262, 4 Am. B. R. 63; but see *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801-817, 36 C. C. A. 502, 2 Am. B. R. 529.

<sup>59</sup> *In re Bean*, 100 Fed. Rep. 162, 4 Am. B. R. 63.

If no deposit is made a trustee may decline to serve, unless creditors furnish the advance fee.<sup>61</sup>

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense.<sup>62</sup> Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.<sup>62</sup>

### § 167. Defenses to a voluntary petition.

Proceedings upon a voluntary petition leading to an adjudication are *ex parte*. No answer by a creditor will be permitted.<sup>63</sup>

An adjudication in bankruptcy made *ex parte* on a voluntary petition is not conclusive on creditors on the question of jurisdiction. They may at any time ask a dismissal of the proceedings on the ground that the court is without jurisdiction.<sup>64</sup> It has been held that this issue can not be made by a creditor, who has acquiesced in the application, proved a claim and received a dividend,<sup>65</sup> or by a creditor after a lapse of eight months, during which time other rights had intervened.<sup>66</sup>

<sup>61</sup> *In re Levy*, 101 Fed. Rep. 241, 4 Am. B. R. 108.

<sup>62</sup> Gen. Ord. 10.

<sup>63</sup> *In re Jehu*, 94 Fed. Rep. 638, 2 Am. B. R. 498; *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *In re Carleton*, 115 Fed. Rep. 246, 8 Am. B. R. 270; *In re Junck and Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

<sup>64</sup> *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 403, 11 Am. B. R. 679; *In re Waxelbaum*, 98 Fed. Rep. 589, 3

Am. B. R. 392; and 97 Fed. Rep. 562, 3 Am. B. R. 267; *In re Brice*, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re Mason*, 99 Fed. Rep. 256, 3 Am. B. R. 599; *In re Goodfellow*, No. 5536 Fed. Cas., 1 Low. 510; *In re Walker*, No. 17061 Fed. Cas., 1 Low. 237; *In re Scott*, 111 Fed. Rep. 144, 7 Am. B. R. 39.

<sup>65</sup> *In re Mason*, 99 Fed. Rep. 256, 3 Am. B. R. 599; *In re Hintze*, 134 Fed. Rep. 141, 13 Am. B. R. 721.

<sup>66</sup> *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 92.

An adjudication of a corporation is not conclusive on the stockholders on the question of the authority of the officers filing the petition. A stockholder may move to set aside an adjudication on the ground of want of power to file the petition, but a creditor will not be permitted to raise that issue.

The application may be made by motion or petition to set aside the adjudication and dismiss the petition of the bankrupt. In this way an issue may be made and passed on concerning any fact which goes to defeat the jurisdiction of the court.<sup>67</sup> The adjudication requires the objecting creditor to introduce evidence in support of his motion, but the burden of proof upon the issue remains on the bankrupt.<sup>68</sup>

If the requisite jurisdictional facts did not exist at the time the petition was filed, the court should dismiss the petition.<sup>69</sup> If the petition fails to aver the jurisdictional requisites, which in fact existed, the court may allow an amendment to cure the defect.<sup>70</sup>

### § 168. The order of adjudication.

A judge of a court of bankruptcy regularly hears a voluntary petition and makes the adjudication or dismisses the petition.<sup>71</sup>

The judge opens the petition to ascertain if it is in form prescribed by the supreme court and sufficiently states facts entitling the debtor to take the benefit of the act. These are not issuable facts. The law takes the debtor at his word. If

<sup>67</sup> *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 403, 11 Am. B. R. 677; *In re Yates*, 114 Fed. Rep. 365, 8 Am. B. R. 69; *In re Scott*, 111 Fed. Rep. 144, 7 Am. B. R. 39; *In re Mason*, 99 Fed. Rep. 256, 3 Am. B. R. 599; *In re Waxelbaum*, 97 Fed. Rep. 562, 3 Am. B. R. 267; *In re Goodfellow*, No. 5536 Fed. Cas., 1 Low. 510; *In re Ives*, (C. C. A. 6th Cir.), 113

Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

<sup>68</sup> *In re Scott*, 111 Fed. Rep. 144, 7 Am. B. R. 39.

<sup>69</sup> See Dismissal of a voluntary petition, Sec. 171, *post*.

<sup>70</sup> See Amendments, Sec. 170, *post*.

<sup>71</sup> B. A. 1898, Sec. 18g. Official Forms Nos. 11 and 12, Forms Nos. 28 and 29, *post*.

the petition is sufficient the adjudication is entered as a matter of course.<sup>72</sup> No notice is required to creditors before making the order adjudicating the petitioner a bankrupt.

If the petition does not show jurisdiction, or is not regularly filed, or is materially defective, the court may dismiss it or permit an amendment as justice may require.<sup>73</sup>

If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing of the petition, the clerk forthwith refers the case to the referee.<sup>74</sup> In such case the referee is authorized to consider the petition and make the adjudication or dismiss the petition with the same effect as if it had been made by the judge.<sup>75</sup> The referee is not authorized to make an adjudication in any other case.

If all the partners join in a petition to have the firm declared bankrupt it is clearly a voluntary petition and the adjudication is made at once as in the case of an individual.<sup>76</sup>

If the petition is filed by one partner to have the firm declared bankrupt it is a voluntary petition as to the petitioning partner and the creditors of the firm. The filing of such a petition is in itself considered the equivalent of an act of

<sup>72</sup> In *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 190, 46 L. Ed. 1113, 8 Am. B. R. 1, Mr. Chief Justice Fuller said that "the petition must state that 'petitioner owes debts which he is unable to pay in full,' and 'that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law.' This establishes those facts so far as a decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition. These are not issuable facts, and notice is unnecessary, unless dismissal is sought, when notice is required."

*In re Fowler*, No. 4998 Fed. Cas., 1 Low. 161, Judge Lowell said:

"He may be, in fact, fraudulent, and able and unwilling to pay his debts; but the law takes him at his word, and makes effectual provision, not only by civil but even by criminal process to effectuate his alleged intent of giving up all his property."

<sup>73</sup> Gen. Ord. 11. See Amendment to Petition and Schedules, Sec. 173, *post*. *In re Laughlin*, 96 Fed. Rep. 589, 3 Am. B. R. 1.

<sup>74</sup> B. A. 1898, Sec. 18g. Official Form No. 15, Form No. 32, *post*.

<sup>75</sup> B. A. 1898, Sec. 38, clause 1; *In re Carbone* (Ref. op.), 13 Am. B. R. 55.

<sup>76</sup> *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

bankruptcy and dispenses with proof of any other act of bankruptcy.<sup>77</sup> Notice must be given to the non-consenting partner.<sup>78</sup> He is entitled to appear and contest the adjudication by proving the solvency of the firm, or by showing himself solvent and agreeing to take upon himself the settlement of the partnership business.<sup>79</sup> There is *dicta* in some of the opinions to the effect that the non-consenting partner may oppose the adjudication of the firm as he might if the proceeding was involuntary. From the nature of the proceeding it is evident that his sole defense must be solvency. On this question he is entitled to a trial by jury if requested.<sup>80</sup> The non-consenting partner can not be declared bankrupt against his will in a voluntary proceeding. If such attempt is made in a partner's petition he is entitled to make every defense open to a debtor upon an involuntary petition.<sup>81</sup>

The order of adjudication, unless set aside by a judge or by an appellate court, is conclusive upon the insolvency of the debtor, his willingness to surrender his property and his desire to take the benefit of the statute.<sup>82</sup>

### § 169. Order of reference.

At the time of making an order of adjudication the judge regularly refers to a voluntary petition for subsequent proceedings to the referee within the county of which the debtor is a resident.<sup>83</sup>

He may refer a case to any referee within the territorial jurisdiction of the court, if the convenience of the parties in interest will be served thereby, or for cause, or if the bank-

<sup>77</sup> *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re Junck and Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

But see *In re Ceballos*, 161 Fed. Rep. 445, 20 Am. B. R. 459.

<sup>78</sup> Gen. Ord. 8.

<sup>79</sup> *In re Junck and Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

<sup>80</sup> *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787.

<sup>81</sup> See Petition by less than all the partners, Sec. 262, *post*.

<sup>82</sup> *In re Fowler*, No. 4998 Fed. Cas., 1 Low. 161.

<sup>83</sup> Official Form No. 14, Form No. 31, *post*.

rupt does not do business, reside or have his domicile in the district.<sup>84</sup> But he can not refer the case to a referee outside the district.<sup>85</sup>

A copy of the order should be sent by mail to the referee or delivered to him personally by the clerk or other officer of the court as soon as may be.<sup>86</sup> All the proceedings thereafter, except such as are expressly required by the statute or by the general orders to be had before the judge, are had before the referee.<sup>87</sup> The time when and the place where the referee shall act upon matters referred to him is fixed by special order of the judge, or by the referee.<sup>88</sup>

The order referring a case to a referee should name a day upon which the bankrupt shall attend before the referee. From that day the bankrupt is subject to the orders of the court in matters relating to his bankruptcy, and may receive from the referee protection against arrest, to continue until the final adjudication upon his application for a discharge, unless suspended or vacated by order of the court.<sup>89</sup>

The jury has a supervisory power over the action of a referee in proceedings before him.<sup>90</sup> The judge may recall or modify the order of reference at any time that he sees fit. There are some proceedings which must be had before the judge and not before the referee. Application for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a state, must be heard and decided by the judge.<sup>91</sup> But he may refer such an application or any specified issue arising therefrom to the referee to ascertain and report the facts.<sup>92</sup>

<sup>84</sup> B. A. 1898, Sec. 22; *In re* Schenectady Eng. & Const. Co., 147 Fed. Rep. 868, 17 Am. B. R. 279.

<sup>85</sup> *In re* Schenectady Eng. & Const. Co., 147 Fed. Rep. 868, 17 Am. B. R. 279.

<sup>86</sup> Gen. Ord. No. 12.

<sup>87</sup> Gen. Ord. No. 12 and Gen. Ord. No. 27.

<sup>88</sup> Gen. Ord. No. 12.

<sup>89</sup> Gen. Ord. No. 12.

<sup>90</sup> Sec. 93, *ante*.

<sup>91</sup> See Sec. 84, *ante*.

<sup>92</sup> Gen. Ord. No. 12. B. A. 1898, Sec. 38, clause 4, and Sec. 41.

**§ 170. Amendments to petition and schedules.**

The petitioner may conclude after his petition and schedules have been filed that they are defective, or may find that he has omitted something by mistake or inadvertence. In such case he may apply to the court for leave to amend. The court is expressly authorized to allow amendments to the petition and schedules upon the application of the petitioner.<sup>1</sup>

In his application for leave to amend the petitioner must state the cause of error in the paper originally filed.<sup>2</sup> The application may be by motion or petition. It should be accompanied with a copy of the amendment or amendments to be made. These amendments should be printed or written, signed and verified like original petitions and schedules.<sup>3</sup> The verification should be according to the circumstances of the amendment. The form will not be precisely the same as an oath to an original petition. If the amendments are made to separate schedules, the same must be made separately with proper references.<sup>4</sup>

The proceeding is *ex parte*, and no notice need be given to creditors, nor has any creditor the right to oppose it.<sup>5</sup> The granting or refusing to grant leave to amend the petition or schedules rests in the sound discretion of the court. It is not a matter of right. The courts are liberal in allowing amendments so long as the ends of justice are not sacrificed. A bankrupt has been permitted to amend his schedules by inserting the names of creditors who have been omitted,<sup>6</sup> but not after the expiration of the year within which such creditors could file claims.<sup>7</sup>

Where the petition is referred to a referee to make the adjudication he may allow amendments to the petition. He

<sup>1</sup> Gen. Ord. 11. *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514; 19 Am. B. R. 746.

<sup>2</sup> Gen. Ord. 11.

<sup>3</sup> *In re Watts*, No. 17293 Fed. Cas., 3 Ben. 166; *In re Heller*, 41 Howard Prac. 213.

<sup>4</sup> *In re Beerman*, 112 Fed. Rep. 663, 7 Am. B. R. 434.

<sup>5</sup> *In re Hawk* (C. C. A. 8th Cir.), 114 Fed. Rep. 916, 52 C. C. A. 536, 8 Am. B. R. 71; *In re Spicer*, 145 Fed. Rep. 431, 16 Am. B. R. 802; *In re Kittler*, 176 Fed. Rep. 655, 23 Am. B. R. 585.

is expressly authorized, and it is his duty, to examine all schedules of property and lists of creditors filed by bankrupts, and to cause such as are incomplete or defective to be amended.<sup>4</sup> The referee may also refuse to allow an amendment. Whether he grants or refuses to permit an amendment to be made, the question is subject to be reviewed by the judge.<sup>5</sup>

### §171. The dismissal of a voluntary petition.

A voluntary petition can not be dismissed by the petitioner, or for want of prosecution, or by the consent of parties until after notice to creditors.<sup>1</sup> The rule under the former acts was otherwise.<sup>2</sup>

Notice to creditors is indispensable since the amendment of 1910. It expressly requires the court, before entertaining an application for dismissal, to cause notice to be sent to all the creditors and to delay the hearing for a reasonable time to allow them opportunity to be heard.<sup>3</sup> It is not necessary to give notice to creditors other than those who were creditors at the time the petition was filed. No notice need be given subsequent creditors who have acquired liens since the petition was filed.<sup>4</sup>

A voluntary bankrupt will not be permitted to withdraw his petition over the protest of his creditors because he could not obtain a discharge.<sup>5</sup> After a debtor has invoked the juris-

<sup>4</sup> B. A. 1898, Sec. 39, clause 2; *In re Brumelkamp*, 95 Fed. Rep. 814, 2 Am. B. R. 318; *In re Beerman*, 112 Fed. Rep. 662, 7 Am. B. R. 434.

<sup>5</sup> Gen. Ord. 27. *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746; *In re Mackey & Co.* (Ref. op.), 1 Am. B. R. 593.

<sup>1</sup> B. A. 1898, Sec. 59g as amended by the Act of June 25, 1910, 36 Stat. at L. 838.

<sup>2</sup> *In re Randall*, No. 11550 Fed. Cas., 5 Law Rep. 115; *In re Harris*, No. 6110 Fed. Cas., 3 N. Y. Leg.

Obs. 152; *Dudley's case*, No. 4114 Fed. Cas., 1 Pa. Law Jour. 302; *Ex parte Bennett*, No. 1309 Fed. Cas., 1 Pa. Law Jour. 145; *In re Gile*, No. 5423 Fed. Cas., Law Rep. 224.

<sup>3</sup> B. A. 1898, Sec. 59g as amended by the Act of June 25, 1910, 36 Stat. at L. 838.

<sup>4</sup> *In re Hebbart*, 104 Fed. Rep. 322, 5 Am. B. R. 8.

<sup>5</sup> *In re Smith*, 155 Fed. Rep. 688, 19 Am. B. R. 63; *In re Tully*, 156 Fed. Rep. 634, 19 Am. B. R. 604.



diction of the bankruptcy court, creditors are entitled to have his property administered by that court. If no creditors object, the petitioner may withdraw his petition by leave of court upon the payment of expenses which have incurred to that time.<sup>6</sup>

A voluntary petition may be dismissed by the court whenever it is made to appear that the court has no jurisdiction of the proceedings by reason of the residence of the debtor or absence of other jurisdictional requisites.<sup>7</sup> But a creditor will not be permitted to question a debtor's residence after he has acquiesced in an adjudication and filed his claim for allowance.<sup>8</sup>

The court may dismiss the petition for the purpose of protecting itself against imposition. Where the sole purpose is to enable the debtor to obtain a discharge, when he has failed to apply for one in season, or has been refused a discharge in a former proceeding,<sup>9</sup> or where the only debts specified in the schedules are not provable in bankruptcy,<sup>10</sup> or where such debts would not be barred by a discharge, the court may, in its discretion, dismiss the petition, but it is not compelled in

<sup>6</sup> *In re Salaberry*, 107 Fed. Rep. 95, 5 Am. B. R. 847; *In re Hebbart*, 104 Fed. Rep. 322, 5 Am. B. R. 8.

<sup>7</sup> *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 403, 11 Am. B. R. 679; *In re Waxelbaum*, 97 Fed. Rep. 562, 3 Am. B. R. 267, and 98 Fed. Rep. 589, 3 Am. B. R. 392.

As to making this objection by creditors, see Sec. 167, *ante*.

*In re Tully*, 156 Fed. Rep. 634, 19 Am. B. R. 604, the court was asked to dismiss proceedings upon application for a discharge because the bankrupt had not resided three months in the district at the time the petition was filed. The court denied the application and directed

a second order of adjudication to be entered *nunc pro tunc* as of a date after the expiration of the three months.

<sup>8</sup> *In re Hintze*, 134 Fed. Rep. 141, 13 Am. B. R. 721.

<sup>9</sup> *Kuntz v. Young*, (C. C. A. 8th Cir.), 131 Fed. Rep. 719, 65 C. C. A. 477, 12 Am. B. R. 505; *In re Fiegenbaum* (C. C. A. 2d Cir.), 121 Fed. Rep. 69, 57 C. C. A. 409, 9 Am. B. R. 595; *In re Silverman* (C. C. A. 2d Cir.), 157 Fed. Rep. 675, 85 C. C. A. 224, 19 Am. B. R. 460; *In re Weintraub*, 133 Fed. Rep. 1000, 13 Am. B. R. 711; *In re Schnabel*, 166 Fed. Rep. 383, 23 Am. B. R. 22.

<sup>10</sup> *In re Yates*, 114 Fed. Rep. 365, 8 Am. B. R. 69.

all cases to do so.<sup>11</sup> Creditors may be entitled to have the debtor's property distributed by a court of bankruptcy where its jurisdiction has been invoked by the debtor, even though he may not be released from the unpaid balance of the debts by a discharge.

It has been held that where a voluntary partnership petition has been filed by the firm and subsequently withdrawn in part and a new petition made including the individual schedules of the partners, the date of the filing was the date the later or amended petition was filed.<sup>12</sup>

### **§ 172. Proceedings subsequent to the adjudication.**

Proceedings in voluntary bankruptcy subsequent to the order of adjudication and reference are not essentially different from the proceedings had upon an involuntary petition, or a petition for the purpose of having a partnership, or the members thereof, adjudged bankrupts. The examination of the bankrupt, the first creditors' meeting, the election of a trustee, the collection of the assets of the bankrupt, the distribution of the estate and other matters pertaining to the proper administration of the estate will be considered hereafter under appropriate heads.

<sup>11</sup> *In re Colaluca*, 133 Fed. Rep. 255, 18 Am. B. R. 292; *In re Maples*, 105 Fed. Rep. 919, 5 Am. B. R. 426.

<sup>12</sup> *In re Washburn*, 99 Fed. Rep. 84, 3 Am. B. R. 585.

## CHAPTER XII.

## SCHEDULES.

SEC.	SEC.
173. The object of schedules.	177. General form of schedules.
174. By whom prepared and filed.	178. Schedule of creditors and debts.
175. Where the debtor fails to file a schedule.	179. Schedule of assets.
176. Time and manner of filing schedules.	180. Amendments to schedules.

## § 173. The object of schedules.

The object of requiring a debtor to file a schedule of his property and list of his creditors is to show the true condition of his affairs as clearly and lucidly as possible.

The schedule is merely a statement of the financial condition of the debtor at the time the petition in bankruptcy is filed. It does not change existing rights. The omission of assets from a schedule does not prevent property passing to the trustee as part of the estate.<sup>1</sup> The omission of the name of a creditor does not affect his right to prove his claim and participate in the proceedings.<sup>2</sup>

The schedule should faithfully disclose the entire financial condition of the debtor. It should show the kind and value of his property, the names and addresses of his creditors and such claim for exemptions as he may be entitled to.<sup>3</sup>

Great care should be observed in preparing schedules. The debtor and his attorney should fully investigate all obligations and property interests in advance of preparing the schedule. If property is omitted, which should be included, it may defeat

<sup>1</sup> *Rand v. Iowa Central Ry. Co.*, 96 App. Div. N. Y. 413, 12 Am. B. R. 164.

<sup>2</sup> *In re Brumelkamp*, 95 Fed. Rep. 814, 2 Am. B. R. 318.

<sup>3</sup> *In re Schiller*, 96 Fed. Rep. 400, 2 Am. B. R. 704; *In re Dvorak*, 107 Fed. Rep. 76, 6 Am. B. R. 66; *In re Mackey & Co. (Ref.)*, 1 Am. B. R. 593.

a discharge.<sup>4</sup> If a creditor's name or address is omitted, it may prevent the discharge being pleaded in bar of a suit on his debt.<sup>5</sup> A full and complete schedule facilitates the distribution of the property among the creditors and prevents delays, which may interfere with an expeditious settlement of the debtor's estate.

#### § 174. By whom prepared and filed.

The debtor in voluntary or involuntary proceedings should prepare and file the schedule.

The statute expressly makes it the duty of the bankrupt to prepare, make oath to and file in court a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to.<sup>1</sup>

When a petition is filed by partners, a schedule of the liabilities and assets of the firm and separate schedules of the individual liabilities and assets of each petitioning partner should be prepared and filed.<sup>2</sup> Where a partner refuses to join in a petition to have the partnership declared bankrupt and an adjudication is made, such partner must file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors in involuntary bankruptcy.<sup>3</sup>

<sup>4</sup> *In re Gailey* (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 62 C. C. A. 336, 11 Am. B. R. 539; *In re Royal*, 112 Fed. Rep. 135, 7 Am. B. R. 106.

<sup>5</sup> *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231, 12 Am. B. R. 691. *In re Quackenbush*, 122 N. Y. App. Div. 456, 19 Am. B. R. 647; *Westheimer v. Howard*, 93 N. Y. Supp. 518, 14 Am. B. R. 547; *Mur-*

*phy v. Blumenrich*, 123 N. Y. App. Div. 645, 19 Am. B. R. 910.

<sup>1</sup> B. A. 1898, Sec. 7, clause 8.

<sup>2</sup> *In re Laughlin*, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re Morrison*, 127 Fed. Rep. 186, 11 Am. B. R. 498; *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Brick*, 4 Fed. Rep. 804.

<sup>3</sup> Gen. Ord. 8.

In the case of a corporation, in voluntary or involuntary proceedings, it is the duty of the officers to prepare and make oath to the schedules on behalf of the corporation.<sup>4</sup>

**§175. Where the debtor fails to file a schedule.**

If the bankrupt fails to file a schedule with a voluntary petition, the court may decline to proceed with the adjudication until the schedule is filed by the bankrupt, or the referee may prepare and file it or cause it to be done.<sup>1</sup>

If the bankrupt, in an involuntary proceeding, fails to file a schedule within ten days after the adjudication, the referee may prepare and file the schedule of property and list of creditors required to be filed by the bankrupt, or cause the same to be done.<sup>2</sup> If the bankrupt can be found he may be ruled to show cause why he shall not be compelled to file a schedule,<sup>3</sup> and he may be punished for failing to do so.<sup>4</sup>

Where the bankrupt is absent or can not be found the petitioning creditors must file within five days after the adjudication a schedule giving the names and places of residence of all the creditors of the bankrupt according to their best information.<sup>5</sup> The object of this provision is to furnish the referee with *data*, with respect to the creditors, to be used in preparing the schedule which the act makes it his duty to prepare and file.<sup>6</sup> The referee is also entitled to such information as he may obtain from the bankrupt's books and any other sources from which he may derive knowledge of assets or the names of creditors.

The referee should file such schedules in the clerk's office in triplicate, which should conform as nearly as possible to the

<sup>4</sup> *In re Alphin & Lake Cotton Co.*, 131 Fed. Rep. 824, 12 Am. B. R. 653.

<sup>1</sup> B. A. 1898, Sec. 39, clause 6.

<sup>2</sup> B. A. 1898, Sec. 39a, clause 6; *In re Schiller*, 96 Fed. Rep. 400, 2 Am. B. R. 704.

<sup>3</sup> Gen. Ord. 9. *In re Brady*, 21 Am. B. R. 364, such an order was allowed by Judge Evans pending an

appeal from the adjudication where no supersedeas was given.

<sup>4</sup> *In re Fellerman*, 149 Fed. Rep. 244, 17 Am. B. R. 785; *In re Schulman & Goldstein*, 164 Fed. Rep. 440, 20 Am. B. R. 707.

<sup>5</sup> Gen. Ord. 9.

<sup>6</sup> B. A. 1898, Sec. 39a, clause 6.

schedules required by the bankrupt. He is not required to make oath to schedules prepared by him, but should certify to the fact

**§ 176. Time and manner of filing schedules.**

A voluntary bankrupt is required to file a schedule of his property and list of creditors with their addresses with his petition.<sup>1</sup>

An involuntary bankrupt is required to file such a schedule within ten days after the adjudication, unless further time is granted by the court.<sup>2</sup> The schedule should be filed with the clerk of the court and not with the referee.<sup>3</sup>

The schedule in either case must be filed in triplicate, one copy for the clerk, one for the referee and one for the trustee.<sup>4</sup>

**§ 177. General form of schedules.**

The supreme court of the United States has provided forms of schedules, which should be observed and used with such alterations as may be necessary to suit the circumstances of each particular case.<sup>1</sup> The same form of schedule is used in voluntary and involuntary proceedings, and in proceedings to have a partnership or corporation declared bankrupt.<sup>2</sup>

The schedule required by the statute to be filed in court and the form prepared by the supreme court is divided into two general parts. The first part, schedule A, is a list of creditors of the bankrupt, with the amount due each of them.<sup>3</sup>

<sup>1</sup> B. A. 1898, Sec. 7, clause 8.

<sup>2</sup> B. A. 1898, Sec. 7, clause 8.

<sup>3</sup> See observation of Judge Dodge *In re Back Bay Automobile Co.*, 158 Fed. Rep. 679, 19 Am. B. R. 835.

<sup>4</sup> B. A. 1898, Sec. 7, clause 8.

<sup>1</sup> Gen. Ord. 38. Official Form 1, schedules A and B; see form No. 3, *post*. *Mahoney v. Ward*, 100 Fed. Rep. 278, 3 Am. B. R. 770; *Burke v. Guarantee Title & Trust Co.*, (C.

C. A. 3d Cir.), 134 Fed. Rep. 562, 67 C. C. A. 486, 14 Am. B. R. 31; *In re McClintock* (Ref.), 13 Am. B. R. 607.

*In re Sallee*, No. 12256 Fed. Cas., 2 N. B. R. 228.

<sup>2</sup> Consult Official Form No. 1, schedules A and B, and note at the ends of Official Form No. 3. See Forms Nos. 3, 4 and 5, *post*.

<sup>3</sup> See Sec. 178, *post*.

The second part, schedule B, is a statement of all the property of the bankrupt.<sup>4</sup> Each part is divided into separate classes. Each class is stated in detail in a separate paper prepared for that purpose.

In classifying the creditors and the property the notes and instructions placed on each division of the forms should be carefully noted. All the separate forms prepared by the supreme court should be used in each case. If a debtor has no creditor or no property properly classified in a particular form he should so state the fact in that form. This is usually done by writing the word "none" in the space to be filled in by the bankrupt. He should not omit the form for the reason that he has no creditor or property properly classified under that head.

General Order No. 5 provides that the schedule shall be written out plainly, without abbreviation or interlineation, except where such abbreviation or interlineation shall be for the purpose of reference.

Each sheet or form should be signed by the debtor. At the end of schedule A and again at the end of schedule B the debtor must make oath in the form prescribed. It has been held that the omission to sign the affidavit at the end of the schedules by the bankrupt was not fatal, when the certificate of the officers showed that the oath was duly administered.<sup>5</sup>

When the parts of the schedule are completed they should be fastened neatly and firmly together and filed as one paper. This is "the schedule" of the statute. It consists of schedule A, schedule B and a summary of debts and assets taken from the statements of the debtor in these two parts of his schedule.

#### **§ 178. Schedule of creditors and debts.**

Schedule A is a list of creditors and a statement of all the debts owing by the bankrupt at the time the petition was filed.

The object of this statement is to inform the court of the liabilities of the bankrupt, to whom he is indebted, the amount

<sup>4</sup> See Sec. 179, *post*.

<sup>5</sup> *In re McConnell* (Ref.), 11 Am. B. R. 418.

and nature of each claim against his estate, and where the notices, required to be given creditors, may be sent to each creditor. To this end the bankrupt is required to prepare and file a full and true list of his creditors showing their residences, if known, if unknown, that fact to be stated, the amount due each of them, the consideration therefor, and the security held by them, if any.<sup>1</sup>

Schedule A consists of five separate divisions by means of which the creditors are divided into as many distinct classes.<sup>2</sup> In classifying the creditors of the bankrupt the instructions placed on each division of the official form should be carefully observed.

The *first division* is a list of all creditors who are to be paid in full, or to whom priority is secured by law.

The *second division* is a list of creditors holding securities.

The *third division* is a list of creditors whose claims are unsecured.

The *fourth division* is a statement of the debtor's liabilities on notes or bills discounted, which ought to be paid by the drawers, makers, acceptors or endorsers.

The *fifth division* is a statement of the bankrupt's liability on accommodation paper.

The name and address of every creditor, who may assert claim against the estate, should be entered in the schedule without regard to whether the claim is valid or invalid.<sup>3</sup> This

<sup>1</sup> B. A. 1898, Section 7, clause 8; *In re Dvorak*, 107 Fed. Rep. 76, 6 Am. B. R. 66; *In re Schiller*, 96 Fed. Rep. 400, 2 Am. B. R. 704.

<sup>2</sup> Official Form No. 1, Form No. 3, *post*.

<sup>3</sup> *In re Robertson*, No. 11921 Fed. Cas., 5 Law Reporter 321, a judgment confessed by the debtor to his mother was put upon his schedule. Of it Judge Betts said, "He is concluded from denying the debt, and, however destitute of valuable consideration it might have been in its origin, yet, as between himself

and the judgment creditor and his representatives, it must be recognized by him as a debt he is liable to discharge. He accordingly properly put the holder of the judgment in the list of his creditors. This responsibility is, however, attached to himself, and the property he may possess after all his debts are discharged. If the judgment is without legal or fair consideration, it is mere waste paper as against his other creditors or his assignee in bankruptcy."



makes him a party, who will receive notice of the bankruptcy proceedings and an opportunity to prove his claim. If the name of a creditor is omitted and he has no actual notice of the bankruptcy proceedings, he is not bound by them and his debt is not released by the discharge.<sup>2</sup> Where the creditor is a copartnership the name of the firm and not the individual partners is proper.<sup>3</sup> When the debt is due a newspaper the name of the proprietor should be given and not the name of the newspaper only.<sup>4</sup>

It is proper to include creditors, whose debts are barred by the statute of limitations.<sup>5</sup> The insertion of such a debt in the schedules does not revive the claim.<sup>7</sup>

Great care should be observed in scheduling the names of creditors correctly. It has been held that the name of a creditor was not properly entered in the schedule, where George Liesum was scheduled as "George Liesman,"<sup>8</sup> or where A. Custard appeared in the schedule as "A. Castard."<sup>9</sup>

It is equally important to state the place of residence of the creditor fully and correctly.<sup>10</sup> If a creditor resides in a large city, his street number or post-office box should be given. If the residence can not be ascertained that fact should be stated and what efforts have been made to ascertain where he resides.<sup>11</sup>

<sup>2</sup> *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231, 12 Am. B. R. 691.

<sup>3</sup> *Anon.*, No. 457 Fed. Cas., 1 N. B. R. 122.

<sup>4</sup> *Anon.*, No. 462 Fed. Cas., 2 N. B. R. 141.

<sup>5</sup> *In re Resler*, 95 Fed. Rep. 804, 2 Am. B. R. 602; *In re Lipman*, 94 Fed. Rep. 353, 2 Am. B. R. 46; *In re Kingsley*, No. 7819 Fed. Cas., 1 Low. 216; *In re Ray*, No. 11589 Fed. Cas., 2 Ben. 33; *In re Cushman*, No. 3512 Fed. Cas., 7 Ben. 482; *In re Harddin*, No. 6048 Fed. Cas., 1 N. B. R. 395.

<sup>7</sup> *In re Lipman*, 94 Fed. Rep. 353, 2 Am. B. R. 46; *In re Resler*, 95

Fed. Rep. 804, 2 Am. B. R. 602.

<sup>8</sup> *Liesum v. Kraus*, 71 N. Y. Supp. 1022, 35 N. Y. Misc. Rep. 376.

<sup>9</sup> *Custard v. Wigderson*, 130 Wis. 412, 17 Am. B. R. 337.

<sup>10</sup> *Murphy v. Blumenreich*, 123 N. Y. App. Div. 645, 19 Am. B. R. 910; *In re Dvorak*, 107 Fed. Rep. 76, 6 Am. B. R. 66; *In re Quackenbush*, 122 N. Y. App. Div. 456, 19 Am. B. R. 647; *Westheimer v. Howard*, 93 N. Y. Supp. 518, 14 Am. B. R. 547.

<sup>11</sup> *In re Dvorak*, 107 Fed. Rep. 76, 6 Am. B. R. 66; *Schiller v. Weinstein*, 97 N. Y. Misc. Rep. 622, 15 Am. B. R. 183; *Murphy v. Blumenreich*, 123 N. Y. App. Div.

Where the wrong address of a creditor is inserted in the schedule it is clearly defective. Thus where a creditor is entered as residing at 317 Main Street, New York City, when in fact he resided at 317 Main Street, Cincinnati,<sup>12</sup> or where the address of a resident of Brooklyn is given as Hoboken, New Jersey, a place where he had never resided,<sup>13</sup> there can be no question. It has been held that a debt was not properly scheduled where the office address, and not the place of residence, was given,<sup>14</sup> or where the address was abbreviated, as "135 Bdwy,"<sup>15</sup> or where the residence was indicated by ditto marks.<sup>16</sup> These cases show the strict rule applied by some courts at least and the necessity of fully and accurately stating the names and addresses of creditors in the schedules.

The schedule should contain a statement of the amount of the debt due each creditor, when contracted, the consideration therefor, and the security held by him, if any.<sup>17</sup> These facts should be stated as fully and accurately as possible. The amount and date of the debt is sufficient without computing the interest, for the exact amount can be ascertained at any stage of the proceedings.<sup>18</sup>

Where a note has been given or judgment rendered on the note, or in case there is a person jointly liable for the debt,

645, 19 Am. B. R. 910; *In re Pulver*, No. 11466 Fed. Cas., 1 N. B. R. 46.

*In re Dvorak*, 107 Fed. Rep. 76, 6 Am. B. R. 66, Judge Shiras said: "When the bankrupt gives a list of creditors, but states that their addresses are unknown, the referee should require the addresses to be furnished, or satisfactory proof to be made that the same can not be ascertained after due search had been made."

<sup>12</sup> *Westheimer v. Howard*, 93 N. Y. Supp. 519, 14 Am. B. R. 547.

<sup>13</sup> *Murphy v. Blumenreich*, 123 N. Y. App. Div. 645, 19 Am. B. R. 910.

<sup>14</sup> *Weidenfeld v. Tillinghast* (City Court of N. Y.), 18 Am. B. R. 531.

*In the matter of David*, 44 N. Y.

Misc. Rep. 516, and *In re Grisso v. Marx*, 45 N. Y. Misc. Rep. 500, and *In re Vaughn v. Irwin*, 49 N. Y. Misc. Rep. 611, the decision was placed on the ground that the creditor had actual notice and not that the debt was properly scheduled by giving the office address.

<sup>15</sup> *Sutherland v. Lashen*, 41 N. Y. Misc. Rep. 249, 11 Am. B. R. 780, affirmed, without opinion, 87 N. Y. App. Div. 633.

<sup>16</sup> *Haack v. Theise*, 51 N. Y. Misc. Rep. 3, 16 Am. B. R. 699.

<sup>17</sup> B. A. 1898, Sec. 7, clause 8; *In re Schiller*, 96 Fed. Rep. 400, 2 Am. B. R. 704.

<sup>18</sup> *In re Hill*, No. 6481 Fed. Cas., 1 Ben. 321.

this fact should be stated.<sup>19</sup> A judgment has been held properly scheduled in the name of the judgment creditor of record, although it had been sold to another creditor or with the bankrupt's knowledge.<sup>20</sup> It would have been better practice in this case to have stated the fact of the sale.

### § 179. Schedule of assets.

Schedule B is a statement of all of the property of the bankrupt, including such property as he claims to be exempt under the laws of the state of his domicile.<sup>1</sup>

Schedule B consists of six separate divisions. These divisions embrace every species of property and interests in property of which one can well conceive of a man invested with ownership.

The *first division* is a statement of all the real estate of the bankrupt, together with its location, description, encumbrances and value.<sup>2</sup>

The *second division* is an itemized statement of the personal property of the bankrupt, together with the value thereof.<sup>3</sup>

The *third division* is a statement of all choses in action in which the bankrupt has an interest.

The *fourth division* is a statement of all property in reversion, remainder or expectancy, including property held in trust for the debtor or subject to any power or rights to dispose of

<sup>19</sup> *In re Orne*, No. 10582 Fed. Cas., 1 Ben. 420.

<sup>20</sup> *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 36 C. C. A. 502, 2 Am. B. R. 529.

<sup>1</sup> For form of schedule B, see Official Form No. 1. Form No. 3, *post*; *In re Todd*, 112 Fed. Rep. 315, 7 Am. B. R. 770.

*In re Bean*, 100 Fed. Rep. 262, 4 Am. B. R. 63, it was held that pension money should be scheduled with claim for exemption.

<sup>2</sup> The name of the town, county and state and the grantor were held

sufficiently accurate *In re Dodge*, No. 3946a Fed. Cas., but a description as "an interest in half a lot in Buffalo," is not, *In re Frisbee*, No. 5130 Fed. Cas., 4 Law Rep. 483.

<sup>3</sup> See *In re Hill*, No. 6481 Fed. Cas., 1 Ben. 321; *In re Malcolm*, No. 8986 Fed. Cas., 4 Law Rep. 488.

An interest in the net profits of a business as additional compensation need not be scheduled. *In re Brown*, No. 1978 Fed. Cas., 5 Law Rep. 121.

or charge it. In this form is included also property theretofore conveyed for the benefit of creditors and money paid counsel for services rendered or to be rendered in bankruptcy.

The *fifth division* is a particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation, and if any portion of it is real estate, its location, description and present use should be stated.<sup>4</sup>

The *sixth division* is a complete list of all books, papers, deeds, rights, etc., relating to the business dealings, estate and effects of the bankrupt.

It is important that the bankrupt schedule all his property of every kind and nature, because the making of a false oath to a schedule is punishable by imprisonment,<sup>5</sup> and is sufficient cause for the refusal of a discharge.<sup>6</sup> If there is any question as to whether the bankrupt has any interest or title in property, it is his duty to disclose the transaction in his schedule that the matter may be determined by proper proceedings before the court.<sup>7</sup>

#### § 180. Amendments to schedules.

The court may, upon proper application, allow the bankrupt to amend his schedule.<sup>1</sup>

A referee may order amendments to be made to the schedule after the case is referred to him.<sup>2</sup> The application to amend

<sup>4</sup> See exceptions, Chap. XXIV.

Military uniforms, arms and equipments are exempted by R. S. Sec. 1628.

As to listing exempt property, see *In re Todd*, 112 Fed. Rep. 315, 7 Am. B. R. 770; *In re Bean*, 100 Fed. Rep. 262, 4 Am. B. R. 63.

<sup>5</sup> B. A. 1898, Sec. 29b, clause 2; *Bartlett v. United States* (C. C. A. 9th Cir.), 106 Fed. Rep. 884, 46 C. C. A. 19, 5 Am. B. R. 678; *United States v. Lake*, 129 Fed. Rep. 499, 12 Am. B. R. 270.

<sup>6</sup> *In re Gailey* (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 62 C. C. A. 336, 11 Am. B. R. 539; *In re Royal*, 112 Fed. Rep. 135, 7 Am. B. R. 106; *In re O'Gara*, 97 Fed. Rep. 932, 3 Am. B. R. 349; *Barton Bros. v. Texas Produce Co.* (C. C. A. 8th Cir.), 136 Fed. Rep. 355, 69 C. C. A. 181, 14 Am. B. R. 502.

<sup>7</sup> *In re Gailey* (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 62 C. C. A. 336, 11 Am. B. R. 539.

<sup>1</sup> Gen. Ord. No. 11.

<sup>2</sup> *In re Brumelkamp*, 95 Fed. Rep. 814, 2 Am. B. R. 318.

the schedule is regularly made to the referee. One copy of the schedule is referred to the referee as soon as may be after it is filed. It is his duty to examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended.<sup>3</sup>

The application is regularly made by petition or motion. It should be accompanied by a copy of the amendment or amendments to be made. The amendment should be printed or written, signed and verified like original petitions or schedules.<sup>4</sup> If the amendments are made to separate schedules the same must be made separately with proper reference.<sup>5</sup> In the application for leave to amend the petitioner should state the cause of error in the paper originally filed.<sup>6</sup> A copy of the petition and amendments should be served upon the adverse party.

The granting or refusing to grant leave to amend rests in the sound discretion of the court. It is not a matter of right. The courts are liberal in allowing amendments to schedules so long as the ends of justice are not sacrificed. The referee's finding is not conclusive so as to preclude inquiry at the proper time and in a proper manner as to the sufficiency of the schedule.<sup>7</sup>

The order allowing the amendment should be in triplicate and a copy sent to the clerk and trustee at once by the referee.

A bankrupt may be permitted to amend his schedules by inserting the names of creditors who have been omitted,<sup>8</sup> but he will not be allowed to add such names by amendment after the expiration of the year within which the creditors may file claims against his estate.<sup>9</sup> The reason for this rule is plain.

<sup>3</sup> B. A. 1898, Sec. 39a, clause 2;  
*In re Beerman*, 112 Fed. Rep. 663,  
7 Am. B. R. 434.

<sup>4</sup> Gen. Ord. No. 11.

<sup>5</sup> Gen. Ord. No. 11.

<sup>6</sup> Gen. Ord. No. 11.

<sup>7</sup> Gen. Ord. 23, Sec. 93, *ante*.

*In re Hill*, No. 6481 Fed. Cas.,  
1 Ben. 321.

<sup>8</sup> *In re Beerman*, 112 Fed. Rep.  
663, 7 Am. B. R. 434.

<sup>9</sup> *In re Hawk* (C. C. A. 8th Cir.),  
114 Fed. Rep. 916, 52 C. C. A. 536,  
8 Am. B. R. 71; *In re Spicer*, 145  
Fed. Rep. 431, 16 Am. B. R. 802;  
*In re Kittler*, 176 Fed. Rep. 655,  
23 Am. B. R. 585.

The creditor must be brought into the proceedings in time to avail of the benefits of the law—in time to give him an equal opportunity with the other creditors—and not so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends.<sup>10</sup>

A bankrupt may be permitted to amend his schedule of assets at any stage of the proceedings to include property omitted through mistake or inadvertence.<sup>11</sup> No amendment should be allowed where the property was knowingly omitted with the intent to prevent it from reaching his creditors.<sup>12</sup> A concealment of property or a false oath can not be cured in this manner. The amendment is allowed only when the bankrupt has acted in good faith.

A schedule may be amended so as to include or change a claim for exemption, if the error occurred through inadvertence or mistake.<sup>13</sup>

<sup>10</sup> See *Birkett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231, 12 Am. B. R. 691.

<sup>11</sup> *In re McKee*, 165 Fed. Rep. 269, 21 Am. B. R. 306; *In re Bean*, 100 Fed. Rep. 262, 4 Am. B. R. 63; *In re Eaton*, 110 Fed. Rep. 731, 6 Am. B. R. 531; *In re Irwin*, 177 Fed. Rep. 284, 23 Am. B. R. 165.

<sup>12</sup> *In re Becker*, 106 Fed. Rep. 54, 5 Am. B. R. 438; *In re Royal*,

112 Fed. Rep. 135, 7 Am. B. R. 106.

<sup>13</sup> *In re Tollett* (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 46 C. C. A. 11, 5 Am. B. R. 404; *In re Falconer* (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 49 C. C. A. 50, 6 Am. B. R. 557; *In re Kaufman*, 142 Fed. Rep. 898, 16 Am. B. R. 118; *In re Maxson*, 170 Fed. Rep. 356, 22 Am. B. R. 424; *In re White*, 128 Fed. Rep. 513, 11 Am. B. R. 556.

## CHAPTER XIII.

PARTIES AND THE PETITION IN INVOLUNTARY  
BANKRUPTCY.

SEC.	SEC.
181. Petitioning creditors.	192. In which district a creditor's petition may be filed.
182. Petitioning creditors having unliquidated claims.	193. The period of residence, domicile or business.
183. Preferred creditors as petitioners.	194. Domicile and residence.
184. Attachment and judgment creditors as petitioners.	195. The principal place of business.
185. Secured creditors as petitioners.	196. Transfer of cases begun in different districts.
186. Intervention by creditors to make the requisite number of petitioners.	197. Procedure where petitions are filed in different courts.
187. Counting creditors.	198. Different petitions in the same court.
188. Creditors may be estopped from being petitioners.	199. The petition.
189. When creditors may file a second petition.	200. The time and manner of filing the petition.
190. Amount of petitioner's claims.	201. Application to amend petition.
191. Against whom a petition may be filed.	202. Amendments to a petition.
	203. Involuntary proceedings as to grounds for a suit for damages.

## § 181. Petitioning creditors.

Proceedings in involuntary bankruptcy are instituted by a creditor or creditors filing a petition, praying that the debtor may be declared a bankrupt and that his property may be distributed according to law.

Any creditor having a provable claim against the alleged bankrupt may be a petitioner.<sup>1</sup> By creditor is meant any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy.<sup>2</sup> A provable claim is one that can be proved in the proceedings under section 63 of the bankrupt act.<sup>3</sup> It is not necessary that a provable claim be allowable at the time the petition is

<sup>1</sup> B. A. 1898, Sec. 59b; *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864.

<sup>2</sup> B. A. 1898, Sec. 1, clause 9.

<sup>3</sup> In *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am.

B. R. 484, the supreme court said: "The whole argument from the letter of the statute depends on reading 'provable claims' in section 59b as meaning claims that may be proved then and there when the petition is filed. But if it can be seen then and there that the claims



filed. It does not affect the provability of a claim that before it can be allowed, it must be liquidated,<sup>4</sup> or that a preference must be surrendered.<sup>5</sup> It is sufficient if it can be seen at that time that the claim is of the kind that can be proved in the proceedings.

It has been held that the debt of a petitioning creditor must have been created at the time the act of bankruptcy complained of was committed.<sup>6</sup> But it may be observed that the statute does not so limit petitioning creditors. Section 59b provides that "creditors who have provable claims against any person" may be petitioning creditors. If the petitioner owns a provable claim at the time the petition is filed the words of the statute are satisfied.<sup>7</sup>

Whether a person may be a petitioner depends upon whether he has a claim, at the time the petition is filed, provable in bankruptcy against the estate of the debtor.<sup>8</sup> If he has a claim, which may be proved in the proceedings, he may be a

are of a kind that can be proved in the proceedings the words are satisfied; and further, no reason appears why a liquidation may not be ordered on the filing of the petition to ascertain whether it is filed rightly or not."

As to what are provable claims, see Sec. 288, *et seq.*, *post*.

<sup>4</sup> Sec. 182, *post*; *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484; *In re Manhattan Ice Co.* (C. C. A. 2nd Cir.), 116 Fed. Rep. 604, 54 C. C. A. 60, 8 Am. B. R. 569.

<sup>5</sup> Sec. 183, *post*.

<sup>6</sup> *Brake v. Callison* (C. C. A. 5th Cir.), 129 Fed. Rep. 201, 63 C. C. A. 359, 11 Am. B. R. 797; *Beers v. Hanlin*, 99 Fed. Rep. 695, 3 Am. B. R. 745.

<sup>7</sup> *In re Bevins* (C. C. A. 2nd Cir.), 165 Fed. Rep. 434, 91 C. C. A. 302, 21 Am. B. R. 344; *In re Perry & Whitney Co.*, 172 Fed. Rep. 745, 22 Am. B. R. 772, affirmed (C. C. A.

1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695.

*In re Hanyan*, 180 Fed. Rep. 498, 24 Am. B. R. 72, after quoting Sec. 59b, Judge Holt uses this language: "There is nothing in this section, or in any other provision of the bankruptcy act, requiring that a petitioning creditor should have been one at the time of the act of bankruptcy. All that the act requires is that he have a provable claim against the alleged bankrupt when the petition is filed. With entire respect for those who have intimated a different opinion, I am not able to see upon what ground courts have the right to impose additional conditions, not stated in the bankruptcy act, upon the right of any creditor having a provable claim to join in an involuntary petition."

<sup>8</sup> B. A. 1898, Sec. 59b; *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.



petitioner.<sup>9</sup> If he has not a provable claim, he can not properly join in bringing a petition.<sup>10</sup> A creditor having a debt, which will be extinguished by operation of law upon an adjudication, can not be a petitioner.<sup>11</sup> A person having an unliquidate claim for tort can not join in a petition.<sup>12</sup>

The wife of the debtor may be a petitioning creditor and may file a petition against her husband where there are less than twelve creditors.<sup>13</sup>

A surety who assumes charge of the work under a contract of indemnity becomes a creditor for the amount of the loss he sustained and is entitled to maintain a petition against his principal in involuntary bankruptcy.<sup>14</sup> A surety who has not paid the debt of a creditor can not maintain a petition.<sup>14\*</sup>

A trustee in bankruptcy of a creditor of an insolvent debtor may be a petitioner or may be substituted for the bankrupt creditor.<sup>15</sup>

<sup>9</sup> *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484, affirming *In re Grant Shoe Co.* (C. C. A. 2nd Cir.), 130 Fed. Rep. 881, 66 C. C. A. 78, 12 Am. B. R. 349; *Mills v. Fisher* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 227; *Boyce v. United States Fidelity & Guar. Co.* (C. C. A. 6th Cir.), 111 Fed. Rep. 138, 49 C. C. A. 276, 7 Am. B. R. 6; *Hays v. Wagner* (C. C. A. 6th Cir.), 150 Fed. Rep. 533, 80 C. C. A. 275, 18 Am. B. R. 163; *In re Rothenberg*, 140 Fed. Rep. 798, 15 Am. B. R. 485; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864.

<sup>10</sup> *In re Ellis* (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 74 C. C. A. 297, 16 Am. B. R. 221; *Beers v. Hanlin*, 99 Fed. Rep. 695, 3 Am. B. R. 745; *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; *In re Windt*, 177 Fed. Rep. 584, 24 Am. B. R. 536; *In re Hud-*

*son River Electric Power Co.*, 173 Fed. Rep. 934, 23 Am. B. R. 191; *First Nat. Bank v. Barnum*, 160 Fed. Rep. 245, 20 Am. B. R. 439.

<sup>11</sup> *In re Windt*, 177 Fed. Rep. 584, 24 Am. B. R. 536, it was held that a surety for a debtor in attachment having executed an officer's receipt, could not force the debtor into bankruptcy because he had not discharged the attachment.

<sup>12</sup> *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 556, 20 Am. B. R. 25.

<sup>13</sup> *In re Novak*, 101 Fed. Rep. 800, 4 Am. B. R. 311; *In re Penzansky* (Ref.), 8 Am. B. R. 99.

<sup>14</sup> *Boyce v. United States Fidelity & Guar. Co.* (C. C. A. 6th Cir.), 111 Fed. Rep. 138, 49 C. C. A. 276, 7 Am. B. R. 9.

<sup>14\*</sup> *Philips v. Dreher Shoe Co.*, 112 Fed. Rep. 404, 7 Am. B. R. 326.

<sup>15</sup> *Hays v. Wagner* (C. C. A. 6th Cir.), 150 Fed. Rep. 533, 80 C. C. A. 275, 18 Am. B. R. 163.

The purchaser or assignee of a claim, who is a creditor at the time the petition is filed, may be a petitioner.<sup>16</sup> A person who buys a claim after the petition is filed is not entitled to join as a petitioner, because he was not a creditor at the time the petition was filed.<sup>17</sup> The courts will not permit a juggling of claim to create artificially a new condition for the purpose of defeating the scheme of the act either by splitting up a claim, assigning a part of it, to make a sufficient number of petitioning creditors,<sup>18</sup> or for the purpose of keeping alive the claims of twelve creditors so as to prevent proceedings in involuntary bankruptcy being instituted by one creditor.<sup>19</sup> To entitle the purchaser of a claim to join in the petition the transaction must have been in good faith.

A partnership may be a petitioner. In such case the firm and the individual partners should be named. The omission to do so is not fatal.<sup>20</sup> A partnership can not join in a petition against a partner or *vice versa*, because the claim is not provable unless the court permits proof to be made.<sup>21</sup> Firm creditors may, as such, join in a petition against a partner because

<sup>16</sup>*In re Bevins* (C. C. A. 2d Cir.), 165 Fed. Rep. 434, 91 C. C. A. 302, 21 Am. B. R. 344.

<sup>17</sup>*Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695.

<sup>18</sup>*Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; *In re Independent Thread Co.*, 113 Fed. Rep. 998, 7 Am. B. R. 704; *In re Tribelhorn* (C. C. A. 2d Cir.), 137 Fed. Rep. 3, 69 C. C. A. 601, 14 Am. B. R. 491.

<sup>19</sup>*Leighton v. Kennedy* (C. C. A. 1st Cir.), 129 Fed. Rep. 737, 64 C. C. A. 265, 12 Am. B. R. 229; *In re Blount*, 142 Fed. Rep. 263, 16 Am. B. R. 97.

<sup>20</sup>*In re Livingston* (Haw.), 13 Am. B. R. 357.

<sup>21</sup>*In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 224, 106 C. C. A. 366, 25 Am. B. R. 148.

<sup>22</sup>*Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re Hee* (Haw.), 13 Am. B. R. 8.

In *Mills v. Fisher & Co.*, *supra*, Judge Lurton said: "The right of a partnership creditor to share in the separate estate of the members of the co-partnership, gives him such an interest in the separate property of its members as to entitle him to prove his claim against the separate estate and to make such a claim the basis for an adjudication of bankruptcy against a member of a firm who has given a preference out of his estate."

they have provable claims against the partner's separate estate.<sup>23</sup> This was the rule under former acts.<sup>23</sup>

A corporation may be a petitioner. In such cases it is proper to describe the corporation by giving the name of the state granting the charter and its principal place of business. The omission to do so is not fatal.<sup>24</sup> Officers, directors or stockholders of a corporation, if creditors, may join in filing a petition against the corporation.<sup>25</sup> Depositors in an insolvent bank have been permitted to file a petition against a stockholder, when such stockholder is personally liable under the state law for deposits.<sup>26</sup>

### § 182. Petitioning creditors having unliquidated claims.

A creditor is entitled to be a petitioner if he owns an unliquidated claim against the debtor which may be proved and liquidation under section 63.<sup>1</sup>

In such case a liquidation may be ordered on the filing of the petition to ascertain the amount of the claim and whether it is a claim which may be proved in the proceedings.<sup>2</sup>

The owner of an unliquidated claim arising in tort can not be a petitioning creditor for the reason that a claim for damages in tort is not provable in bankruptcy.<sup>10</sup> A mere contin-

<sup>23</sup> *In re Melick*, No. 9399 Fed. Cas., 4 N. B. R. 97; *In re Jewett*, No. 7306 Fed. Cas., 7 Biss. 328; *In re Redmond*, No. 11632 Fed. Cas., 9 N. B. R. 408; *In re McLean*, No. 8879 Fed. Cas., 15 N. B. R. 333; *In re Lloyd*, No. 8429 Fed. Cas., 15 N. B. R. 257.

<sup>24</sup> *In re Levingston* (Haw.), 13 Am. B. R. 357.

<sup>25</sup> *First Nat. Bank v. Wyoming Ice Co.*, 136 Fed. Rep. 406, 14 Am. B. R. 448.

<sup>26</sup> *In re Brown* (C. C. A. 9th Cir.), 164 Fed. Rep. 673, 90 C. C. A. 489, 21 Am. B. R. 123; *In re Walker* (C. C. A. 9th Cir.), 164 Fed. Rep. 680, 90 C. C. A. 644, 21 Am. B. R. 132.

<sup>1</sup> *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484, affirming *In re Grant Shoe Co.* (C. C. A. 2nd Cir.), 130 Fed. Rep. 881, 66 C. C. A. 78, 12 Am. B. R. 349; *In re Manhattan Ice Co.* (C. C. A. 2d Cir.), 116 Fed. Rep. 604, 54 C. C. A. 60, 8 Am. B. R. 569.

<sup>2</sup> *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.

<sup>10</sup> *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 556, 20 Am. B. R. 25; *In re Brinckman*, 103 Fed. Rep. 65, 4 Am. B. R. 551; *Beers v. Hanlin*, 99 Fed. Rep. 695, 3 Am. B. R. 745; *In re Morales*, 105 Fed. Rep. 761, 5 Am. B. R. 425.

gent liability is not such a claim as will entitle the owner to join in a petition.<sup>11</sup> If the obligation of the debtor is fixed, although not payable until some time in the future, the creditor may join in the petition to have the debtor adjudged a bankrupt.<sup>12</sup>

### §183. Preferred creditors as petitioners.

A creditor, who has received a preference voidable under section 60*b*, or to whom conveyances, transfers, assignments or encumbrances, void or voidable under section 67*c*, have been made or given may join in filing the petition.<sup>1</sup> The reason is that section 59*g* prohibits the allowance of such claims until the creditor surrenders his preference or other advantage, which he has unlawfully obtained over the other creditors. It does not affect the provability of his claim, merely the allowance. He therefore falls within section 59*b*, which provides that "creditors who have provable claims" may be petitioning creditors.

There are cases holding that a preferred creditor can not be a petitioner until he has surrendered his preference.<sup>2</sup> But the better rule is that he may be a petitioner, prove his claims, surrender his preference and have his claim allowed. He can not, however, procure an allowance of his claim, or vote in creditors' meeting or obtain any advantage from his

<sup>11</sup> *In re Ellis* (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 74 C. C. A. 297, 16 Am. B. R. 221.

As to Contingent Debts, see Sec. 293, *post*.

<sup>12</sup> *In re Rothenberg*, 140 Fed. Rep. 798, 15 Am. B. R. 485.

<sup>1</sup> *In re Hornstein*, 122 Fed. Rep. 266, 10 Am. B. R. 309; *In re Gillette*, 104 Fed. Rep. 769, 5 Am. B. R. 119; *In re Miller*, 104 Fed. Rep. 764, 5 Am. B. R. 140; *In re Herzikopf*, 118 Fed. Rep. 101, 9 Am. B. R. 90; *In re Vastbinder*, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864; *Stevens v.*

*Nave-McCord Mercantile Co.* (C. C. A. 8th Cir.), 150 Fed. Rep. 71, 80 C. C. A. 25, 17 Am. B. R. 709.

*In re Girard Glazed Kid Co.*, 129 Fed. Rep. 841, 12 Am. B. R. 295, the payment was made to a petitioning creditor more than four months before petition was filed.

<sup>2</sup> *In re Rogers Milling Co.*, 102 Fed. Rep. 687, 4 Am. B. R. 540; *In re Burlington Malting Co.*, 109 Fed. Rep. 777, 6 Am. B. R. 369; *In re Schenkein*, 113 Fed. Rep. 421, 7 Am. B. R. 162; *In re Fishplate Clothing Co.*, 125 Fed. Rep. 986, 11 Am. B. R. 204.

claim in the bankruptcy proceedings before he surrenders his preference. He may properly be required to surrender it before an adjudication.

#### § 184. Attachment and judgment creditors as petitioners.

A creditor, who has obtained a lien, within four months, by levy, judgment, attachment or otherwise through legal proceedings may be a petitioner.<sup>1</sup>

In such cases the lien is nullified by section 67f of the act, if the debtor is adjudged to be bankrupt. It can be seen at the time the petition is filed that if an adjudication is made, the petitioner has an unsecured claim, which can be proved in the proceedings. He is, therefore, clearly entitled to be a petitioner.<sup>2</sup> It has been said that he should procure the judicial lien to be vacated before adjudication.<sup>3</sup> If he does not do so, the adjudication avoids it as a matter of law.

If the judicial lien was obtained more than four months prior to the filing of the petition the lienor is a secured creditor.<sup>4</sup>

A judgment creditor may be a petitioner if his judgment does not constitute a lien on the debtor's property, because he is then merely an unsecured creditor.

#### § 185. Secured creditors as petitioners.

A secured creditor may be a petitioner to the extent of provable claims in excess of the value of securities held by him.<sup>1</sup>

A creditor who is fully secured is entitled to no voice in the question whether the debtor shall be adjudged a bankrupt. That is a matter which concerns, and alone concerns, the

<sup>1</sup> *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864; *In re Hornstein*, 122 Fed. Rep. 266, 10 Am. B. R. 308.

But see *contra*, *In re Schenkein*, 113 Fed. Rep. 421, 7 Am. B. R. 162;

*In re Burlington Malting Co.*, 109 Fed. Rep. 777, 6 Am. B. R. 369.

<sup>2</sup> Sec. 181, *ante*.

<sup>3</sup> *In re Hornstein*, 122 Fed. Rep. 266, 10 Am. B. R. 308.

<sup>4</sup> See Sec. 185, *post*.

<sup>5</sup> B. A. 1898, Sec. 59b.



unsecured creditors. If, however, a creditor is not fully secured, as to the excess of his debtor over the value of the security he is to be regarded as unsecured. The bankrupt act provides for determining as nearly as may be the relative value of the debt and the security to enable such creditors to participate in the bankruptcy proceedings before the final allowance of the claim in excess of the security.<sup>2</sup>

A creditor, who is fully secured, may waive his security and become a petitioner.<sup>3</sup> Joining in the petition may be considered an implied waiver, but the better practice is to expressly waive the security in the petition.<sup>4</sup> Where the security is less than the debt and the creditor, relying upon his security, is a petitioning creditor for the excess only, waiver is not necessary or proper.

**§ 186. Intervention by creditors to make the requisite number of petitioners.**

The number of creditors required to institute involuntary proceedings depends upon the total number of creditors of the debtor at the time the petition is filed.<sup>1</sup>

Where all creditors are less than twelve, one creditor, having a provable claim amounting, in excess of the value of the securities held by him, if any, to five hundred dollars or over, may file a petition in involuntary bankruptcy without other creditors joining with him.<sup>2</sup>

<sup>2</sup> B. A. 1898, Sec. 57c.

<sup>3</sup> *In re Stansell*, No. 13293 Fed. Cas., 6 N. B. R. 183; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864.

<sup>4</sup> *In re Stansell*, No. 13293 Fed. Cas., 6 N. B. R. 183.

<sup>1</sup> *Moulton v. Coburn* (C. C. A. 1st Cir.), 131 Fed. Rep. 201, 66 C. C. A. 90, 12 Am. B. R. 553, affirming *In re Coburn*, 126 Fed. Rep. 218, 11 Am. B. R. 212.

<sup>2</sup> B. A. 1898, Sec. 59b; *Stevens v. Nave-McCord Mercantile Co.* (C. C. A. 8th Cir.), 150 Fed. Rep. 71, 80 C. C. A. 25, 17 Am. B. R. 609; *Leighton v. Kennedy* (C. C. A. 1st Cir.), 129 Fed. Rep. 737, 64 C. C. A. 265, 12 Am. B. R. 229; *In re Blount*, 142 Fed. Rep. 263, 16 Am. B. R. 97; *In re Miner*, 104 Fed. Rep. 520, 4 Am. B. R. 710.

Where the total number of creditors is twelve or more, three or more creditors, whose claims amount in the aggregate in excess of the value of securities held by them, if any, to five hundred dollars or over, must join as petitioners.<sup>3</sup>

The date of the adjudication, and not that of filing the petition, is the time at which the number of petitioners is computed to determine whether the requisite number of creditors have joined in the petition.<sup>4</sup> If one creditor files a petition alleging that there are less than twelve creditors, when in fact there are more,<sup>5</sup> or where three or more creditors have joined in the petition and it is made to appear that less than three are proper petitioners,<sup>6</sup> other creditors may join at any time before adjudication for the purpose of making the requisite amount and number of petitioners. This may be done more than four months after the act of bankruptcy was committed.<sup>7</sup>

<sup>3</sup> B. A. 1898, Sec. 59b; *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864; *In re Independent Thread Co.*, 113 Fed. Rep. 998, 7 Am. B. R. 704; *In re Gillette*, 104 Fed. Rep. 769, 5 Am. B. R. 125; *In re Rogers Milling Co.*, 102 Fed. Rep. 687, 4 Am. B. R. 540; *In re Brown*, 111 Fed. Rep. 979, 7 Am. B. R. 102.

<sup>4</sup> *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665.

<sup>5</sup> B. A. 1898, Sec. 59f; *First Nat. Bank v. Haswell* (C. C. A. 8th Cir.), 174 Fed. Rep. 209, 98 C. C. A. 217, 23 Am. B. R. 330; *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re Charles*

*Town Light & Power Co.*, 183 Fed. Rep. 160, 25 Am. B. R. 687.

As to the practice in such cases see Sec. 235, *post*.

<sup>6</sup> B. A. 1898, Sec. 59f; *In re Vastbinder*, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re Etheridge Furniture Co.*, 92 Fed. Rep. 329, 1 Am. B. R. 112; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864; *In re Perry & Whitney Co.*, 172 Fed. Rep. 744, 745 and 752, and *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695.

<sup>7</sup> *In re Stein* (C. C. A. 2d Cir.), 105 Fed. Rep. 749, 45 C. C. A. 29, 5 Am. B. R. 288; *In re Mammoth Pine Lumber Co.*, 109 Fed. Rep. 308, 8 Am. B. R. 651; *In re Charles Town Light & Power Co.*, 183 Fed. Rep. 160, 25 Am. B. R. 687.

A creditor may purchase claims against the debtor in good faith for the purpose of enabling him to unite in the petition;<sup>8</sup> but creditors will not be allowed to split up claims by assigning part of them in order to create the requisite number of petitioning creditors.<sup>9</sup> Creditors who are not the real owners of claims or who do not have provable claims, will not be permitted to join as petitioners.<sup>10</sup>

A petitioner may request others to intervene when such intervention becomes necessary to preserve the proceeding,<sup>11</sup> and the debtor may also solicit them not to do so.<sup>12</sup>

<sup>8</sup> *In re Bevins* (C. C. A. 2d Cir.), 165 Fed. Rep. 434, 91 C. C. A. 302, 21 Am. B. R. 344; *In re Woodford*, No. 17972 Fed. Cas., 1 Cin. Law Bul. 37; *Ex parte Shouse*, No. 12815 Fed. Cas., Crabbe 482.

<sup>9</sup> *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695, affirming 172 Fed. Rep. 744, 22 Am. B. R. 722; *In re Halsey Electric Generator Co.*, 163 Fed. Rep. 118, 20 Am. B. R. 378; *In re Independent Thread Co.*, 113 Fed. Rep. 998, 7 Am. B. R. 704; *In re Tribelhorn* (C. C. A. 2d Cir.), 137 Fed. Rep. 3, 69 C. C. A. 601, 14 Am. B. R. 491; *In re Burlington Malting Co.*, 109 Fed. Rep. 777, 6 Am. B. R. 369.

<sup>10</sup> *In re Perry v. Whitney Co.*, 172 Fed. Rep. 744, 745, and 752, 22 Am. B. R. 772, and *Stroheim v. Perry & Whitney Co.*, 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Fed. Rep. 695.

<sup>11</sup> *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864; *In re Brett*, 130 Fed. Rep. 981, 12 Am. B. R. 492; *In re Mackey*, 110 Fed. Rep. 355, 6 Am. B. R. 577; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626.

*In Bernard v. Fromme*, 132 N. Y. App. Div. 922, 116 N. Y. Supp. 807, 22 Am. B. R. 585, an attorney solic-

ited a creditor to join in the petition and agreed to personally pay his claim in full. In enforcing this agreement the court said: "It may be that it was reprehensible for the attorney, because he was an attorney, to make such a promise in order to earn the fee and compensation which might be expected to flow to him from the bankruptcy proceedings, but it was not illegal for plaintiff to consent to sign the petition, or to agree to accept from the attorney personally, not from the bankrupt or her estate, the amount of his claim. Such an agreement did not tend to defeat the intention of the bankruptcy statute, because it had no tendency to prevent the due and proportionate distribution of the bankrupt's estate among her creditors. A very different question is thus presented from that considered in numerous cases wherein a creditor, in consideration of a secret promise for the payment of his claims, has signed or joined in an application for the bankrupt's release. So, too, a very different case would be presented if the agreement had been that the bankrupt herself would pay plaintiff's claim in full."

<sup>12</sup> *In re Brown*, 111 Fed. Rep. 979, 7 Am. B. R. 102.



When a creditor intervenes for the purpose of joining in the petition he has a right to prosecute the original petition in the same manner as the petitioning creditors could have done.<sup>13</sup> He may insist upon a trial although the petitioning creditors consent to continue the case.<sup>14</sup>

A creditor who has joined as a petitioner, will not be permitted to withdraw if any petitioner objects, when such withdrawal will result in the dismissal of the petition, because the number of petitioning creditors is less than the requisite number,<sup>15</sup> or the amount of the petitioners' debts is less than \$500.<sup>1</sup>

<sup>13</sup> *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re Bedingfield*, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re Stein* (C. C. A. 2nd Cir.), 105 Fed. Rep. 749, 45 C. C. A. 29, 5 Am. B. R. 288; *In re Ryan*, 114 Fed. Rep. 373, 7 Am. B. R. 562; *In re Lacy*, No. 7965, Fed. Cas., 12 Blatch. 322.

*In Neustadter v. Dry Goods Co.*, 96 Fed. Rep. 830, 3 Am. Bankr. R. 96, it was said that "There is no right given to other creditors to come in and take the conduct of the case out of the hands of the original petitioners, and it can not reasonably be presumed that congress intended to authorize different creditors to come in successively and retry issues which have been decided, and in that way make the pendency of involuntary cases perpetual."

<sup>14</sup> *Knickerbocker Ins. Co. v. Comstock*, No. 7879, Fed. Cas., 9 N. B. R. 484.

<sup>15</sup> *In re Bedingfield*, 96 Fed. Rep. 190, 2 Am. B. R. 255; *In re Quincy Granite Quarries Co.*, 147 Fed. Rep. 279, 16 Am. B. R. 823; *In re Cronin*, 98 Fed. Rep. 584, 3 Am. B. R. 552;

*In re Lewis*, 129 Fed. Rep. 147, 11 Am. B. R. 683.

<sup>16</sup> *In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20 Am. B. R. 537; *In re Bedingfield*, 96 Fed. Rep. 190, 2 Am. B. R. 355.

*In re Stovall Grocery Co.*, *supra*, Judge Newman said: "The petition in bankruptcy in this case was made by a number of creditors whose debts aggregated \$529.72. Two creditors have withdrawn their claims, leaving the total amount of indebtedness contained in the petition less than \$500. I doubt if this can be done, especially in view of what seems to be the fact that these two claims that were withdrawn were purchased by a son of the members of the bankrupt firm. While the amount paid for the claims is not shown, such conduct, if tolerated, allows an alleged bankrupt, after bankruptcy proceedings have been instituted, to buy up the claims of creditors filing a petition against him, and thereby give the creditors whose claims are so purchased a preference; doing in this way the very thing which it is the purpose of the Bankrupt Act to prevent."

An intervening creditor has been allowed to withdraw, before any final action of the court making him a party to the original petition, where he joined in the petition under a misunderstanding or mistake of fact.<sup>17</sup> Where the other petitioning creditors procure the payment of the third petitioner's claim, he may withdraw, although it results in a dismissal.<sup>18</sup>

### § 187. Counting creditors.

In computing the number of creditors of a debtor for the purpose of determining how many creditors must join in the petition, only the general or unsecured creditors are counted.

If creditors have become disqualified to join as petitioners, as by assenting to a general assignment for the benefit of creditors or otherwise, they will not be counted.<sup>1</sup>

Creditors will not be permitted to create artificially a new condition and thus by indirect methods defeat the scheme of the act. They will not be allowed to split up claims by assigning part of them, in order to create the requisite number of petitioning creditors,<sup>2</sup> or to keep alive the claims of twelve creditors so as to prevent proceedings being instituted by one creditor.<sup>3</sup> In one case the court refused to count, as creditors, persons to whom the debtor owed small bills, contracted after

<sup>17</sup> *In re Coburn*, 126 Fed. Rep. 218, 11 Am. B. R. 212, affirmed in *Moulton v. Coburn* (C. C. A. 1st Cir.), 131 Fed. Rep. 201, 66 C. C. A. 90, 12 Am. B. R. 553.

<sup>18</sup> *Cummins Grocery Co. v. Talley* (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. —, 26 Am. B. R. 484.

<sup>1</sup> *In re Miner*, 104 Fed. Rep. 520, 4 Am. B. R. 710; *In re Blount*, 142 Fed. Rep. 263, 16 Am. B. R. 297.

As to who may be estopped from being petitioners, see Sec. 188, *post*.

<sup>2</sup> *Stroheim v. Perry & Whitney* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R.

695, affirming 172 Fed. Rep. 744, 22 Am. B. R. 722; *In re Halsey Electric Generator Co.*, 163 Fed. Rep. 118, 20 Am. B. R. 378; *In re Independent Thread Co.*, 113 Fed. Rep. 998, 7 Am. B. R. 704; *In re Tribelhorn* (C. C. A. 2d Cir.), 137 Fed. Rep. 3, 69 C. C. A. 601, 14 Am. B. R. 491; *In re Burlington Malting Co.*, 109 Fed. Rep. 777, 6 Am. B. R. 369.

<sup>3</sup> *Leighton v. Kennedy* (C. C. A. 1st Cir.), 129 Fed. Rep. 737, 64 C. C. A. 265, 12 Am. B. R. 229; *In re Blount*, 142 Fed. Rep. 263, 16 Am. B. R. 97.

the act of bankruptcy was committed for family necessities or similar purposes, where the effect was to defeat justice.<sup>4</sup>

Creditors holding claims which are secured or have priority are not counted in computing the number of creditors or the amount of their claims, unless the amount of such claims exceed the values of such securities or priorities, and then only for such excess.<sup>5</sup>

A creditor having a voidable preference, should not be counted in computing the number of creditors of a debtor, that must join in the petition for an adjudication in bankruptcy until he surrenders his preference.<sup>6</sup> If he surrenders his preference before the adjudication he may be counted after the surrender.<sup>7</sup>

Creditors who were employed by the debtor at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, are not to be counted.<sup>8</sup> Every generation in lineal consanguinity constitutes a different degree, reckoning either upwards or downwards. The method of computing the degree of collateral relationship at common law, in the words of Mr. Justice Blackstone, is as follows: "We begin at the common ancestor and run downwards, and in whatever degree the two

<sup>4</sup> *In re Blount*, 142 Fed. Rep. 263, 268, 16 Am. B. R. 297, Judge Triebner said: "To treat the holders of such claims as creditors to be considered in determining the number existing for the purpose of preventing a *bona fide* creditor to institute proceedings of this nature, when an insolvent conveys all his property, with the avowed intention of preferring all of his creditors except one, would be a violation, if not of the letter, certainly of the spirit, of the bankrupt law, and can not be tolerated."

<sup>5</sup> B. A. 1898, Sec. 59b and Sec. 56b; *In re Blount*, 142 Fed. Rep. 263, 16 Am. B. R. 297.

<sup>6</sup> *Stevens v. Nave-McCord Mercantile Co.* (C. C. A. 8th Cir.), 150 Fed. Rep. 71, 80 C. C. A. 25, 17 Am. B. R. 609; *In re Blount*, 142 Fed. Rep. 263, 16 Am. B. R. 297; *In re Miner*, 104 Fed. Rep. 520, 4 Am. B. R. 710.

<sup>7</sup> *In re Vastbinder*, 126 Fed. Rep. 417, 11 Am. B. R. 118; *Stevens v. Nave-McCord Mercantile Co.* (C. C. A. 8th Cir.), 150 Fed. Rep. 71, 80 C. C. A. 25, 17 Am. B. R. 609.

<sup>8</sup> B. A. 1898, Sec. 59e.

persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other."<sup>2</sup>

**§188. Creditors may be estopped from being petitioners.**

Creditors may be estopped by their own consent to an act from alleging it against their debtor as an act of bankruptcy to procure an adjudication.<sup>1</sup>

The ground of the rule is, that to allow him to do so would be inconsistent with good faith and fair dealing, encourage deceit and put it within the power of creditors to entrap the debtor by inducing him to commit acts apparently fraudulent as to them, which they intend afterwards to repudiate to his advantage. A person will not therefore be allowed to complain of an act of bankruptcy where he induced the act, or after its commission has so acted with regard to it that others have the right to act on the faith of its validity so far as his subsequent conduct can effect it.<sup>1</sup>

<sup>2</sup> Black. Com. 206; Coke on Litt. 23; 3 Washburn on Real Property, star p. 406; McDowell v. Adams, 45 Penn. St. 432.

<sup>1</sup> Stroheim v. Perry & Whitney Co. (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; Clark v. Henne & Meyer (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 62 C. C. A. 172, 11 Am. B. R. 583; Woolford v. Diamond State Steel Co., 138 Fed. Rep. 582, 15 Am. B. R. 31; Simonson v. Sinsheimer (C. C. A. 6th Cir.), 95 Fed. Rep. 948, 37 C. C. A. 337, 3 Am. B. R. 824; Moulton v. Coburn (C. C. A. 1st Cir.), 131 Fed. Rep. 203, 66 C. C. A. 99, 12 Am. B. R. 553; *In re* Weiss, 142 Fed. Rep. 279, 15 Am. B. R. 459; *In re* Miner, 104 Fed. Rep. 520, 4 Am. B. R. 710; Durham Paper Co. v. Seaboard Knitting Mills, 121 Fed. Rep. 179, 10 Am. B. R. 29.

In *Simonson v. Sinsheimer, supra*, after reviewing the cases, the court said: "Coming to apply our conclusions to the case at bar, we can not doubt that the answer tendered made a case of estoppel against the petitioners. They are alleged to have become parties to the assignment proceedings, to have filed their claims under the assignment, to have requested a reference to pass upon the claims, the accounts of the assignee, and the questions of distribution. They waited three months and a half before filing their petition. By their acquiescence they certainly induced the assignors, the assignee, and the purchasers of the assets from the assignee to believe that they would not seek to set aside the assignment."

The case was reversed and remanded to the district court, where

A creditor who participates in, receives benefits under, or assents to a general assignment for the benefit of creditors, is estopped from afterwards filing or joining in a petition charging the assignment as an act of bankruptcy.<sup>2</sup> The same rule applies where the act of bankruptcy complained of is the appointment of a receiver.<sup>3</sup>

The mere fact of proving a claim in the case of an assignment or receivership proceedings is not of itself sufficient to estop a creditor from maintaining a petition against the debtor.<sup>4</sup> The acceptance of the position of assignee by a person who is secretary of a corporation does not estop the corporation.<sup>5</sup> Where a creditor is induced by misrepresentations of the debtor to participate in an assignment or receivership proceeding he is not estopped from being a petitioner in bankruptcy against the debtor.<sup>6</sup>

Where a judicial lien was procured by the attorney for the petitioning creditors for the purpose of laying a foundation

answer was filed and evidence taken. The court held that the evidence did not establish an estoppel and adjudged the respondents to be bankrupts (96 Fed. Rep. 579). This decree was affirmed on appeal by the circuit court of appeals for the sixth circuit (100 Fed. Rep. 426, 3 Am. B. R. 824).

<sup>2</sup> *Stroheim v. Perry & Whitney* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; *Moulton v. Coburn* (C. C. A. 1st Cir.), 131 Fed. Rep. 201, 66 C. C. A. 90, 12 Am. B. R. 553; *Clark v. Henne & Meyer* (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 62 C. C. A. 178, 11 Am. B. R. 583; *Simonson v. Sinsheimer* (C. C. A. 6th Cir.), 95 Fed. Rep. 948, 37 C. C. A. 337, 3 Am. B. R. 824, *In re Miner*, 104 Fed. Rep. 520, 4 Am. B. R. 710; *Durham Paper Co. v. Seaboard Knitting Mills*, 121 Fed. Rep. 179,

10 Am. B. R. 29; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461.

<sup>3</sup> *Woolford v. Diamond State Steel Co.*, 138 Fed. Rep. 582, 15 Am. B. R. 31; *Lowenstein v. McShane Mfg. Co.*, 130 Fed. Rep. 1007, 12 Am. B. R. 602.

<sup>4</sup> *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *Hays v. Wagner* (C. C. A. 6th Cir.), 150 Fed. Rep. 533, 80 C. C. A. 275, 18 Am. B. R. 395; *In re Curtis* (C. C. A. 7th Cir.), 94 Fed. Rep. 630, 36 C. C. A. 430, 2 Am. B. R. 226; *In re Salmon & Salmon*, 143 Fed. Rep. 395, 16 Am. B. R. 136.

<sup>5</sup> *In re Winston*, 122 Fed. Rep. 187, 10 Am. B. R. 171.

<sup>6</sup> *Canner v. Webster Tapper Co.* (C. C. A. 1st Cir.), 168 Fed. Rep. 519, 93 C. C. A. 541, 21 Am. B. R. 872.



for bankruptcy proceedings, the lienor was held to be estopped from charging the debtor's failure to discharge the preference as an act of bankruptcy.<sup>7</sup>

### § 189. When creditors may file a second petition.

Creditors of a bankrupt, who have proved claims against his estate, may file a second petition to have him again adjudicated a bankrupt to reach after acquired property, where a discharge was refused him in the first proceeding, if he has committed an act of bankruptcy within four months of the filing of the second petition.

A second adjudication can not be had where the act complained of occurred more than four months before filing the second petition.<sup>1</sup>

### § 190. Amount of petitioners' claims.

The petitioning creditors must have provable claims which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over.<sup>1</sup> If there is only one petitioner his claim must amount to five hundred dollars.<sup>1</sup>

The amount at which the claim of a secured creditor is to be reckoned is the amount the claim exceeds the value of the security or priority.<sup>2</sup>

The amount of the debts of creditors intervening to join in a petition is counted to make up the \$500.<sup>3</sup> When a creditor intervenes for this purpose he thereby becomes a petitioning creditor.

<sup>7</sup> *In re Weiss*, 142 Fed. Rep. 279, 15 Am. B. R. 459.

<sup>1</sup> *In re Barton's Estate*, 144 Fed. Rep. 540, 16 Am. B. R. 569.

<sup>1</sup> B. A. 1898, Sec. 59b.

<sup>2</sup> B. A. 1898, Sec. 56b.

<sup>3</sup> *In re Bevins* (C. C. A. 2d Cir.), 165 Fed. Rep. 434, 91 C. C. A. 302,

21 Am. B. R. 344; *Hays v. Wagner* (C. C. A. 6th Cir.), 150 Fed. Rep.

533, 80 C. C. A. 275, 18 Am. B. R.

163; *In re Etheridge Furniture Co.*,

92 Fed. Rep. 329, 1 Am. B. R. 112;

*In re Bedingfield*, 96 Fed. Rep. 190,

2 Am. B. R. 355.

Interest constitutes part of a debt provable against the estate of the bankrupt and may be added to the principal to make the jurisdictional amount.<sup>4</sup>

**§ 191. Against whom a petition may be filed.**

To warrant or justify the institution of involuntary proceedings against a debtor three things must concur with reference to such debtor.

*First.* The debtor must be within the class subject to the provisions and entitled to the benefits of the statute as an involuntary bankrupt. Who may be adjudged involuntary bankrupts is considered in another place.<sup>1</sup>

*Second.* He must owe debts to the amount of \$1,000.00 or over.<sup>2</sup>

Not only debts unpaid at the date of bankruptcy, but also those preferentially paid within four months, may be counted to make up this amount.<sup>3</sup> In case of a general assignment for creditors, the amount of debts is computed as of the date of the assignment.<sup>4</sup>

*Third.* He must have committed an act of bankruptcy within four months prior to the filing of the petition.<sup>5</sup> The statute declares what shall constitute an act of bankruptcy.<sup>6</sup> Unless the act of the debtor complained of by the creditor or creditors comes within the enumeration contained in the statute it is not an act of bankruptcy and can not be a ground for instituting involuntary proceedings.<sup>7</sup>

<sup>4</sup> *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

<sup>1</sup> Chap. IX. See also B. A. 1898, Sec. 4, as amended June 25, 1910, 36 Stat. at L. 838.

<sup>2</sup> B. A. 1898, Sec. 4b. *Taft Co. v. Century Sav. Bank* (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594; *In re Pinson & Co.*, 180 Fed. Rep. 787, 24 Am. B. R. 804; *In re Cain* (Ref.), 2 Am. B. R. 378.

<sup>3</sup> *In re Tirre*, 95 Fed. Rep. 425, 2 Am. B. R. 493; *In re Cain* (Ref.),

2 Am. B. R. 378; *In re McMurtrey* (Ref.), 15 Am. B. R. 427.

<sup>4</sup> *In re Jacobson* (Ref.), 21 Am. B. R. 921.

<sup>5</sup> B. A. 1898, Sec. 3b.

<sup>6</sup> B. A. 1898, Sec. 3a as amended February 5, 1903, 32 Stat. at L. 797.

<sup>7</sup> *In re Empire Metallic Bedstead Co.*, 98 Fed. Rep. 981, 39 C. C. A. 372, 3 Am. B. R. 575, the circuit court of appeals for the second circuit said: "When acts of bankruptcy are classified, as they are

One act specified in the statute is sufficient to support a petition. Several different acts of bankruptcy may be charged against the same defendant and if one is proved it will lead to an adjudication.

These facts are jurisdictional and must all exist in order to give the court power to adjudicate the debtor a bankrupt. If any one of these three things does not exist the proceeding fails, as where it does not appear that the debtor is one subject to be adjudged an involuntary bankrupt,<sup>8</sup> or does not owe debts to the amount of one thousand dollars,<sup>9</sup> or has not committed an act of bankruptcy specified in the statute.<sup>10</sup>

If the jurisdictional facts exist, but are not alleged in the petition, an amendment may be allowed to make the petition conform to the facts.<sup>11</sup> A court of bankruptcy has jurisdiction of the proceedings to determine whether these facts exist or not.<sup>12</sup>

The statute provides that a petition may be filed against a person who is insolvent.<sup>13</sup> In construing this clause it has been held that solvency at the time the petition was filed is a defense only when an act of bankruptcy under clause one of Section 3a is charged in petition.<sup>14</sup>

in the statute of 1898, it is not the province of a court to enlarge the classification, because the omitted class seems to partake of the sin of the named class."

<sup>8</sup> *In re Taylor* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 57 C. C. A. 150, 9 Am. B. R. 762.

<sup>9</sup> *Taft Co. v. Century Sav. Bank* (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594.

<sup>10</sup> *In re Empire Metallic Bedstead Co.* (C. C. A. 2d Cir.), 98

Fed. Rep. 981, 39 C. C. A. 372, 3 Am. B. R. 575.

<sup>11</sup> See Amendment, Sec. 202, *post*.

<sup>12</sup> *In re Altonwood Park Co.* (C. C. A. 2nd Cir.), 160 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31; *In re New England Breeders Ass.* (C. C. A. 1st Cir.), 169 Fed. Rep. 586, 95 C. C. A. 84, 22 Am. B. R. 124; *In re Tully*, 156 Fed. Rep. 634, 19 Am. B. R. 604.

<sup>13</sup> B. A. 1898, Sec. 3b.

<sup>14</sup> *West v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *Day v. Beck & Gregg Hdwe. Co.* (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 52 C. C. A. 468, 8 Am. B. R. 175.



**§ 192. In which district a creditor's petition may be filed.**

A creditor's petition must be filed in the court of bankruptcy in which the debtor could file a voluntary petition.<sup>1</sup>

The court in which involuntary proceedings may be instituted depends upon where the debtor has had his domicile, resided or had his principal place of business for the greater portion of the preceding six months, irrespective of the residence of his creditors.<sup>2</sup>

An involuntary petition against the firm may be filed in any district in which any partner resides.<sup>3</sup>

Where the debtor has had his domicile, resided, or had his principal place of business in the same district for the greater portion of six months, there is but one court in which his creditors may institute proceedings to have him adjudged an involuntary bankrupt.

Where he has resided or had his domicile in one district for the greater portion of six months and his principal place of business in another for an equal length of time the creditors may institute proceedings in either district.<sup>4</sup>

There is a legal distinction between "domicile" and "residence."<sup>5</sup> A debtor may therefore have a domicile in one district and reside in another and have his principal place of business in a third district. In such cases the creditors have an election of three districts within which to institute involuntary proceedings; namely, the district of his domicile, the district of his residence, or the district in which he has his principal

<sup>1</sup> See Sec. 162, *ante*.

<sup>2</sup> B. A. 1898, Sec. 2, clause 1; *In re Plotke* (C. C. A. 7th Cir.), 104 Fed. Rep. 964, 44 C. C. A. 282, 5 Am. B. R. 171; *In re Filer*, 108 Fed. Rep. 209, 5 Am. B. R. 332; *In re Mackey*, 110 Fed. Rep. 355, 6 Am. B. R. 577.

<sup>3</sup> *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588; *In re Waxelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 267.

<sup>4</sup> *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454; *In re Pennsylvania Consolidated Coal Co.*, 163 Fed. Rep. 579, 20 Am. B. R. 872.

<sup>5</sup> See Sec. 193, *post*; *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 397, 11 Am. B. R. 679; *In re Williams*, 99 Fed. Rep. 544, 3 Am. B. R. 677.

place of business, provided that in each case it has extended over the greater portion of the six months preceding the filing of the petition.<sup>6</sup>

It is obvious that involuntary petitions may be filed against the same debtor in two or more districts; or that two or more petitions may be filed against the same debtor by different creditors in the same district. The order of proceeding in such cases is regulated by the general orders.<sup>7</sup>

In case the debtor has not had a principal place of business, resided, or had a domicile, but has property within the United States, the creditors must file their petition in the district within which the property is situated. If he has property in more than one district, they may elect in which of such districts to institute proceedings.

### § 193. The period of residence, domicile or business.

Involuntary proceedings may be instituted in any district in which the debtor has had his residence, domicile, or principal place of business for the greater portion of the six months preceding the filing of the petition, that is, more than three months.<sup>1</sup>

The act 1867 provided for filing a petition in the "judicial district in which debtor has resided or carried on business for the six months next preceding the time of filing such petition or for the longest period during such six months".<sup>2</sup> It was immaterial how short a period the debtor had resided or carried on business provided it was the longest period of doing so anywhere during the six months.<sup>3</sup> Under the present act the period must be more than three months of the preceding six months.

<sup>6</sup> See Secs. 193 and 195, *post*.

<sup>7</sup> Gen. Ords. 6 and 7. See Secs. 196 *et seq.*, *post*.

<sup>1</sup> B. A. 1898, Sec. 2, clause 1. *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588; *In re Filer*, 108 Fed. Rep. 209, 5 Am. B. R. 332; *In re Mackey*, 110 Fed. Rep. 355, 6 Am.

B. R. 577; *In re Harris* (Ref.), 11 Am. B. R. 649; *In re Berner* (Ref.), 3 Am. B. R. 325.

<sup>2</sup> R. S. Sec. 5014.

<sup>3</sup> *In re Foster*, No. 4962 Fed. Cas., 3 Ben. 386; *In re Goodfellow*, No. 5536, 1 Low. 510.

Where the debtor has had his residence, domicile, or principal place of business within the district during the whole period of the six months immediately preceding the filing of the petition, no question can arise as to the district in which the petition is to be filed.

Where he has had his residence, domicile, or principal place of business (according to the ground of jurisdiction alleged) in different districts during such six months, then the petition must be filed in the district in which he has had his residence, domicile, or principal place of business for the greater portion of the six months, or for more than three months. It is sufficient if a person has had any one of the three (residence, domicile, or place of business) in the district for the greater part of six months immediately preceding the date of bankruptcy.<sup>4</sup> It is immaterial in what portion of the six months' period this occurs.<sup>5</sup>

<sup>4</sup> *In re Plotke* (C. C. A. 7th Cir.), 104 Fed. Rep. 964, 44 C. C. A. 282, 5 Am. B. R. 171; *In re Williams*, 120 Fed. Rep. 34, 9 Am. B. R. 736; *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588; *In re Berner* (Ref.), 3 Am. B. R. 325; *In re Harris* (Ref.), 11 Am. B. R. 649.

<sup>5</sup> *In re Isaacson*, 161 Fed. Rep. 777, 20 Am. B. R. 437, and 161 Fed. Rep. 779, 20 Am. B. R. 430, the courts in both districts held that the removal by the debtor of his domicile a few days before the petition was filed did not defeat the jurisdiction of the court, where it had been within the district for more than three months at the time of removal.

*In re Berner* (Ref.), 3 Am. B. R. 325, the debtor had a domicile within the district for the first four months of the six month's period and the petition was filed two

months after he had changed his domicile. A motion to dismiss the petition was denied.

*In re Plotke* (C. C. A. 7th Cir.), 104 Fed. Rep. 964, 44 C. C. A. 282, 5 Am. B. R. 171, the court said, "The limitation is made with reference alone to the duration of the business in the district, and regardless of the fact that its location may be changed short of that period, and thus be carried on in different districts without exceeding the three months in either, or that it may be discontinued entirely without reaching the time limited in any one; and the provisions in reference to domicile and residence are equally restricted, except for the distinction as to residence, that it may be retained in one district after domicile is changed to another."

If he has not had a residence, or a domicile or a principal place of business for more than three months in the district, the court is without jurisdiction.<sup>6</sup>

### § 194. Domicile and residence.

There is a legal distinction between "domicile" and "residence."<sup>1</sup>

By domicile is meant that residence from which there is no present intention to remove, or to which there is a general intention to return.<sup>2</sup> The domicile of a debtor does not depend on citizenship, nor on residence, but on the concurrence of two elements: *first*, residence in a place, and, *second*, the intention for the present to make that place his home.<sup>3</sup> A person can not be without a legal domicile somewhere.<sup>4</sup>

The domicile of a person may be changed. To constitute a new domicile two things are indispensable: *first*, residence in a new locality, and, *second*, the intention to remain there. The change can not be made except *facto et animo*. Both are alike necessary. Mere absence from a fixed home, however, long continued, can not work the change.<sup>5</sup> There must be *animus* to change the prior domicile for another. Until

<sup>6</sup> *In re Plotke* (C. C. A. 7th Cir.), 104 Fed. Rep. 964, 44 C. C. A. 282, 5 Am. B. R. 171; *In re Perry Aldrich Co.*, 165 Fed. Rep. 249, 21 Am. B. R. 244; *In re Williams*, 120 Fed. Rep. 34, 9 Am. B. R. 736; *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588.

<sup>1</sup> *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 397, 11 Am. B. R. 679; *In re Williams*, 99 Fed. Rep. 544, 3 Am. B. R. 677; *In re Clisdell* (Ref.), 2 Am. B. R. 424.

<sup>2</sup> *In re Williams*, 99 Fed. Rep. 544, 3 Am. B. R. 677.

<sup>3</sup> *In re Williams*, 99 Fed. Rep. 544, 3 Am. B. R. 677; *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 397, 11 Am. B. R. 679; *Mitchell v. United States*, 21 Wall. 352-3, 22 L. Ed. 584; *Morris v. Gilmer*, 129 U. S. 328, 32 L. Ed. 690.

<sup>4</sup> *Desmare v. United States*, 93 U. S. 610, 23 L. Ed. 959.

<sup>5</sup> *In re Williams*, 99 Fed. Rep. 544, 3 Am. B. R. 677; *In re Isaacson*, 161 Fed. Rep. 779, 23 Am. B. R. 98.

the new one is acquired the old one remains.<sup>6</sup> The fact that a man absconds to avoid arrest, leaving his family behind, does not change his domicile.<sup>7</sup>

The domicile of a corporation is the state in which it was originally created and it can not change its domicile by filing its charter or being incorporated in another state.<sup>8</sup> Where there is more than one district in a state, the domicile of the corporation is that district within which the general business of the corporation is done and where it has its headquarters and general offices.<sup>9</sup> An involuntary proceeding in bankruptcy may be instituted against a domestic corporation in the district in which it has its principal business office.<sup>10</sup>

Where the business transactions of two alleged bankrupt corporations organized in different jurisdictions are so intermingled as to be impossible of separation and the necessities of the case require that the entire joint estate be brought into one jurisdiction for the purpose of administration, the court which, first, under proper pleadings and by proper process, acquires jurisdiction of the persons and possession of the property, may proceed to a final adjudication and determination of the rights of the creditors in the joint property.<sup>11</sup>

By residence is meant one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time.

<sup>6</sup> *In re Isaacson*, 161 Fed. Rep. 779, 23 Am. B. R. 98; *In re Williams*, 99 Fed. Rep. 544, 3 Am. B. R. 677; *In re Schultz*, 135 Fed. Rep. 228, 14 Am. B. R. 317; *Morris v. Gilmer*, 129 U. S. 328, 32 L. Ed. 690; *Mitchell v. United States*, 21 Wall. 353, 22 L. Ed. 584.

<sup>7</sup> *In re Filer*, 108 Fed. Rep. 209, 5 Am. B. R. 332; *In re Oldstein*, 182 Fed. Rep. 409, 25 Am. B. R. 138.

<sup>8</sup> *St. Louis & San Francisco R. R. Co. v. James*, 161 U. S. 545, 40 L. Ed. 802; *Southern Railway Co. v. Allison*, 190 U. S. 326; *White*

*Mountain Paper Co. v. Morse* (C. C. A. 1st Cir.), 127 Fed. Rep. 643, 62 C. C. A. 369, 11 Am. B. R. 633; *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454.

<sup>9</sup> *Galveston, etc., R. R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248; *Harvey v. Richmond, etc., R. Co.* 64 Fed. Rep. 19.

<sup>10</sup> *In re Elmira Steel Co.*, 109 Fed. Rep. 456, 5 Am. B. R. 484.

<sup>11</sup> *In re Alaska American Fish Co.*, 162 Fed. Rep. 498, 20 Am. B. R. 712; *In re Southwestern Bridge & Iron Co.*, 133 Fed. Rep. 568, 13 Am. B. R. 304.



To give the court of bankruptcy jurisdiction to adjudge a debtor bankrupt on the ground of residence within its jurisdiction for the greater portion of the preceding six months, the debtor's residence must be "*bona fide* and not pretentious." <sup>12</sup>

Where a bankrupt procures a dismissal of proceedings against him in one district on the ground that he is a resident of another state, which he names, he and his administrator will be estopped to deny residence in that state for the purpose of defeating proceedings instituted there. <sup>13</sup>

Where it is sought to show a change of domicile or residence the burden of proof lies upon him, who asserts the change. <sup>14</sup>

#### § 195. The principal place of business.

A petition in involuntary bankruptcy may be filed in the district in which the debtor has had his principal place of business for the greater portion of the preceding six months, although he may not have resided or had his domicile within that district. <sup>1</sup>

The phrase "principal place of business" implies that the debtor is carrying on what is commonly known as business, as distinguished from other vocations or employment. He must provide the money that is needed or have an interest in the business by contributing the labor, or, if the capital is borrowed, the business must be done in the debtor's name. A debtor can not be said to have a place of business in a district where he merely superintends the business of another or is

<sup>12</sup> *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 397, 11 Am. B. R. 679; *In re Dinglehoeft*, 109 Fed. Rep. 866, 6 Am. B. R. 242; *In re Williams*, 120 Fed. Rep. 34, 9 Am. B. R. 736.

<sup>13</sup> *Long v. Lockman*, 135 Fed. Rep. 197, 14 Am. B. R. 172.

<sup>14</sup> *In re Waxelbaum*, 97 Fed. Rep. 562, 3 Am. B. R. 267; *In re Scott*, 111 Fed. Rep. 144, 7 Am. B. R. 39; *In re Berner* (Ref.), 3 Am. B. R. 325; *In re Clisdell* (Ref.), 2 Am. B. R. 424.

<sup>1</sup> *In re Mackey*, 110 Fed. Rep. 355, 6 Am. B. R. 577.

employed as a clerk,<sup>2</sup> or where he is engaged in winding up the affairs of an insolvent concern to which he belongs,<sup>3</sup> or where he is engaged in any vocation not properly included in the word "business."

Where a debtor has several places of business in different districts, the creditors' petition must be filed in the district in which he has his principal place of business. This limits to one district jurisdiction of involuntary proceedings on this ground. The principal place of business is, generally speaking, where the general offices or headquarters are located. It is the place where his principal business is actually done. Where the principal place of business is located is a question of fact to be determined by the circumstances in each particular case.

The principal place of business of a corporation is usually where the general offices or headquarters are located without regard to the place named in the charter as the principal place of business.<sup>4</sup> It is where the actual business of the concern is chiefly transacted and managed. It has been held that the principal place of business of a manufacturing corporation, which had shut down its works, was where it maintained its office for the transaction of its executive and banking business.<sup>5</sup> Where a Maine corporation stopped business in Mas-

<sup>2</sup> *In re Brice*, 93 Fed. Rep. 942, 2 Am. B. R. 197; *In re Magic*, No. 8951, Fed. Cas., 2 Ben. 369; *In re Kinsman*, No. 7832 Fed. Cas., 1 N. Y. Leg. Obs. 309.

<sup>3</sup> *In re Little*, No. 8391, Fed. Cas., 3 Ben. 25; *In re Perry Aldrich Co.*, 165 Fed. Rep. 249, 21 Am. B. R. 244.

<sup>4</sup> *In re Matthews Consolidated Slate Co.* (C. C. A. 1st Cir.), 144 Fed. Rep. 737, 75 C. C. A. 603, 16 Am. B. R. 360, affirming 144 Fed. Rep. 724, 16 Am. B. R. 407; *Tiffany v. La Plume Condensed Milk Co.*, 141 Fed. Rep. 444, 15 Am. B. R. 413; *Dressel v. North State Lumber Co.*, 107 Fed. Rep. 255, 5 Am. B. R.

744; *In re Magid-Hope Silk Mfg. Co.*, 110 Fed. Rep. 352, 6 Am. B. R. 610; *In re Marine Machine & Conveyor Co.*, 91 Fed. Rep. 630, 1 Am. B. R. 431; *In re Pennsylvania Consolidated Coal Co.*, 163 Fed. Rep. 579, 20 Am. B. R. 872; *In re Elmira Steel Co.*, 109 Fed. Rep. 456, 5 Am. B. R. 484.

<sup>5</sup> *In re Marine Machine & Conveyor Co.*, 91 Fed. Rep. 630, 1 Am. B. R. 421.

But see *Tiffany v. La Plume Condensed Milk Co.*, 141 Fed. Rep. 444, 15 Am. B. R. 413; *Elmira Steel Co.*, 109 Fed. Rep. 456, 5 Am. B. R. 484.

sachusetts by order of court and receivers were put in charge "to collect its assets," it was held not to have a place of business in Massachusetts.<sup>6</sup>

Where a corporation has several places of business, located in different districts, its principal place of business is where the affairs of the corporation are actually managed. This is a question of fact to be determined by the circumstances of each particular case.<sup>7</sup>

<sup>6</sup>*In re Perry Aldrich Co.*, 165 Fed. Rep. 249, 21 Am. B. R. 244.

<sup>7</sup>*In re Matthews Consolidated Slate Co.* (C. C. A. 1st Cir.), 144 Fed. Rep. 737, 75 C. C. A. 603, 16 Am. B. R. 360, affirming 144 Fed. Rep. 724, 16 Am. B. R. 407, the debtor was a New Jersey Corporation operating quarries in Vermont and New York, but having its executive offices and selling agency in Boston. The principal banking was done in Boston and supreme direction and control was exercised therefrom. Books of account were kept there, and the great bulk of its sales were there negotiated. It was held that Boston was the principal place of business of the company, and that the corporation was subject to the jurisdiction of the bankruptcy court for the district of Massachusetts.

In *Tiffany v. La Plume Condensed Milk Co.*, 141 Fed. Rep. 444, 15 Am. B. R. 413, it was held that a company chartered under the law of the state of New Jersey and having a nominal office in that state in order to comply with the laws thereof, but having its principal place of business at Scranton, could be adjudged a bankrupt in the middle district of Pennsylvania, and this notwithstanding that six months prior to the proceedings in bankruptcy a fire had destroyed its plant.

In *Dressel v. North State Lumber Co.*, 107 Fed. Rep. 255, 5 Am. B. R. 744, it was held that notwithstanding the corporation was incorporated in another state, and a provision in the articles of its association named a place within that state as the place for its principal office, the corporation could be adjudged a bankrupt in North Carolina, if its principal place of business was situated within that district.

*In re Marine Machine & Conveyor Co.*, 91 Fed. Rep. 630, 1 Am. B. R. 421, the corporation was organized under the laws of Rhode Island, and having its plant there, but its general office in New York. It was adjudged a bankrupt in the latter district, notwithstanding the fact that during the greater part of the six months prior to the filing of the petition in bankruptcy the corporation did no business in Rhode Island; its works being shut down and its business there stopped, and it having been shown, however, that it did have a place of business in New York and did transact business there during the period in question.

*In re Elmira Steel Co.*, 109 Fed. Rep. 456, 5 Am. B. R. 484, it was held that the principal place of business of a manufacturing corporation was the place designated in its charter and where its plant was located,



A petition may be filed against a corporation incorporated in another state, in the district where it has its principal place of business for the greater portion of the preceding six months.<sup>8</sup> It is not necessary that the foreign corporation has complied with the state law requiring a certificate or charter to be filed before doing business in that state.<sup>9</sup>

### § 196. Transfer of cases begun in different districts.

It is possible for three petitions to be filed against the same debtor in three different districts,—the district of the debtor's residence, the district of his domicile, and the district where he has his principal place of business.<sup>1</sup>

To prevent a conflict of jurisdiction section 32 of the statute provides that: "In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy, each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest."<sup>2</sup>

rather than at a place in another state where it had an agent for the sale of its products, did its banking business and held most of its directors' meetings; such matters being merely incidental to its principal business.

<sup>8</sup> *In re Matthews Consolidated Slate Co.* (C. C. A. 1st Cir.), 144 Fed. Rep. 737, 75 C. C. A. 603, 16 Am. B. R. 360, affirming 144 Fed. Rep. 724, 16 Am. B. R. 407; *In re Pennsylvania Consolidated Coal Co.*, 163 Fed. Rep. 579, 20 Am. B. R. 872; *Dressel v. North State Lumber Co.*, 107 Fed. Rep. 255, 5 Am. B. R. 744; *In re Magid-Hope Silk Mfg. Co.*, 110 Fed. Rep. 352, 6 Am. B. R. 610; *In re Marine Mach. & Conveyor Co.*, 91 Fed. Rep. 630, 1 Am. B. R. 421; *Tiffany v. La Plume Con-*

*densed Milk Co.*, 141 Fed. Rep. 444, 15 Am. B. R. 413; *In re Duplex Radiator Co.*, 142 Fed. Rep. 906, 15 Am. B. R. 324; *White Mountain Paper Co. v. Morse & Co.* (C. C. A. 1st Cir.), 127 Fed. Rep. 643, 62 C. C. A. 369, 11 Am. B. R. 633.

<sup>9</sup> *In re Duplex Radiator Co.*, 142 Fed. Rep. 906, 15 Am. B. R. 324; *In re Perry Aldrich Co.*, 165 Fed. Rep. 249, 21 Am. B. R. 244.

<sup>1</sup> B. A. 1898, Sec. 2, clause 1. Sec. 192, *ante*.

<sup>2</sup> The former bankrupt acts did not contain a like provision; but under the act of 1867, the supreme court provided by rule 16 the order of proceeding where petitions were filed in different districts. This rule is substantially the same as the present General Order 6.

General Order 6 provides that in case of petitions filed against an individual in different courts, the first hearing shall be in the district of the domicile.<sup>3</sup> The word individual includes a corporation.<sup>4</sup> By district of domicile is meant the court whose ground of jurisdiction is that the bankrupt's domicile has been within the district for the greater portion of the previous six months.<sup>5</sup>

General Order 6 also provides that, if, in partnership cases, two or more petitions are filed, by creditors or partners, in different courts, the petition first filed shall be first heard.<sup>6</sup>

In the case of an individual or a partnership, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy retains jurisdiction over all proceedings therein until the same shall be closed.<sup>7</sup> But the court so retaining jurisdiction must, if satisfied that it is for the greatest convenience of parties in interest that another court should proceed with the case, order it to be transferred to that court.<sup>8</sup>

<sup>3</sup> *In re Isaacson*, 161 Fed. Rep. 779, 20 Am. B. R. 430 and 161 Fed. Rep. 777, 20 Am. B. R. 437; *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454 and 132 Fed. Rep. 378, 12 Am. B. R. 763; *In re Globe Sec. Co.*, 132 Fed. Rep. 709, 12 Am. B. R., note; *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 697, 13 Am. B. R. 62; *In re Pennsylvania Consolidated Coal Co.*, 163 Fed. Rep. 579, 20 Am. B. R. 872.

<sup>4</sup> *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454 and 132 Fed. Rep. 378, 12 Am. B. R. 763; *In re Globe Sec. Co.*, 132 Fed. Rep. 709, 12 Am. B. R. 764, note.

<sup>5</sup> *In re Isaacson*, 161 Fed. Rep. 777, 20 Am. B. R. 437.

<sup>6</sup> *In re Wixelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392; *In re Sears*, 112 Fed. Rep. 58, 7 Am. B. R. 279.

<sup>7</sup> Gen. Order 6. *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 697, 13 Am. B. R. 62; *In re Wixelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392; *In re Isaacson*, 161 Fed. Rep. 777, 20 Am. B. R. 437 and 161 Fed. Rep. 779, 20 Am. B. R. 430.

<sup>8</sup> Gen. Order 6. *In re Isaacson*, 161 Fed. Rep. 777, 20 Am. B. R. 437, and 161 Fed. Rep. 779, 20 Am. B. R. 430; *In re United Button Co.*, 132 Fed. Rep. 378, 12 Am. B. R. 761, and 137 Fed. Rep. 668, 13 Am. B. R. 454; *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 697, 13 Am. B. R. 62, and 132 Fed. Rep. 978, 13 Am. B. R. 68; *In re General Metals Co.*, 133 Fed. Rep. 84, 12 Am. B. R. 770; *Kyle Lumber Co. v. Bush* (C. C. A. 5th Cir.), 133 Fed. Rep. 688, 66 C. C. A. 592, 13 Am. B. R. 535; *In re Globe Sec.*

Both the statute and the general orders contemplate a case in which each court has jurisdiction of the proceedings.<sup>9</sup> The location of the domicile, or, in case of a partnership, priority of filing the petition, governs the priority of hearing. If a petition is filed in the district of the domicile of the bankrupt and another petition is filed in the district where he has his principal place of business, the court of his domicile has the superior right to retain the case for an adjudication. If a conflict arises in a partnership case, the court in which the first petition is filed has the superior right to retain the case for an adjudication. The courts have recognized this rule and have often stayed proceedings for a time to await the action of the court having the superior right.<sup>10</sup> If the petitioning creditors in the preferred district are not diligent, or if no proceedings are started in a district having a superior right, an adjudication may be had in any court acquiring jurisdiction.<sup>11</sup> The court first to make an adjudication has the right of exclusive administration, unless it yields jurisdiction for the convenience of the parties in interest.<sup>12</sup>

Neither the act nor the general orders define or describe "greatest convenience" or "parties in interest."

A party in interest may be said generally to be one whose pecuniary interests are directly affected by the proceedings in bankruptcy.<sup>13</sup> It is not limited to unsecured creditors, but includes the bankrupt and creditors holding securities which

Co., 132 Fed. Rep. 709, 12 Am. B. R. 764 note.

<sup>9</sup> *In re Wixelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392, was a case of an involuntary petition in one district and a voluntary petition in another district.

<sup>10</sup> *In re Wixelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392; *In re Isaacson*, 161 Fed. Rep. 779, 20 Am. B. R. 430.

<sup>11</sup> *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 697, 13 Am. B. R.

62; *In re Wixelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392; *In re Isaacson*, 161 Fed. Rep. 777, 20 Am. B. R. 437 and 161 Fed. Rep. 779, 20 Am. B. R. 430.

<sup>12</sup> *In re United Button Co.*, 132 Fed. Rep. 378, 12 Am. B. R. 761.

<sup>13</sup> Gen. Order 6. *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 978, 13 Am. B. R. 68.

<sup>14</sup> *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454.

are sought to be set aside by the trustee in bankruptcy.<sup>14</sup> The petitioning creditors in the other district and creditors having a preference are parties in interest.

What may be for the greatest convenience of parties in interest depends upon the circumstances of each particular case. Proximity of the place of business of the bankrupt to the court entertaining the proceedings and proximity of a majority of the creditors of the bankrupt, in number, or in amount of their claims and the expedition and economy in the administration of the estate are all circumstances entitled to weight.<sup>15</sup>

### § 197. Procedure where petitions are filed in different courts.

In case of petitions filed in different courts, the application to transfer the case under section 32 of the act should be made to the court which is to relinquish jurisdiction. One court of bankruptcy can not compel another court to yield jurisdiction of a case.

The application may be made by motion to transfer the case to a particular court having acquired jurisdiction of proceedings against the same debtor.

<sup>14</sup> *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454.

But see *In re Sears*, 112 Fed. Rep. 58, 7 Am. B. R. 279.

<sup>15</sup> *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454; *In re Sears*, 112 Fed. Rep. 58, 7 Am. B. R. 279; *In re Waxelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392; *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 978, 13 Am. B. R. 68.

*In re Isaacson*, 161 Fed. Rep. 779, 783, 20 Am. B. R. 430, Judge Chatfield said: "The largest creditors have asked that jurisdiction be retained in this district; the books of the bankrupt, and the witnesses who were engaged as clerks of the bankrupt in the keeping of those books,

are presumably in the Eastern District; the real estate of the bankrupt is located here; his retail business is much greater in extent, so far as its physical aspects are concerned, than the wholesale business conducted in the Broadway office. The convenience of attorneys will not be greatly different in one district than in the other. No prejudice to the interests of the creditors or the bankrupt can be gathered from the affidavits, if the hearings should be held in the Eastern District and the estate administered there, and no sufficient reason is shown why the case should be transferred, under the provisions of Sec. 32.

A hearing is then had upon the motion and upon such affidavits and counter affidavits as may be filed with respect to the convenience of the parties in interest. The court may hear oral testimony or may refer the matter to a referee for a finding of facts.<sup>1</sup> In any case the judge, and not the referee, should make the order.

If it is made to appear that it is for "the greatest convenience of parties in interest" to proceed in another court, having acquired jurisdiction of proceedings against the debtor, it should yield jurisdiction.<sup>2</sup> Where it is not made to appear for the greatest convenience of parties in interest, the court applied to is not required to yield jurisdiction.<sup>3</sup> The burden of proof is upon him seeking the transfer.<sup>4</sup>

If no hearing has been had in the court having the superior right to retain the case for an adjudication, the order is regularly to stay proceedings for a time to await the action of that court.<sup>5</sup> In case that court should find that it had no jurisdiction, or should relinquish jurisdiction, this court might then proceed with the case.

<sup>1</sup> As was done in *Pennsylvania Consolidated Coal Co.*, 163 Fed. Rep. 579, 20 Am. B. R. 872.

<sup>2</sup> *In re Isaacson*, 161 Fed. Rep. 777, 20 Am. B. R. 437 and 161 Fed. Rep. 779, 20 Am. B. R. 430; *In re United Button Co.*, 132 Fed. Rep. 378, 12 Am. B. R. 761 and 137 Fed. Rep. 668, 13 Am. B. R. 454; *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 697, 13 Am. B. R. 62 and 132 Fed. Rep. 978, 13 Am. B. R. 68; *In re General Metals Co.*, 133 Fed. Rep. 84, 12 Am. B. R. 770; *Kyle Lumber Co. v. Bush* (C. C. A. 5th Cir.), 133 Fed. Rep. 688, 66 C. C. A. 592, 13 Am. B. R. 535; *In re Globe Sec. Co.*, 132 Fed. Rep. 709, 12 Am. B. R. 764, note.

*In re Waxelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392, was a case of an involuntary petition in one

district and a voluntary petition in another district.

<sup>3</sup> *In re Sears*, 112 Fed. Rep. 58, 7 Am. B. R. 279; *In re Isaacson*, 161 Fed. Rep. 779, 20 Am. B. R. 430; *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454; *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 978, 13 Am. B. R. 68.

<sup>4</sup> *In re Pennsylvania Consolidated Coal Co.*, 163 Fed. Rep. 579, 20 Am. B. R. 872; *In re United Button Co.*, 137 Fed. Rep. 668, 13 Am. B. R. 454; *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 978, 13 Am. B. R. 68.

<sup>5</sup> *In re Waxelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 392; *In re Tybo Min. & Reduction Co.*, 132 Fed. Rep. 697, 13 Am. B. R. 62; *In re Isaacson*, 161 Fed. Rep. 777, 20 Am. B. R. 430, and 161 Fed. Rep. 779, 20 Am. B. R. 430.

After a case has been transferred the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than the first alleged, if such earlier act is charged in either of the other petitions.<sup>6</sup> The object of this provision is to preserve to creditors the benefit of any earlier act alleged in the petition in the case removed, which might not be availed of by the petitioning creditors because of the expiration of the four months' period. It was not intended to limit the right of amendment, but rather to enlarge it. But it has been held that the power to allow amendment is limited to an earlier act of bankruptcy than the one charged in the petition sought to be amended.<sup>7</sup>

The court to which a case is transferred and consolidated with proceedings pending therein proceeds to make an adjudication and administer the property and grant or refuse a discharge as if the case had been originally instituted in that court.

#### § 198. Different petitions in the same court.

It is clear that a debtor having a large number of creditors is liable to have several petitions filed against him in the same court by different creditors. The same or different acts of bankruptcy may be alleged as a ground for having him adjudged a bankrupt.

Whenever two or more petitions have been filed by creditors against a common debtor, alleging several acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition is first heard and tried which alleges the commission of the earliest act of bankruptcy.<sup>1</sup>

<sup>6</sup> Gen. Order 6.

<sup>7</sup> *In re Sears* (C. C. A. 2d Cir.), 117 Fed. Rep. 294, 54 C. C. A. 532, 8 Am. B. R. 713.

<sup>1</sup> Gen. Order 7. *In re Harris*, 155 Fed. Rep. 216, 19 Am. B. R. 204;

*In re McCracken & McLeod*, 129 Fed. Rep. 621, 12 Am. B. R. 95; *Salt Lake Valley Canning Co. v. Collins* (C. C. A. 9th Cir.), 176 Fed. Rep. 91, 99 C. C. A. 611, 23 Am. B. R. 716.



In case several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated and proceed to a hearing as upon one petition.<sup>1</sup>

If an adjudication of bankruptcy is made upon either petition, or for the commission of a single act of bankruptcy, it is not necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.<sup>2</sup>

### § 190. The petition.

The application to have a debtor adjudged a bankrupt and his property distributed according to the bankrupt law is made by petition.

The supreme court has prescribed forms which should be observed and used with such alterations as may be necessary to suit the circumstances in any particular case.<sup>1</sup> The petition must be printed or written out plainly, without abbreviations or interlineations, except where such abbreviations or interlineations may be for the purpose of reference.<sup>2</sup> It should be prepared in duplicate, one copy for the clerk and one for service upon the bankrupt.<sup>3</sup>

The petition should be entitled in the proper court of bankruptcy. The caption is regularly A. B., C. D. and E. F., petitioners, v. X. Y., respondent. Although the title of the

<sup>1</sup> Gen. Order 7. *Salt Lake Valley Canning Co. v. Collins* (C. C. A. 9th Cir.), 176 Fed. Rep. 91, 99 C. C. A. 611, 23 Am. B. R. 716.

As to attorney's fees on consolidation, see *In re McCracken & McLeod*, 129 Fed. Rep. 621, 12 Am. B. R. 95.

<sup>2</sup> Gen. Order 7. *In re Harris*, 155 Fed. Rep. 216, 19 Am. B. R. 204.

<sup>3</sup> Gen. Order 38. Official Form No. 3, Form No. 5, *post*; *Gage & Co. v. Bell*, 124 Fed. Rep. 371, 10 Am. B. R. 696.

<sup>2</sup> Gen. Order 5. *Mahoney v. Ward*, 100 Fed. Rep. 278, 3 Am. B. R. 770. See also criticism of Judge Woolson, 1 N. B. N. 239; *West Co. v. Lea*, 174 N. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>3</sup> B. A. 1898, Sec. 59c; *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re Stevenson*, 94 Fed. Rep. 110, 2 Am. B. R. 66; *In re Dupree*, 97 Fed. Rep. 28, 8 Am. B. R. 321.

court and the style of the case are not required to be stated in a caption, and in many of the earlier cases were never put in the petition, it is more convenient for reference, and is now frequently inserted by the best pleaders. The petition is addressed to the judge of the court in which it is to be filed,<sup>4</sup> as to the Honorable S. R., judge of the district court of the United States for the district of —.

The petition should state the names and residences of both the petitioning creditors and the debtor. It should contain a sufficient description of the debtor to show that he is subject to be adjudged an involuntary bankrupt, and should charge his insolvency at the time of filing the petition.<sup>5</sup> A petition against a corporation should state that it is not a municipal railroad, insurance or banking corporation,<sup>6</sup> and a petition against an individual that he is not a wage-earner or a person engaged chiefly in farming or the tillage of the soil.<sup>7</sup> If such allegation is omitted and the defendant answers on the merits the defect is waived.<sup>8</sup> The defect may be cured by amendment.<sup>9</sup>

<sup>4</sup> In *Anon.*, No. 459 Fed. Cas., 1 N. B. R. 216, leave was asked to present an involuntary petition addressed to "Hon. Nye K. Hale, District Judge." It was held that the name of the judge must be given correctly if at all; that it can not be stricken out as surplusage, and consequently permission to file was denied.

<sup>5</sup> B. A. 1898, Sec. 3b; *In re Taylor* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515. See *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>6</sup> The cases in the next note below are authority for such an allegation.

<sup>7</sup> *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746; *In re Taylor* (C. C. A. 7th

Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *In re Bellah*, 116 Fed. Rep. 69, 8 Am. B. R. 310; *In re Callison*, 130 Fed. Rep. 987, 12 Am. B. R. 344, affirmed (C. C. A. 5th Cir.), 129 Fed. Rep. 201, 63 C. C. A. 354, 11 Am. B. R. 797; *In re Brett*, 130 Fed. Rep. 981, 12 Am. B. R. 492; *In re White*, 135 Fed. Rep. 199, 14 Am. B. R. 241; *Rise v. Bordner*, 140 Fed. Rep. 566, 15 Am. B. R. 297.

<sup>8</sup> *Green River Deposit Bank v. Craig*, 110 Fed. Rep. 137, 6 Am. B. R. 381.

<sup>9</sup> *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 57 C. C. A. 150, 9 Am. B. R. 762; *In re White*, 135 Fed. Rep. 199,



It should set forth all the matters that are requisite to give jurisdiction to the court over the particular case. It should show that the debtor had had his principal place of business, resided or had his domicile within the territorial jurisdiction of the court for the greater portion of the preceding six months.<sup>10</sup> If he has not had a principal place of business, resided or had his domicile within the territorial jurisdiction show that he has property within the jurisdiction of the court.<sup>11</sup> If one creditor only petitions, it should be averred that all creditors of the bankrupt are less than twelve in number.<sup>12</sup> If, in fact, there are more than twelve creditors, the court may allow an amendment permitting other petitioning creditors to join in the petition at any time before adjudication.<sup>13</sup> The petition must also allege that the debtor owes debts to the amount of one thousand dollars.<sup>14</sup>

The petition must set forth and describe the claim or claims of the petitioning creditor or creditors sufficiently to show that they are provable claims and amount in the aggregate to five hundred dollars or over.<sup>15</sup> Ordinarily where the debt is founded upon a written instrument, as a note, bond, contract, etc., the paper is annexed to the petition as an exhibit, and proper reference to it is made in that part of the petition which is designed to describe the debt or claim. Where several claims or debts are stated in the petition each debt should be

14 Am. B. R. 241; *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665.

<sup>10</sup> B. A. 1898, Sec. 2, clause 1.

<sup>11</sup> B. A. 1898, Sec. 2, clause 1.

<sup>12</sup> B. A. 1898, Sec. 59d; *In re Miner*, 104 Fed. Rep. 520, 4 Am. B. R. 710; *In re Novak*, 101 Fed. Rep. 800, 4 Am. B. R. 311.

<sup>13</sup> *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re Haff* (C. C. A. 2d Cir.),

136 Fed. Rep. 78, 68 C. C. A. 646, 13 Am. B. R. 362.

<sup>14</sup> B. A. 1898, Sec. 4b; *Taft Co. v. Century Sav. Bank* (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594.

<sup>15</sup> B. A. 1898, Sec. 59b; *Grant Shoe Co. v. Laird*, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1; *In re Stein*, 130 Fed. Rep. 377, 12 Am. B. R. 364; *In re Bedingfield*, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re Western Sav. & T. Co.*, No. 17442 Fed. Cas., 4 Saw 490; *In re Hadley*, No. 5894 Fed. Cas., 12 N. B. R. 366.

set forth in a separate paragraph, with sufficient particularity to show that it is a provable claim.

The petition should contain an allegation that the act of bankruptcy (setting forth in detail the act of the debtor which is relied upon as an act of bankruptcy) was committed within the period of four months prior to the filing of the petition. The allegation in regard to the act of bankruptcy must be positive, full and unqualified.<sup>16</sup> An allegation on "information and belief" has been held sufficient.<sup>16\*</sup> But an averment of acts of bankruptcy in the language of the act, without setting forth any other facts or circumstances, is not sufficient.<sup>17</sup> Evidence of acts not set up in the petition will not be received or considered.<sup>18</sup> Where the petition is filed against a partnership, the allegation should set forth an act of bankruptcy on the part of the firm. An averment of an act of bankruptcy upon the part of one of the members of the firm acting within the scope of the firm business is sufficient.<sup>19</sup> Several acts of bankruptcy may be charged in the same petition.<sup>19\*</sup> When this is done they should be alleged conjunctively. In such case it is enough if either of them is satisfactorily proven.<sup>20</sup>

<sup>16</sup> *Clark v. Henne & Meyer* (C. C. A. 5th Cir.), 127 Fed. Rep. 283, 62 C. C. A. 172, 11 Am. B. R. 583; *In re Mero*, 128 Fed. Rep. 630, 12 Am. B. R. 171; *In re Blumberg*, 133 Fed. Rep. 845, 13 Am. B. R. 343; *In re Vetterman*, 135 Fed. Rep. 443, 14 Am. B. R. 245; *In re White*, 135 Fed. Rep. 199, 14 Am. B. R. 241; *In re Nelson*, 98 Fed. Rep. 76, 1 Am. B. R. 65; *In re Cliffe*, 2 Am. B. R. 317, 94 Fed. Rep. 354; *In re Ewing* (C. C. A. 2d Cir.), 115 Fed. Rep. 707, 53 C. C. A. 289, 8 Am. B. R. 269; *Seaboard Steel Casting Co. v. Trigg Co.*, 124 Fed. Rep. 75, 10 Am. B. R. 594; *In re Pure Milk Co.*, 154 Fed. Rep. 632, 18 Am. B. R. 75.

<sup>16\*</sup> *In re Ball*, 156 Fed. Rep. 682, 19 Am. B. R. 609.

<sup>17</sup> *In re Hark*, 135 Fed. Rep. 603, 14 Am. B. R. 400.

<sup>18</sup> *Ex parte Potts*, No. 11344 Fed. Cas., Crabbé 469.

<sup>19</sup> *In re Shapiro*, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837. See also Chap. —, *post*.

<sup>19\*</sup> *In re Nusbaum*, 152 Fed. Rep. 835, 18 Am. B. R. 598; *Bradley Timber Co. v. White* (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 58 C. C. A. 55, 10 Am. B. R. 329.

<sup>20</sup> *Bradley Timber Co. v. White* (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 58 C. C. A. 55, 10 Am. B. R. 329; *In re Riggs Restaurant Co.* (C. C. A. 2d Cir.) (130 Fed. Rep. 691, 66 C. C. A. 43, 11 Am. B. R. 508; *In re Lanre*, 97 Fed. Rep. 197, 3 Am. B. R. 232; *In re Drummond*,

The petition should not include an application for a warrant to seize property. If it does, the petition is bad for multifariousness.<sup>21</sup>

The petition should conclude with a prayer that service of the petition with a subpoena may be made upon the debtor (naming him) as provided in the acts of Congress relating to bankruptcy, and that he should be adjudged by the court to be a bankrupt within the purview of said acts.<sup>22</sup>

The petition should be signed by the petitioning creditor or creditors, or their attorney or agent.<sup>23</sup> It must be verified as to matters of fact by an affidavit under oath.<sup>24</sup> The president may verify a petition on behalf of a petitioning corporation and a partner for his firm.<sup>24\*</sup> Neither the statute nor the general orders require the petition to be signed or verified by the petitioners personally. An agent or an attorney may make the oath if it appears that he has knowledge of the facts.<sup>25</sup> This, however, is not good practice where it is not inconvenient for the petitioning creditors to make it. Where it does not appear that the attorney has knowledge of the facts, the defect

No. 4093, Fed. Cas., 1 N. B. R. 231; *In re McKibben*, No. 8859 Fed. Cas., 12 N. B. R. 97.

<sup>21</sup> *In re Kelly*, 91 Fed. Rep. 504, 1 Am. B. R. 306; *Mather v. Coe*, 92 Fed. Rep. 333, 1 Am. B. R. 504; *In re Ogles*, 93 Fed. Rep. 426, 1 Am. B. R. 671.

<sup>22</sup> See Official Form No. 3, Form No. 5, *post*.

<sup>23</sup> *In re Raynor*, No. 11597 Fed. Cas., 11 Blatch. 43; *Wald v. Wehl*, 6 Fed. Rep. 163.

<sup>24</sup> B. A. 1898, Sec. 18c; *In re Donnelly*, 5 Fed. Rep. 783; *In re Raynor*, No. 11597 Fed. Cas., 11 Blatch. 43; *Wald v. Wehl*, 6 Fed. Rep. 163.

The oath attached to the creditor's petition, Form No. 54, under the act of 1867, provided for making oath on information and belief. The oath attached to the cred-

itor's petition, Form No. 3, under the present statute, provides only for a positive statement and not for a verification upon information and belief.

<sup>24\*</sup> *Walker v. Woodside* (C. C. A. 9th Cir.), 164 Fed. Rep. 680, 90 C. A. 644, 21 Am. B. R. 132.

<sup>25</sup> *Rogers v. DeSoto Placer Min. Co.* (C. C. A. 9th Cir.), 136 Fed. Rep. 407, 69 C. C. A. 251, 14 Am. B. R. 252; *In re Vastbinder*, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re Herzkopf*, 118 Fed. Rep. 101, 9 Am. B. R. 90; *In re Hunt*, 118 Fed. Rep. 282, 9 Am. B. R. 251; *In re Chequasset Lumber Co.*, 112 Fed. Rep. 56, 7 Am. B. R. 87; but see *In re Nelson*, 98 Fed. Rep. 76, 1 Am. B. R. 63; *In re Simonson, Whiteson & Co.*, 92 Fed. Rep. 904, 1 Am. B. R. 197; *In re Glass*, 119 Fed. Rep. 509, 9 Am. B. R. 391.

is waived if answer is made on the merits.<sup>26</sup> The oath or affirmation may be administered by a referee, an officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the same are to be taken; or a diplomatic or consular officer of the United States in any foreign country.<sup>27</sup>

### § 200. The time and manner of filing the petition.

The petition must be filed in the office of the clerk of a court of bankruptcy, and not with a referee. When there is a vacancy in the office of judge, the clerk should file the petition and issue subpoena.<sup>1</sup>

A petition in bankruptcy is deemed filed within the meaning of the statute from the time it is presented to the clerk in his office, and not from the time when it is presented to the judge for his action.<sup>2</sup> No notice of filing a petition is required to be given creditors.<sup>3</sup> No schedule is required to be filed with a petition in involuntary bankruptcy. The statute provides that the petition shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.<sup>4</sup> The petition is received by the clerk and filed and the case docketed as in voluntary proceedings.<sup>5</sup> The deposit for costs should be made by the petitioning creditors as by a voluntary debtor.<sup>6</sup> There is one exception, namely, the petitioning creditors are not per-

<sup>26</sup> *In re* Simonson, Whiteson & Co., 92 Fed. Rep. 904, 1 Am. B. R. 197; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *Simonson v. Sinsheimer* (C. C. A. 6th Cir.), 95 Fed. Rep. 948, 37 C. C. A. 337.

<sup>27</sup> B. A. 1898, Sec. 20.

<sup>1</sup> *In re* Urban, etc., Title Co., 132 Fed. Rep. 140, 12 Am. B. R. 687.

<sup>2</sup> *In re* Von Borcke, 94 Fed. Rep. 352, 2 Am. B. R. 322; *In re* Appel, 103 Fed. Rep. 931, 4 Am. B. R. 722; *In re* Bear, 5 Fed. Rep. 53; *In re* Abrahams, No. 20 Fed. Cas., 5 Law Rep. 328.

<sup>3</sup> *In re* Billing, 145 Fed. Rep. 395, 17 Am. B. R. 80.

<sup>4</sup> B. A. 1898, Sec. 59c; *In re* Dupree, 97 Fed. Rep. 28, 8 Am. B. R. 321; *In re* Stevenson, 94 Fed. Rep. 110, 2 Am. B. R. 66; *In re* Kennedy Tailoring Co., 175 Fed. Rep. 871, 23 Am. B. R. 656.

But if the alleged bankrupt answers, he waives the objection that only one copy is filed. *In re* Plymouth Cordage Co. (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665.

<sup>5</sup> Sec. 165, *ante*. Gen. Orders 1 and 2.

<sup>6</sup> Consult Sec. 166, *ante*.

mitted to proceed *in forma pauperis*, without making a deposit.

The petition must be filed within four months after the commission of the act of bankruptcy upon which it is founded.<sup>7</sup> Where the petition is filed within four months after the commission of the act of bankruptcy charged, it has been held sufficient if other creditors join in the petition before an adjudication thereon, although after the four months' period, and are reckoned in the making up of the requisite number of creditors and amount of claims.<sup>7\*</sup>

The time for filing a petition does not expire until four months after the date of the recording or registering of the transfer or assignment, when the act consists in having made a transfer of any of his property, with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.<sup>7\*\*</sup>

Where the act of bankruptcy complained of is a preference resulting from legal proceedings, the four months' period begins to run from five days before the sale, if the property is not released by that time.<sup>8</sup> Creditors need not wait for sale,

<sup>7</sup> B. A. 1898, Sec. 3b; *In re Mingo Valley Creamery Association*, 100 Fed. Rep. 282, 4 Am. B. R. 67; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re Edelman* (C. C. A. 2nd Cir.), 130 Fed. Rep. 700, 65 C. C. A. 665, 12 Am. B. R. 238.

<sup>\*\*</sup> *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re Bedingfield*, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re Stein* (C. C. A. 2nd Cir.), 105 Fed. Rep. 749, 45 C. C. A. 29, 5 Am. B. R. 288; *In re Ryan*, 114 Fed. Rep. 373, 7 Am. B. R. 562.

<sup>\*\*\*</sup> B. A. 1898, Sec. 3b; *In re Mingo Valley Creamery Association*, 100 Fed. Rep. 282, 4 Am. B. R. 67; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 461; *In re Edelman* (C. C. A. 2d Cir.), 130 Fed. Rep. 700, 65 C. C. A. 665, 12 Am. B. R. 238.

<sup>8</sup> *Parmenter Mfg. Co. v. Stoevers* (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 38 C. C. A. 200, 3 Am. B. R. 220; *In re National Hotel & Cafe Co.*, 138 Fed. Rep. 947, 15 Am. B. R. 69; *In re Rome Planing Mills*, 96 Fed. Rep. 812, 3 Am. B. R. 121.

but may file this petition within the five days before the advertised date of the sale.<sup>9</sup> But where a sale was advertised for the 22d, a petition filed on the 17th was held to be premature.<sup>10</sup> It has been held that the failure to discharge a lien on each succeeding day, including the day of sale, constitutes distinct acts of bankruptcy, and a petition filed within four months of the sale, but more than four months after the fifth day prior to the sale is in time.<sup>11</sup>

In computing the four months within which the petition is to be filed, the first day is excluded and the last day included, unless the last day falls upon a Sunday or a legal holiday, in which event the last day included shall be the next day thereafter which is not a Sunday or a legal holiday.<sup>11\*</sup> Holidays are defined by the act to include Christmas, the fourth of July, the twenty-second of February, and any day appointed by the president of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving.<sup>12</sup>

The authority of an attorney to file a petition should be challenged by rule to show his authority supported by affidavits and not by answer.<sup>13</sup>

### § 201. Application to amend petition.

The court may, upon proper application, allow amendments to the petition and schedules.<sup>1</sup> Mere formal amendments may

<sup>9</sup> *In re Rome Planing Mill*, 96 Fed. Rep. 812, 3 Am. B. R. 123; *In re National Hotel & Cafe Co.*, 136 Fed. Rep. 947, 15 Am. B. R. 69; *Parmenter Mfg. Co. v. Stoeber* (C. C. A. 1st Cir.), 97 Fed. Rep. 330, 38 C. C. A. 200, 3 Am. B. R. 220.

<sup>10</sup> *Pittsburg Laundry Co. v. Imperial Laundry Co.*, 154 Fed. Rep. 662; 83 C. C. A. 486, 18 Am. B. R. 756.

<sup>11</sup> *In re Nusbaum*, 152 Fed. Rep. 835, 18 Am. B. R. 598.

<sup>11\*</sup> B. A. 1898, Sec. 31; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *In re Lang*, No 8056 Fed. Cas., 2 N. B. R. 480.

<sup>12</sup> B. A. 1898, Sec. 1, clause 14; *In re Stevenson*, 94 Fed. Rep. 110, 2 Am. B. R. 66; *In re Dupree*, 97 Fed. Rep. 28.

<sup>13</sup> *Gage & Co. v. Bell*, 124 Fed. Rep. 371, 10 Am. B. R. 696.

<sup>1</sup> Gen. Ord. 11. *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746.

be asked in open court at the time of the hearing or trial and allowed, when justice may be done by so doing, even after all the testimony in the case has been taken.<sup>2</sup> The misnomer of the bankruptcy may be corrected by amendment.<sup>3</sup> Formal defects are waived if objection is not reasonably made or by answering on the merits.<sup>4</sup>

When new matter is sought to be introduced, leave must be first obtained of the court to file the amendment. The application is regularly made by petition or motion. It should be accompanied by a copy of the amendment or amendments to be made. These amendments should be printed or written, signed and verified like original petitions or schedules.<sup>5</sup> The amendment should state no more of the original paper than may be absolutely necessary to introduce and make intelligible the new matter, which should alone constitute the chief subject of the amendment.

The application for leave to amend must state the cause of the error in the paper originally filed.<sup>6</sup> In other words, it must be shown that the petitioner or his attorney had no knowledge of and could not have ascertained with reasonable diligence the facts sought to be added by the amendment at the time the original petition was filed, or that the facts were omitted by inadvertence, mistake or other reason which would excuse such omission.<sup>7</sup> The application for leave to amend

<sup>2</sup> *In re Bininget*, No. 1420 Fed. Cas., 7 Blatch. 262; *In re Craft*, No. 3316 Fed. Cas., 2 Ben. 214; *In re Haughton*, No. 6223 Fed. Cas., 1 N. B. R. 460; *In re Gallinger*, No. 5202 Fed. Cas., 1 Saw. 224.

<sup>3</sup> *Gleason v. Smith, Perkins & Co.* (C. C. A. 3d Cir.), 145 Fed. Rep. 895, 76 C. C. A. 427, 16 Am. B. R. 602.

<sup>4</sup> *In re Simonson, Whiteson & Co.*, 92 Fed. Rep. 904, 1 Am. B. R. 197; *Leidigh Carriage Co. v. Stengel* (C. C. A. 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *Simonson v.*

*Sinsheimer* (C. C. A., 6th Cir.), 95 Fed. Rep. 948, 37 C. C. A. 337; *Green River Deposit Bank v. Craig*, 110 Fed. Rep. 137, 6 Am. B. R. 381; *In re First National Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 269.

<sup>5</sup> Gen. Ord. 11.

<sup>6</sup> Gen. Ord. 11. *In re Partner*, 149 Fed. Rep. 799, 18 Am. B. R. 89.

<sup>7</sup> *White v. Bradley Timber Co.*, 116 Fed. Rep. 768, 8 Am. B. R. 671; *Wilder v. Watts*, 138 Fed. Rep. 426, 15 Am. B. R. 57; *In re Hark*, 142 Fed. Rep. 279, 15 Am. B. R. 460.

must be made within a reasonable time after the discovery of such facts.<sup>8</sup> A copy of the petition and amendment should be served upon the adverse party.

The granting or refusing to grant leave to amend rests in the sound discretion of the court.<sup>8\*</sup> It is not a matter of right. The courts are liberal in allowing amendments so long as the ends of justice are not sacrificed.<sup>9</sup> The courts, in allowing such amendments, are governed by substantially the same principles which apply to similar cases in other courts. Leave to amend may be granted on terms, as upon payment of costs.<sup>10</sup>

An amendment may be allowed at any stage in the proceedings as justice may require. The power of the court is not limited in this respect. A petition may be amended at the trial,<sup>11</sup> or before a new trial,<sup>12</sup> or an appellate court may re-

<sup>8</sup> *In re Freudenfels*, No. 5112a, Fed. Cas.

<sup>8\*</sup> *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746; *Hark v. Allen & Co.* (C. C. A. 3d Cir.), 146 Fed. Rep. 665, 77 C. C. A. 91, 17 Am. B. R. 3.

*In Pittsburgh v. Laundry Supply Co. v. Imperial Laundry Co.* (C. C. A. 3d Cir.), 154 Fed. Rep. 662, 83 C. C. A. 486, 18 Am. B. R. 756, the court said: "The whole matter of permitting or refusing amendments, is entirely within the judicial discretion of the court, and, in accordance with the general rule, will not be interfered with by a reviewing court, unless abuse of such discretion has been shown."

<sup>9</sup> *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re Shoemith* (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645; *In re Lange*, 97 Fed. Rep.

197, 3 Am. B. R. 232; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re Nelson*, 98 Fed. Rep. 76, 1 Am. B. R. 63; *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588; *In re Cliffe*, 94 Fed. Rep. 354, 2 Am. B. R. 317; *In re Miller*, 104 Fed. Rep. 764, 5 Am. B. R. 140.

<sup>10</sup> *In re Howland*, No. 6791 Fed. Cas., 2 N. B. R. 357; *In re Strait* (Ref.), 2 Am. B. R. 308; *In re Riggs Restaurant Co.* (C. C. A. 2d Cir.), 130 Fed. Rep. 691, 66 C. C. A. 48, 11 Am. B. R. 508.

<sup>11</sup> *In re Miller*, 104 Fed. Rep. 764, 5 Am. B. R. 140; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re Lange*, 97 Fed. Rep. 197, 3 Am. B. R. 232; *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A. 7th Cir.), 141 Fed. Rep. 518, 72 C. C. A. 576, 15 Am. B. R. 804.

<sup>12</sup> *In re Hark*, 142 Fed. Rep. 279, 15 Am. B. R. 460, affirmed (C. C. A. 3d Cir.), 146 Fed. Rep. 665, 77 C. C. A. 91, 17 Am. B. R. 3,



mand a case with leave to allow the petition to be amended.<sup>12</sup> Leave to amend will not be granted for the purpose of adding a member of a firm as a new party after all the evidence has been taken and the case is before the court for final hearing.<sup>14</sup>

An amended petition can not be filed as an original petition by erasing "amended" after execution.<sup>15</sup>

Where a petition is referred to a referee to make the adjudication he may also allow amendments to the petition.<sup>16</sup> He is expressly authorized and it is his duty to examine all schedules of property and lists of creditors filed by bankrupts and to cause such as are incomplete and defective to be amended.<sup>17</sup> The referee may also refuse to allow an amendment. Whether he grants or refuses an amendment to be made, the question is subject to review by the judge.<sup>18</sup>

#### § 202. Amendments to a petition.

The granting or refusing an amendment to a petition rests in the sound discretion of the court of bankruptcy.<sup>1</sup> But it is a legal discretion, which must be exercised in view of the facts sufficiently proven and is controlled by fixed rules of law, and may be revised by an appellate court.<sup>2</sup>

<sup>12</sup> *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *Taft & Co. v. Century Savings Bank* (C. C. A., 8th Cir.), 141 Fed. Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594.

<sup>14</sup> *In re Pitt*, 11188 Fed. Cas., 8 Ben. 389.

<sup>15</sup> *In re Hyde & Gload Mfg. Co.*, 103 Fed. Rep. 617, 4 Am. B. R. 602.

<sup>16</sup> *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746.

<sup>17</sup> B. A. 1898, Sec. 39, clause 2; *In re Miller*, 104 Fed. Rep. 764, 5 Am. B. R. 140.

<sup>18</sup> Gen. Ord. 27. *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746.

<sup>1</sup> *Armstrong v. Fernandez*, 208 U. S. 324, 52 L. Ed. 514, 19 Am. B. R. 746; *Hark v. Allen & Co.* (C. C. A. 3d Cir.), 146 Fed. Rep. 665, 77 C. C. A. 91, 17 Am. B. R. 3; *Pittsburgh Laundry Supply Co. v. Imperial Laundry Co.* (C. C. A. 3d Cir.), 154 Fed. Rep. 662, 88 C. C. A. 486, 18 Am. B. R. 756.

<sup>2</sup> *Conway v. German* (C. C. A. 4th Cir.), 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527; *Pittsburgh Laundry Co. v. Imperial Laundry Co.* (C. C. A. 3d Cir.), 154 Fed. Rep. 662, 83 C. C. A. 486, 18 Am. B. R. 756.

When an amendment to a petition is allowed, it relates back to the time of filing the original petition and has the same force and effect as if included in that petition.<sup>3</sup>

Where a petition fails to properly aver jurisdictional facts the defect may be cured by amendment,<sup>4</sup> or the petition, if fatally defective, may be dismissed.<sup>5</sup>

Jurisdiction in bankruptcy comes from the statute and is not conferred by the accuracy and precision of the averments made in the petition. An amendment may be allowed to set forth the jurisdictional facts existing at the time the petition was filed.<sup>6\*</sup> A petition may be amended to show that the debtor is not within one of the excepted classes, as a municipal, railroad, insurance or banking corporation, or a wage earner or farmer,<sup>6</sup> or to allow petitioning creditors to join in a petition

<sup>3</sup> *Ryan v. Hendricks* (C. C. A. 7th Cir.), 166 Fed. Rep. 94, 92 C. C. A. 78, 21 Am. B. R. 570; *First State Bank v. Haswell* (C. C. A. 8th Cir.), 174 Fed. Rep. 209, 98 C. C. A. 217, 23 Am. B. R. 330; *Chicago Motor Vehicle Co. v. American Oak Leather Co.* (C. C. A. 8th Cir.), 141 Fed. Rep. 518, 72 C. C. A. 576, 15 Am. B. R. 804; *In re Shoesmith* (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645; *International Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866.

<sup>4</sup> *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *Ryan v. Hendricks* (C. C. A., 7th Cir.), 166 Fed. Rep. 94, 92 C. C. A. 78, 21 Am. B. R. 570.

<sup>5</sup> *Woolford v. Diamond State Steel Co.*, 138 Fed. Rep. 582, 15 Am. B. R. 31.

<sup>6\*</sup> *In Ryan v. Hendricks* (C. C. A. 7th Cir.), 166 Fed. Rep. 94, 92 C. C. A. 78, 21 Am. B. R. 570, Judge Baker said: "The amendments related to the number of the petitioning creditors and the

amount and nature of their claims, and to the occupation of the debtor. There is no doubt that at the time the original petition was filed Logerman was a bankrupt and all the conditions existed which made it proper for his estate to be administered under the bankruptcy law. If the original petition failed to set forth these conditions fully and clearly, the court did right in allowing the amendments; and the amendments, when made, related back to the time of the filing of the original petition and had the same effect as if originally incorporated therein."

<sup>6</sup> *Conway v. German* (C. C. A. 4th Cir.), 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527; *In re Pilger*, 118 Fed. Rep. 206, 9 Am. B. R. 245; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 57 C. C. A. 150, 9 Am. B. R. 762; *In re Brett*, 12 Am. B. R. 492, 130 Fed. Rep. 981; *In re White*, 135 Fed. Rep. 199, 14 Am. B. R. 241; *In re Bellah*, 116 Fed. Rep. 69, 8 Am. B. R. 310.

averring less than twelve creditors when it appears from the answer that there are more than twelve creditors,<sup>7</sup> or to show that the provable claims owned by the petitioning creditors in the aggregate amount to \$500,<sup>7\*</sup> or to permit petitioning creditors to join for the purpose of making the amount of provable claims equal to \$500,<sup>8</sup> or to permit an amendment so as to show that the debtor owed at least \$1,000,<sup>9</sup> or to allege the insolvency of partners, where the original petition alleged that "the partnership is insolvent",<sup>10</sup> or add an averment of the requisite domicile, residence or principal place of business in the district.<sup>11</sup>

A petition may be amended to cure a defective allegation with respect to an act of bankruptcy charged,<sup>12</sup> or to introduce a new act of bankruptcy founded upon or growing out of facts stated or referred to in the original petition.<sup>13</sup> Where the

<sup>7</sup> *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re Haff* (C. C. A. 2nd Cir.), 136 Fed. Rep. 78, 68 C. C. A. 646, 13 Am. B. R. 362; *First State Bank v. Haswell* (C. C. A. 8th Cir.), 174 Fed. Rep. 209, 98 C. C. A. 217, 23 Am. B. R. 330.

<sup>7\*</sup> *Conway v. German* (C. C. A. 4th Cir.), 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527.

<sup>8</sup> *In re Bedingfield*, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re Romanow*, 92 Fed. Rep. 510, 1 Am. B. R. 469; *Conway v. German* (C. C. A. 4th Cir.), 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527. But see *In re Stein*, 130 Fed. Rep. 377, 12 Am. B. R. 364 disapproved, *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665.

<sup>9</sup> *Taft Co. v. Century Savings Bank* (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594.

<sup>10</sup> *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588.

<sup>11</sup> *In re Weinman* (Ref.), 2 N. B. N. 51.

<sup>12</sup> *Conway v. German* (C. C. A. 4th Cir.), 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527; *In re Hammond*, 163 Fed. Rep. 548, 20 Am. B. R. 776; *Hark v. Allen & Co.* (C. C. A. 3d Cir.), 146 Fed. Rep. 665, 77 C. C. A. 91, 17 Am. B. R. 3, affirming 142 Fed. Rep. 279, 15 Am. B. R. 460; *In re Shoemsmith* (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645.

<sup>13</sup> *Hark v. Allen & Co.* (C. C. A. 3d Cir.), 146 Fed. Rep. 665, 77 C. C. A. 91, 17 Am. B. R. 3, affirming 142 Fed. Rep. 279, 15 Am. B. R. 460; *In re Nusbaum*, 152 Fed. Rep. 835, 18 Am. B. R. 598; *In re Henderson*, 9 Fed. Rep. 196; *In re Cleary*, 179 Fed. Rep. 990, 24 Am. B. R. 742.

*In re Hamrick*, 175 Fed. Rep. 279, 281, 23 Am. B. R. 271, Judge

original petition charged that a transfer was made with intent to delay, hinder or defraud creditors, it may be amended to charge the same transfer to be a preference.<sup>14</sup> When the proof discloses acts of bankruptcy not averred in the original petition, the petition may be amended to conform to the proof, and after adjudication it will be treated as so amended.<sup>15</sup>

A petition may be amended by setting out an act of bankruptcy, which occurred more than four months before the application for leave to amend, provided the act of bankruptcy was committed within the four months before filing the petition.<sup>16</sup> The reason is that the amendment relates back to the time of filing the original petition and therefore is within time,

Neisman said: "I think the amendment was properly allowed. The original petition in bankruptcy stated imperfectly the ground of bankruptcy, and it is not disputed, as I understand it, that the amendment setting up the additional grounds of bankruptcy in giving the two last mortgages is good if it could be properly attached to the original petition by amendment. The rule as to amendments is very much the same rule that would apply under the practice in the State courts or in this court as to pleadings generally. There must be enough in the pleadings of course, to amend by. It is the rule that where a good cause of action is imperfectly stated it may be amended, and as this could have been amended and was, it, in my judgment, was sufficient as a basis for attaching the additional ground of bankruptcy."

<sup>14</sup> *Hark v. Allen & Co.* (C. C. A. 3d Cir.), 146 Fed. 665, 77 C. C. A. 91, 17 Am. B. R. 3, affirming 142 Fed. Rep. 279, 15 Am. B. R. 460; *In re Henderson*, 9 Fed. 196.

<sup>15</sup> *Chicago Motor Vehicle Co. v.*

*American Oak Leather Co.* (C. C. A. 8th Cir.), 141 Fed. Rep. 518, 72 C. C. A. 576, 15 Am. B. R. 804; *First State Bank v. Haswell* (C. C. A. 8th Cir.), 174 Fed. Rep. 209, 98 C. C. A. 217, 23 Am. B. R. 330; *In re Miller*, 104 Fed. Rep. 764, 5 Am. B. Rep. 140; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626; *In re Lange*, 97 Fed. Rep. 197, 3 Am. B. R. 232; *In re Hark*, 142 Fed. Rep. 279, 15 Am. B. R. 460, affirmed (C. C. A. 3rd Cir.), 146 Fed. Rep. 665, 77 C. C. A. 91, 17 Am. B. R. 3.

<sup>16</sup> *In re Shoesmith* (C. C. A. 7th Cir.), 135 Fed. Rep. 684, 68 C. C. A. 322, 13 Am. B. R. 645; *Hark v. Allen & Co.* (C. C. A. 3d Cir.), 146 Fed. Rep. 665, 77 C. C. A. 91, 17 Am. B. R. 3, affirming 142 Fed. Rep. 279, 15 Am. B. R. 460.

But see *In re Haff* (C. C. A. 2d Cir.), 136 Fed. Rep. 78, 68 C. C. A. 646, 13 Am. B. R. 362; *Walker v. Woodside* (C. C. A. 9th Cir.), 164 Fed. Rep. 680, 90 C. C. A. 644, 21 Am. B. R. 132; *In re Pure Milk Co.*, 154 Fed. Rep. 682, 18 Am. B. R. 735.

if otherwise proper to be included in the petition by amendment. Where petitions are filed against the same individual in different districts and one case is transferred, the petition in the court retaining jurisdiction may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions.<sup>17</sup>

Leave to amend will not generally be granted to introduce into the petition entirely new acts of bankruptcy, which were not founded upon facts stated or referred to in the original petition. An amendment setting up new acts of bankruptcy ought not to be allowed until the petitioners show good reason why these acts were omitted from the original petition or in some way excuse the omission.<sup>18</sup> Where an amendment to a petition alleges new acts of bankruptcy, the respondent is entitled to a reasonable time to answer.<sup>19</sup>

Where the verification is defective it may be amended.<sup>20</sup> Supplemental affidavits may be filed to show an agent's authority to sign and verify the petition.<sup>21</sup>

### § 203. Involuntary proceedings as to grounds for a suit for damages.

Proceedings by a creditor to force a debtor into bankruptcy can not be resorted to as proceedings *in terrorem* for the purpose of collecting a debt.

<sup>17</sup> Gen. Ord. 6. See Sec. 198, *ante*.

<sup>18</sup> Gen. Ord. 11. *White v. Bradley Timber Co.*, 116 Fed. Rep. 768, 8 Am. B. R. 671; *Wilder v. Watts*, 138 Fed. Rep. 426, 15 Am. B. R. 57; *In re Hark*, 142 Fed. Rep. 279, 15 Am. B. R. 460; *In re Pure Milk Co.*, 154 Fed. Rep. 682, 18 Am. B. R. 875.

<sup>19</sup> *Lockman v. Lang* (C. C. A. 2d Cir.), 132 Fed. Rep. 1, 65 C. C. A. 621, 12 Am. B. R. 497; *In re Broadway Savings Trust Co.* (C. C. A. 8th Cir.), 152 Fed. Rep. 152, 81 C. C. A. 58.

<sup>20</sup> *Conway v. German* (C. C. A. 4th Cir.), 166 Fed. Rep. 67, 91 C. C. A. 653, 21 Am. B. R. 527; *In re Nelson*, 98 Fed. Rep. 76, 1 Am. B. R. 63; *In re Vastbinder*, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re Bellah*, 116 Fed. Rep. 69, 8 Am. B. R. 310; *In re Simmons*, No. 12864 Fed. Cas., 10 N. B. R. 253; *In re Sargent*, No. 12361 Fed. Cas., 13 N. B. R. 144; *In re Cal. Pac. R. Co.*, No. 2315 Fed. Cas., 3 Saw. 240; *In re Donnelly*, 5 Fed. Rep. 783.

<sup>21</sup> *In re Rosenfields*, No. 12061 Fed. Cas., 11 N. B. R. 86.

The malicious institution of such proceedings in bankruptcy may be the foundation for an action for damages sustained.<sup>1</sup> In order to maintain an action for damages it is necessary to allege and prove that the proceedings were instituted maliciously and without probable cause and terminated without an adjudication in bankruptcy.<sup>2</sup> It is not necessary to allege or prove that there was an actual seizure of the debtor's property.<sup>3</sup>

<sup>1</sup> *Wilkinson v. Goodfellow-Brooks Shoe Co.*, 141 Fed. Rep. 218, 15 Am. B. R. 554; *Farley v. Danks*, 4 El. & Bl. 493; *Chapman v. Pickersgill*, 2 Wilson, 145; *Cooley on Torts*, 187; *Addison on Torts*, 867.

<sup>2</sup> *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. Ed. 116, reversing No. 13176 Fed. Cas., 2 Woods, 599; *Whitworth v. Hall*, 2 B. & Ad. 695.

<sup>3</sup> *Wilkinson v. Goodfellow-Brooks Shoe Co.*, 141 Fed. Rep. 218, 15 Am. B. R. 554.

## CHAPTER XIV.

## SUBPOENA AND SERVICE.

SEC.	SEC.
204. The writ of subpoena.	208. The return of the subpoena.
205. In what case a subpoena is necessary.	209. Service by publication.
206. The service of a subpoena.	210. How to object to an irregularity of service of subpoena.
207. Voluntary appearance waives service.	

**§ 204. The writ of subpoena.**

The eighteenth section of the bankruptcy act provides that "upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time."

The first step, therefore, after filing a petition in involuntary bankruptcy in the clerk's office, is to have issued and served a writ of subpoena.<sup>1</sup> This is a writ issuing out of the court of bankruptcy directed to the marshal, commanding him to summon the defendant<sup>1</sup> or defendants, naming them, to appear before a day certain and answer the matters alleged against them.<sup>2</sup>

<sup>1</sup> For form of subpoena, see Official Form No. 5, Form No. 8, *post*.

The clerk may issue a subpoena when there is a vacancy in the office of judge, *In re Urban*, etc., Title Co., 132 Fed. Rep. 140, 12 Am. B. R. 687.

<sup>2</sup> Gen. Ord. 3.

In the United States courts a subpoena is directed to the mar-

shal, although it may be observed that formerly the writ of subpoena differed from other writs of process in equity in being directed to the party himself, whereas the subsequent writs are directed to certain ministerial officers commanding them to take proceedings against the defendant calculated to enforce obedience. See Daniels Chan. Prac. (1 ed.) 554.

This writ is issued as of course upon application of the plaintiff.<sup>3</sup> The subpoena is issued under the seal of the court of bankruptcy, and is signed by the clerk of that court.<sup>4</sup> The writ bears *teste* of the judge or, when that office is vacant, of the clerk of that court<sup>5</sup> as of the date of issuing the writ.<sup>6</sup>

The subpoena is returnable within fifteen days unless the judge for cause fixes a longer time.<sup>7</sup> Formerly a writ of subpoena named a money penalty in case of disobedience, but this has fallen into disuse in equity, and is unnecessary in bankruptcy for the reason that the plaintiff has a remedy in procuring an adjudication of bankruptcy, provided neither the bankrupt nor a creditor appears to controvert the facts alleged in the petition.<sup>8</sup>

At the bottom of the subpoena in equity is placed a memorandum that the defendant is to enter his appearance in the suit and plead in the clerk's office on or before the day on which the writ is returnable, otherwise the bill may be taken *pro confesso*,<sup>9</sup> but Form No. 5 in bankruptcy contains no such memorandum.<sup>9\*</sup> If no service is made before the return day, other subpoenas *toties quoties* may be issued until the defendants are all served.<sup>10</sup>

### § 205. In what case a subpoena is necessary.

A subpoena is necessary in case of a petition for involuntary bankruptcy,<sup>1</sup> but not when the petition is filed by the bankrupt himself. No subpoena or service is required to be served on the creditors.<sup>2</sup>

To bring a defendant who is charged with being a bankrupt before the court in the first instance the personal service of a subpoena is proper and necessary. He can not be brought

<sup>3</sup> Equity Rule 12. Form 4 provides for an order to show cause, etc., directing a subpoena.

<sup>4</sup> R. S. Sec. 911; Gen. Ord. 3.

<sup>5</sup> R. S. Sec. 911.

<sup>6</sup> R. S. Sec. 912.

<sup>7</sup> B. A. 1898, Sec. 18.

<sup>8</sup> B. A. 1898, Sec. 18*d*.

<sup>9</sup> Equity Rule 12; B. A. 1898, Sec. 18*d*; Official Form No. 5, Form No. 8, *post*.

<sup>9\*</sup> See *In re Wing Yick Co.* (11*aw.*), 13 Am. B. R. 360.

<sup>10</sup> Equity Rule 14.

<sup>1</sup> B. A. 1898, Sec. 18.

<sup>2</sup> *In re Billings*, 145 Fed. Rep. 395, 17 Am. B. R. 80.



in any other way. But he may voluntarily enter his appearance and thereby he waives any want of or defect in the service of a subpoena.<sup>3</sup> A subpoena should be issued and served on all the defendants named in the petition.

If the debtor die after the proceedings are begun and before the adjudication, his legal representatives must be brought in by subpoena.<sup>4</sup>

### § 206. The service of a subpoena.

A subpoena and copy of the petition are served by the marshal or his deputy, or some other person specially appointed by the court for that purpose.<sup>1</sup> The service can be made only within the territorial jurisdiction of the bankruptcy court issuing the writ.<sup>2</sup> The writ can not be served by the marshal of another district within his jurisdiction.

The manner of serving the subpoena and petition is prescribed by Equity Rule 13, which is as follows: "The service of all subpoenas shall be by delivery of a copy thereof by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant with some adult person who is a member or resident in the family." This must be strictly

<sup>1</sup>*In re* Ulrick, No. 14327 Fed. Cas., 3 Ben. 355; *Johnson v. Waters*, 111 U. S. 640; 28 L. Ed. 547; *Fitzgerald Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608; *Henderson v. Carbondale Co.*, 140 U. S. 25, 35 L. Ed. 332; *Buerk v. Imhaeuser*, 8 Fed. Rep. 457.

<sup>4</sup>*Shute v. Patterson* (C. C. A. 8th Cir.), 147 Fed. Rep. 509, 78 C. C. A. 75, 17 Am. B. R. 99.

<sup>3</sup>Equity Rule 15, R. S. Secs. 788-790; *Bray v. Cobb*, 91 Fed. Rep. 102, 1 Am. B. R. 153; *United States v. Montgomery*, 2 Dall. 335; *Hyman v. Chales*, 12 Fed. Rep. 855; *Deacon v. Sewing Machine Co.*, No.

3694a Fed. Cas., 14 Reporter 43.

<sup>2</sup>*Jobbins v. Montague*, No. 7329, Fed. Cas., 5 Ben. 422; *Paine v. Caldwell*, No. 10674 Fed. Cas., 1 Hask. 452; *In re Hirsch*, No. 6529, Fed. Cas., 2 Ben. 493; *In re Litchfield*, 13 Fed. Rep. 868; *Herdon v. Ridgway*, 17 How. 424, 15 L. Ed. 100.

But see *Babbitt v. Burgess*, No. 693 Fed. Cas., 2 Dill. 169; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Butterworth v. Hill*, 114 U. S. 128, 29 L. Ed. 119; *Pacific Railroad v. Missouri Pacific Railway Co.*, 3 Fed. Rep. 772.

followed or the service will be defective and may be set aside.<sup>3</sup> The objection that service was not properly made may be raised by motion, but not by demurrer.<sup>4</sup>

The subpoena is regularly returnable within fifteen days, unless the judge shall for cause fix a longer time.<sup>5</sup> But the failure to serve the subpoena within fifteen days after its issue does not put an end to the bankruptcy proceedings.<sup>6</sup> Alias subpoenas may be issued, when for any reason it has been impossible to serve the original subpoena.<sup>7</sup>

Service is required to be made on each defendant at least five days before the return day.<sup>8</sup> Hence in a suit against a husband and wife each must be personally served.<sup>9</sup> In a suit against an infant, service should be made upon him personally, and not only upon his guardian or parent.<sup>10</sup> This applies to petitions against partnerships. In case a petition is filed by less than all the partners, the non-joining partner must be brought in by service personally, if possible, or otherwise by publication.<sup>10\*</sup>

Service is regularly made upon a corporation by serving the subpoena upon one or more of its officers within the district

<sup>3</sup> *Romaine v. Union Insurance Co.*, 28 Fed. Rep. 635-6, and cases there collated; *Von Roy v. Blackman*, No. 16997, Fed. Cas., 3 Woods, 98.

<sup>4</sup> *In re Seaboard Fire Underwriters*, 137 Fed. Rep. 987, 13 Ad. B. R. 722.

<sup>5</sup> B. A. 1898, Sec. 18a.

<sup>6</sup> *Gleason v. Smith, Perkins & Co.*, 145 Fed. Rep. 895, 16 Am. B. R. 602; *In re Stein* (C. C. A. 2d Cir.), 105 Fed. Rep. 749, 45 C. C. A. 29, 5 Am. B. R. 288.

<sup>7</sup> *Gleason v. Smith, Perkins & Co.*, 145 Fed. Rep. 895, 16 Am. B. R. 602.

<sup>8</sup> See Official Form 4, Form No. 7, *post*.

<sup>9</sup> *O'Hara v. O'Connell*, 93 U. S. 151, 23 L. Ed. 840.

<sup>10</sup> In *Woolridge v. McKenna*, 8 Fed. Rep. 670, Judge Hammond said: "But never is service or process upon the guardian or parent or other substituted process of that character sufficient to bind the infant where he is personally an essential party defendant." See also *O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840, where service was made on the husband of an infant. In *Smith v. Marshal*, 2 Atk. 70, a service on the mother of infants was held good, it appearing that the infants were secreted.

<sup>10\*</sup> Gen. Ord. 8. *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601.

within which it is domiciled.<sup>11</sup> It can not be made on an officer not authorized to accept service,<sup>11\*</sup> or on an officer of a non-resident corporation temporarily within the district.<sup>12</sup> It will be observed that the cases cited arose under the act of August 13, 1888,<sup>13</sup> where it is provided that a person shall be sued only in the district of his residence. The bankrupt act provides that a person may be adjudged a bankrupt who has his principal place of business, resides or had his domicile within the jurisdiction of the court for the preceding six months, or the greater portion thereof, or aliens, who have property within the jurisdiction of the court.<sup>14</sup> But the general rule is probably applicable to bankruptcy suits that service can not be made upon a non-resident defendant temporarily within the district for the purpose of attending court, either state or federal,<sup>15</sup> nor upon a public officer in the discharge of his duty within the district<sup>16</sup> nor upon a person fraudulently enticed into the district for the purpose of getting service on him.<sup>17</sup> So also a person is free to attend upon bankruptcy proceedings as a witness or to prove a debt, etc., without interference by service of process of any kind.<sup>18</sup>

<sup>11</sup> Shaw v. Quincy Mining Co., 145 U. S. 444, 35 L. Ed. 768; Galveston Ry. v. Gonzales, 151 U. S. 496, 38 L. Ed. 248; Southern Pacific Co. v. Denton, 146 U. S. 202, 36 L. Ed. 377.

As to where the domicile of a corporation is located, see Sec. 194, *ante*.

<sup>11\*</sup> *In re Plasmon Co.*, 14 Am. B. R. 487.

<sup>12</sup> Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517; Fidelity Trust and Safety Vault Co. v. Mobile St. R. R. Co., 53 Fed. Rep. 850.

<sup>13</sup> 25 Stat. at L. 434.

<sup>14</sup> B. A. 1898, Sec. 2, clause 1.

<sup>15</sup> Kauffman v. Kennedy, 25 Fed. Rep. 785; Parker v. Hotchkiss, No. 10739 Fed. Cas., 1 Wall. Jr. 269;

Matthews v. Puffer, 10 Fed. Rep. 606; Brooks v. Farwell, 4 Fed. Rep. 167; Kinne v. Lant, 68 Fed. Rep. 436.

<sup>16</sup> Lyell v. Goodwin, No. 8616, Fed. Cas., 4 McLean, 29.

See also U. S. Const., Art. 1, Sec. 6, with reference to senators and congressmen; Miner v. Markham, 28 Fed. Rep. 387.

<sup>17</sup> Union Sugar Refinery v. Mathieson, No. 14397 Fed. Cas., 2 Cliff. 304; Steiger v. Bonn, 4 Fed. Rep. 17; Plimpton v. Winslow, 9 Fed. Rep. 365; Blair v. Turtle, 5 Fed. Rep. 394.

<sup>18</sup> Matthews v. Tufts, 87 N. Y. 568, and cases cited in appellant's brief; cases cited in note to *ex parte* Hawkins, 4 Ves. Jr. 691.

Where personal service on a resident defendant by delivery of a copy of the subpoena to him is impracticable or inconvenient, it was held prior to the amendment of 1903 that service might be made by leaving a copy at his house or usual place of abode.<sup>19</sup> By that amendment it was provided that in case personal service can not be made, then notice shall be given by publication.<sup>20</sup>

### § 207. Voluntary appearance waives service.

A person may voluntarily appear and plead without being served with subpoena.<sup>1</sup>

In such case the court has complete jurisdiction over him as though he had been legally served with process.<sup>2</sup>

If a non-resident comes into the case for the purpose of proving a claim he thereby submits himself to the jurisdiction of the court irrespective of his place of residence.<sup>3</sup> He thereby makes himself a party to the proceedings and is bound to take notice of and obey the orders of the court to the same extent as any other party.

When a voluntary appearance has been entered it can not be withdrawn without permission of the court.<sup>4</sup>

Brett v. Brown, 13 Abb. Pr., N. S. (N. Y.) 295; Sanford v. Chase, 3 Cowen (N. Y.), 381; Norris v. Beach, 2 Johns (N. Y.), 294; Lampkin v. Starkey, 7 Hun (N. Y.) 479.

<sup>19</sup> Equity Rule 13. See also Form No. 4; *In re Norton*, 148 Fed. Rep. 301, 17 Am. B. R. 504; *In re Risteen*, 122 Fed. Rep. 732, 10 Am. B. R. 494.

<sup>20</sup> B. A. 1898, Sec. 18a, as amended, Feb. 5, 1903, 32 Stat. 797.

As to service by publication, see Sec. 210, *post*.

<sup>1</sup> *In re Western Investment Co.*, 170 Fed. Rep. 677, 21 Am. B. R. 367; *In re Columbia Real Estate*

*Co.*, 101 Fed. Rep. 695, 4 Am. B. R. 411.

<sup>2</sup> *In re Western Investment Co.*, 170 Fed. Rep. 677, 21 Am. B. R. 367; *In re Kirkland*, No. 7851 Fed. Cas., 10 Blatch. 515; *In re Ulrich*, No. 14327, Fed. Cas., 3 Ben. 355.

<sup>3</sup> *In re Kyler*, No. 7956, Fed. Cas., 2 Ben. 414; *In re Sabin*, No. 12195, Fed. Cas., 18 N. B. R. 151; *In re Pease*, 29 Fed. Rep. 595; *In re Anderson*, 23 Fed. Rep. 483.

<sup>4</sup> *In re Ulrich*, No. 14327 Fed. Cas., 3 Ben. 355; see also *United States v. Curry*, 6 How. 106, 12 L. Ed. 363; *Eldred v. Mich. Ins. Bank*, 17 Wall. 545, 21 L. Ed. 685.

**§ 208. The return of the subpoena.**

On or before the day named in the writ on which it is returnable the officer returns it to the clerk's office, with his action therewith endorsed on the back of it.

This is called the marshal's return to the writ,<sup>1</sup> which should state the day on which the writ was received, and when, where and how service was made. It is then signed by the marshal, or in the name of the marshal by his deputy.<sup>2</sup> The truth of an unverified return of a marshal or his deputy is not to be questioned in the cause.<sup>3</sup> If he makes a false return he is liable for any damage that may be sustained in consequence of it.<sup>4</sup>

When a writ is served by one specially appointed for that purpose, proof of the service is made by an affidavit of the one who served it.<sup>5</sup> The return of the marshal may be amended to comply with the facts,<sup>6</sup> but not to supply a fatal omission,<sup>7</sup> as the absence of the clerk's signature, or the authority in whose name it is issued, or the like.

If the officer has failed to make service of it on the defendants, or any of them, he should return the writ and state in his return the reason why no service has been made, as that the defendant named has not been found within the district. An alias subpoena may then be issued.<sup>8</sup>

The endorsement on the writ that service is accepted and signed by the defendant, dated at a place within the district, is sufficient.<sup>9</sup> But accepting service without the district "to

<sup>1</sup> See Loveland's Forms of Fed. Prac. No. 333.

<sup>2</sup> See *Hill v. Gordon*, 45 Fed. Rep. 278.

<sup>3</sup> *Phoenix Ins. Co. v. Wulf*, 1 Fed. Rep. 775; *Von Roy v. Blackman*, No. 16997 Fed. Cas., 3 Woods, 98, *McClaskey v. Barr*, 45 Fed. Rep. 151.

<sup>4</sup> See *Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552; *Von Roy v. Blackman*, No. 16997 Fed. Cas., 3 Woods, 98.

<sup>5</sup> Equity Rule 15.

<sup>6</sup> R. S. Sec. 954; *Phoenix Ins. Co. v. Wulf*, 1 Fed. Rep. 775.

<sup>7</sup> *Dwight v. Merritt*, 4 Fed. Rep. 614; *Peaslee v. Haberstro*, No. 10884 Fed. Cas., 15 Blatch. 472; *United States v. Rose*, 14 Fed. Rep. 681.

<sup>8</sup> Equity Rule 14.

<sup>9</sup> The proper endorsement in such a case is "I promise to appear at the return of the within writ and pray the court to enter

have the same effect as if duly served on me by a proper officer" is not a sufficient service.<sup>10</sup>

### § 209. Service by publication.

Section 18 of the act also provides that "in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."

The reference here is to the method prescribed by section 8 of the Act of March 3, 1875.<sup>1</sup> The bankrupt act changes the time for publication and specifies the return day thereafter. In other respects substituted service is made in bankruptcy as under the Act of 1875.

The court should make an order directing the absent defendant or defendants to appear and plead, answer or demur by a day certain to be designated, which order is served on the absent defendant or defendants, if practicable, wherever found.

Where personal service is not practicable the order may be published in such manner as the court may direct, and "the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer period."<sup>2</sup>

my appearance accordingly," and signed by the defendant. This form is sufficient if made by a nonresident defendant without the district.

<sup>10</sup> *Butterworth v. Hill*, 114 U. S. 128, 132-3, 29 L. Ed. 119.

<sup>1</sup> 18 Stat. at L. 470, 1 Supp. 84. See also *Bracken v. Union Pac. Ry. Co.*, 56 Fed. Rep. 447, 5 C. C.

A. 548; *Batt v. Proctor*, 45 Fed. Rep. 515; *Beach v. Mosgrove*, 16 Fed. Rep. 305; *Loveland's Forms of Fed. Prac.*, Nos. 63 to 69.

For practice in bankruptcy and form of order, see *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601.

<sup>2</sup> B. A. 1898, Sec. 18, as amended Feb. 5, 1903, 32 Stat. at L. 797.

Upon proof of service or publication of such order and the performance of the directions contained in the same the court may entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the district.

Any adjudication affecting absent defendants without appearance should affect only property within the district which can come into the possession of the trustee.<sup>3</sup> Substituted service under this act does not vest the court with jurisdiction of the person generally.

### § 210. How to object to an irregularity of service of subpoena.

Objections are properly raised to the sufficiency of the service by a motion to set aside the return of the marshal;<sup>1</sup> to an irregularity in issuing the subpoena by a motion to quash the writ;<sup>1</sup> to an order for substituted service improperly granted by a motion to set aside the order or service or both.<sup>2</sup> In these cases the motion should be accompanied with a special appearance for the purpose of the motion only, for by a general appearance the defendant submits himself to the jurisdiction of the court.<sup>3</sup>

<sup>3</sup> *In re Appel*, 103 Fed. Rep. 931, 4 Am. B. R. 722; *Citizens Sav. & T. Co. v. I. C. R. R. Co.*, 105 U. S. 46, 51, 51 L. Ed. 703.

<sup>1</sup> *In re Seaboard Fire Underwriters*, 137 Fed. Rep. 987, 13 Am. B. R. 722; *Romaine v. Union Ins. Co.*, 28 Fed. Rep. 634-5, where the authorities are examined and the practice is explained.

See also *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. Rep. 850; *Von Roy v.*

*Blackman*, No. 16997, Fed. Cas., 3 Woods, 98; *Am. Bell Tel. Co. v. Pan Electric Tel. Co.*, 28 Fed. Rep. 625; *Pacific R. Co. v. Missouri R. Co.*, 3 Fed. Rep. 772; *Gregory v. Pike*, 79 Fed. Rep. 520.

<sup>2</sup> *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. Rep. 850; *Bowen v. Christian*, 16 Fed. Rep. 730; *Rogers v. Riessner*, 31 Fed. Rep. 591.

<sup>3</sup> *In re Smith*, 117 Fed. Rep. 961, 9 Am. B. R. 98.

## CHAPTER XV.

### RECEIVERS, INJUNCTIONS AND SEIZURE TO PRESERVE THE ESTATE.

SEC.	SEC.
211. Method of preserving the estate before trustee appointed.	217. Suits by and against receivers.
212. Power to appoint receivers.	218. Receiver's reports and account.
213. The application for a receiver.	219. Compensation of receivers.
214. The appointment and qualification of a receiver.	220. Costs and expenses of a receivership.
215. Powers of a receiver.	221. Temporary injunction or restraining order.
216. Continuing the business by a receiver, marshal, or trustee.	222. The seizure of a debtor's property by a marshal.

#### § 211. Method of preserving the estate before trustee appointed.

Upon filing the petition in bankruptcy it may be desirable and necessary to take steps forthwith to protect and preserve the estate of the bankrupt until the appointment of a trustee. This may occur in voluntary or involuntary proceedings. It is, however, very rarely necessary in the case of voluntary bankruptcy.

It is obvious that in every case of involuntary proceedings in bankruptcy a considerable interval of time is bound to elapse between the filing of the petition and the appointment and qualification of a trustee. Thus, after the petition is filed a subpoena must issue, be served and returned.<sup>1</sup> The bankrupt is entitled to five days thereafter within which to plead.<sup>2</sup> He may demand and have a jury trial.<sup>3</sup> All this takes place prior to the adjudication. Not less than ten nor more than thirty days after the adjudication a meeting of creditors is required to be held, at which a trustee of the

<sup>1</sup> B. A. 1898, Sec. 18a.

<sup>2</sup> B. A. 1898, Sec. 18b, as amended

by the Act of Feb. 5, 1903, 32 Stat. at L. 797.

<sup>3</sup> B. A. 1898, Sec. 19a.



bankrupt's estate is chosen by the creditors.<sup>4</sup> Upon their failure to agree the trustee is appointed by the court.<sup>5</sup>

If there is danger during this interval of the bankrupt or any other person wasting or disposing of the property, or of a creditor obtaining an undue advantage over the other creditors either by judicial process or otherwise, it is the duty of the court, upon proper application, to prevent such injury by making such orders as may be most beneficial to the estate and the creditors generally.

Applications for orders of this nature may be made by petition or motion supported by affidavits. The application is regularly made to the judge and not to a referee. But the judge may refer such an application or any specified issue arising thereon to the referee to ascertain and report the facts.<sup>6</sup> In case the judge is absent from the judicial district, sick or unable to act, the clerk may certify this fact to a referee who may exercise the powers of the judge for taking possession and releasing the property of the bankrupt.<sup>7</sup>

There are four ordinary modes of proceeding for the purpose of protecting and preserving the estate of a bankrupt before a trustee is appointed.

*First.* The court may appoint a receiver or the marshal to take charge of the property of the bankrupt after the filing of the petition and until it is dismissed or the trustee is qualified.<sup>8</sup>

*Second.* The court may restrain the debtor or any other person or persons from making any transfer or disposition of any part of the debtor's property not excepted by the statute from the operation thereof and from any interference therewith.<sup>9</sup>

<sup>4</sup> B. A. 1898, Secs. 44 and 55, Gen. Ord. 13.

<sup>5</sup> B. A. 1898, Sec. 44.

<sup>6</sup> Gen. Ord. 12.

<sup>7</sup> B. A. 1898, Sec.

<sup>8</sup> B. A. 1898, Sec. 2, clause 3. See Sec. 212, *et seq.*, *post.*

<sup>9</sup> B. A. 1898, Sec. 2, Clause 15. See Sec. 221, *post.*

*Third.* The court may in a proper case issue a warrant to a marshal to seize and hold the property of a debtor subject to further orders.<sup>10</sup>

*Fourth.* The court may order a suit, which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, to be stayed until after an adjudication or the dismissal of the petition. If such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.<sup>11</sup>

#### § 212. Power to appoint receivers.

The power to appoint receivers in bankruptcy proceedings is statutory.<sup>1</sup> The bankrupt act expressly confers jurisdiction upon the courts of bankruptcy to appoint receivers.

Section 2 of that act invests those courts "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings; to

"(3) Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts from the filing of the petition and until it is dismissed or the trustee is qualified;" and also

"(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates."

These clauses confer upon a court of bankruptcy jurisdiction in the matter of receiverships.<sup>2</sup> They authorize the ap-

<sup>10</sup> B. A. 1898, Secs. 3e and 69. See Sec. 222, *post*.

<sup>11</sup> B. A. 1898, Sec. 11a. As to staying suits see Chap. 5.

<sup>1</sup> Boonville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 43, 6 Am. B. R. 13;

Guaranty Title & Trust Co. v. Pearlman, 144 Fed. Rep. 550, 16 Am. B. R. 61.

<sup>2</sup> Boonville Nat. Bank v. Blakey (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 93, 6 Am. B. R. 13; Guaranty Title & Trust Co. v.

pointment of a receiver in a bankruptcy proceedings under certain conditions and for certain purposes. The authority of the court to appoint a receiver in any case must be found in these clauses or it is wanting. If power is implied outside of and beyond them, it would make these provisions superfluous and unnecessary.

The court is clothed, it is true, with equity powers "to exercise original jurisdiction in bankruptcy proceedings". This is not a general equity jurisdiction. The court is not authorized, by virtue of this grant of equity power, to appoint a receiver with the authority of a receiver in chancery.<sup>3</sup>

When a court of bankruptcy has appointed a receiver, no other court has power to control him in any way.<sup>4</sup> He may be summoned as a witness and required to bring books and papers in his custody, but he can not be required to prepare a statement of profits for use before a master appointed for an accounting in a patent infringement suit.<sup>5</sup>

### § 213. The application for a receiver.

An application for a receiver may be made at any time after the filing of the petition and before the appointment of a trustee. It may be before or after the adjudication.

An application for a receiver is regularly made to the judge, especially in important cases. A referee has power to

Pearlman, 144 Fed. Rep. 550, 16 Am. B. R. 461; *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73; *In re Fixen & Co.*, 96 Fed. Rep. 748, 2 Am. B. R. 822.

<sup>3</sup> *Booneville Nat. Bank v. Blakey* (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 93, 6 Am. B. R. 13; *Guaranty Title & Trust Co. v. Pearlman*, 144 Fed. Rep. 550, 16 Am. B. R. 461.

As to the powers of a receiver in bankruptcy, see Sec. 215, *post*.

<sup>4</sup> *American Graphophone Co. v. Leeds & Catlin Co.*, 174 Fed. Rep. 158, 23 Am. B. R. 332.

<sup>5</sup> *In American Graphophone Co. v. Leeds & Catlin Co.*, 174 Fed. Rep. 158, 23 Am. B. R. 332, Judge Lacombe said: "The receiver owes no active duty to complainant to expend the money of the estate in an effort to ascertain the facts asked for. Undoubtedly the receiver will afford all reasonable facilities, as he said he would, for the examination of the records which contain the information sought for."

appoint a receiver after a reference of the case by the judge<sup>1</sup> or by the clerk in the absence of the judge.<sup>2</sup>

The application must be made by a "party in interest." It is usually made by a petitioning creditor. It is made by petition or motion supported by affidavits.<sup>3</sup> The petition should show that it is necessary for the preservation of the estate that a receiver be put in charge of it,<sup>4</sup> and pray the appointment of a receiver. The petition should be verified under oath.

<sup>1</sup> Gen. Ord. No. 12. *Faulk & Co. v. Steiner, Lobman & Frank* (C. C. A., 5th Cir.), 165 Fed. Rep., 861, 91 C. C. A. 547, 21 Am. B. R. 623; *In re Florcken*, 107 Fed. Rep. 241, 5 Am. B. R. 802; *In re Rosenthal*, 144 Fed. Rep. 548, 16 Am. B. R. 448.

*In re Maher* (not reported) at Cincinnati, Referee Waite appointed a receiver of a stable of horses on the application of a voluntary bankrupt who was unable to obtain hay and grain to feed them. The receiver was in possession until a trustee was appointed.

<sup>2</sup> B. A. 1898, Sec. 38, clauses 3 and 4; *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432.

<sup>3</sup> For form of petition, see Form No. 23, *post*.

*In Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. Rep. 295, 17 Am. B. R. 257, the court appointed a receiver to take charge of the property of the bankrupt before an adjudication on bill filed by creditors.

<sup>4</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; *Faulk & Co. v. Steiner, Lobman & Frank* (C. C. A. 5th Cir.), 165 Fed. Rep. 861, 91 C. C. A. 547, 21 Am. B. R. 623; *Skubinsky v. Bodek* (C. C. A. 3d Cir.), 172 Fed. Rep. 332,

97 C. C. A. 116, 22 Am. B. R. 689; *In re Oakland Lumber Co.* (C. C. A. 2d Cir.), 174 Fed. Rep. 634, 98 C. C. A. 388, 23 Am. B. R. 181; *In re Standard Cordage Co.*, 184 Fed. Rep. 156, 26 Am. B. R. 5.

*In re Rosenthal*, 144 Fed. Rep. 548, 16 Am. B. R. 448, Judge Lanning said: "There is no intimation in the petition that the assignee is doing anything prejudicial to the interests of creditors or in conflict with the provisions of the bankruptcy act. Nor, in the order made, is there any finding that it is absolutely necessary for the preservation of the bankrupt's estate that a receiver be appointed. It follows that the referee's order must be set aside and the petition on which it was made be dismissed."

*In re Standard Cordage Co.*, 184 Fed. Rep. 156, 157, 26 Am. B. R. —, *supra*, Judge Hazel, vacating a former order appointing a receiver, said: "Looking at the facts as they are now presented, the primal question for consideration is not simply whether it would be better for all parties concerned that the receivership should be continued, but whether such continuance is absolutely essential to protect and conserve the property of the company. The record does not present such a situation."

The statute does not expressly require notice. It is well settled in practice that a judge or referee will not appoint a receiver without notice, except in case of great necessity.<sup>6</sup> It sometimes becomes necessary for the court to act without notice to the defendant, when he has absconded, or is beyond the jurisdiction of the court, or can not be found, or when there is imminent danger of irreparable injury, or when, by giving notice, the very purpose of the appointment may be rendered nugatory.<sup>7</sup>

The court may hear oral testimony or the matter may be submitted upon affidavits. The respondent as well as the applicant is entitled to an opportunity to put in evidence and to be heard before a receiver is appointed.<sup>7</sup>

The evidence to satisfy the judge of the necessity of putting a receiver in charge of the debtor's property, should be clear, positive and certain. This is required by the words "absolutely necessary" used in the statute.<sup>8</sup>

It is not sufficient ground for the appointment of a receiver that the property is in the hands of an assignee for the benefit of creditors or a receiver appointed by a state court, without

<sup>6</sup> *Faulk & Co. v. Steiner, Lobman & Frank* (C. C. A. 5th Cir.), 165 Fed. Rep. 861, 91 C. C. A. 547, 21 Am. B. R. 623; *In re Oakland Lumber Co.* (C. C. A. 2d Cir.), 174 Fed. Rep. 634, 98 C. C. A. 388, 23 Am. B. R. 181; *Ross-Meehan Foundry Co. v. Southern Car & Foundry Co.*, 124 Fed. Rep. 403, 10 Am. B. R. 624.

<sup>7</sup> *In Latimer v. McNeal* (C. C. A. 3d Cir.), 142 Fed. Rep. 451, 73, C. C. A. 567, 16 Am. B. R. 43, affirming *In re Francis*, 136 Fed. Rep. 912, 14 Am. B. R. 676, where two of the defendants had absconded and the other was incarcerated, no notice was required.

<sup>8</sup> *Faulk & Co. v. Steiner, Lobman & Frank Co.* (C. C. A. 5th Cir.),

165 Fed. Rep. 851, 91 C. C. A. 547, 21 Am. B. R. 623; *In re Oakland Lumber Co.* (C. C. A. 2d Cir.), 174 Fed. Rep. 634, 98 C. C. A. 388, 23 Am. B. R. 181; *Ross-Meehan Foundry Co. v. Southern Car & Foundry Co.*, 124 Fed. Rep. 403, 10 Am. B. R. 624.

<sup>9</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623; *Faulk & Co. v. Steiner, Lobman & Frank* (C. C. A. 5th Cir.), 165 Fed. Rep. 861, 91 C. C. A. 547, 21 Am. B. R. 623; *Skubinsky v. Bodek* (C. C. A. 3d Cir.), 172 Fed. Rep. 332, 97 C. C. A. 116, 22 Am. B. R. 689; *In re Oakland Lumber Co.* (C. C. A. 2d Cir.), 174 Fed. Rep. 634, 98 C. C. A. 388, 23 Am. B. R. 181.

further showing that the property was being dissipated or improvidently cared for, or that the assignee or receiver was not careful, prudent or responsible, and that there was likely to be a loss to the estate.<sup>9</sup> The consent of the bankrupt is not sufficient without further showing the necessity for a receiver.<sup>10</sup>

### § 214. The appointment and qualification of a receiver.

It is the province of the court to select and appoint the receiver.<sup>1</sup>

The bankrupt or the creditors are not entitled to any voice in the selection of a receiver. The court will frequently consider suggestions from the parties in interest, but it is not bound to do so. The same care should be observed in selecting a receiver who is competent and disinterested, as in the appointment of a trustee.<sup>2</sup>

An ancillary receiver may be appointed in aid of another court, which is administering the estate of a debtor, for the purpose of taking the assets of the bankrupt within the district and preserving them to be administered by the court of original jurisdiction.<sup>3</sup>

<sup>9</sup> *In re* Oakland Lumber Co. (C. C. A. 2d Cir.), 174 Fed. Rep. 634, 98 C. C. A. 388, 23 Am. B. R. 181; *In re* Rosenthal, 144 Fed. Rep. 548, 16 Am. B. R. 448; *In re* Standard Cordage Co., 184 Fed. Rep. 156, 26 Am. B. R. —.

<sup>10</sup> *Faulk & Co. v. Steiner, Lobman & Frank* (C. C. A. 5th Cir.), 165 Fed. Rep. 861, 91 C. C. A. 547, 21 Am. B. R. 623.

<sup>1</sup> *Birmingham Coal & Iron Co. v. Southern Steel Co.*, 160 Fed. Rep. 212, 20 Am. B. R. 151; *In re* Huddleston, 167 Fed. Rep. 428, 21 Am. B. R. 669.

<sup>2</sup> *Birmingham Coal & Iron Co. v. Southern Steel Co.*, 160 Fed. Rep. 212, 20 Am. B. R. 151.

*In re* Huddleston, 167 Fed. Rep. 428, 21 Am. B. R. 669, the court appointed a woman receiver.

*In re* Etheridge Furniture Co., 92 Fed. Rep. 329, 1 Am. B. R. 112, the assignee for the benefit of creditors, who had inventories and appraisements of the property, and was solvent, was appointed receiver.

<sup>3</sup> *In re* Benedict, 140 Fed. Rep. 55, 15 Am. B. R. 232; *In re* Sutter Bros., 131 Fed. Rep. 654, 11 Am. B. R. 632; *In re* Nelson & Bro. Co., 149 Fed. Rep. 590, 18 Am. B. R. 66. These cases were cited with approval by the supreme court in *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519; see

The petitioning creditors may be required, as a condition to the appointment of a receiver, to furnish a bond, in a sum fixed by the court, conditioned to pay the expenses and costs of the receivership.<sup>4</sup>

Granting or refusing an application for a receiver rests in the sound judicial discretion of the court.<sup>5</sup> It can not be controlled by *mandamus*,<sup>6</sup> but may be reviewed on petition for revision.<sup>7</sup> The official status or the regularity of the proceedings leading up to his appointment can not be collaterally attacked.<sup>8</sup>

The order appointing a receiver regularly recites that the absolute necessity for a receiver was made to appear to the court.<sup>9</sup> The order should specify his powers and duties. This may be done in general language as follows: "That W. R. be and he is hereby appointed receiver of all the assets and property of every kind and character, of and belonging to the said A. Company, and said receiver is hereby clothed with all the powers and authority of receivers in bankruptcy in like

also *In re* Dunseath, 168 Fed. Rep. 973, 21 Am. B. R. 742.

As to Ancillary Jurisdiction generally, see Sec. 35, *ante*.

<sup>4</sup>B. A. 1898, Sec. 3e; *In re* McKane, 152 Fed. Rep. 733, 18 Am. B. R. 594; *In re* Moehs & Rehnitz, 174 Fed. Rep. 165, 22 Am. B. R. 286; *In re* Haff (C. C. A. 2d Cir.), 135 Fed. Rep. 742, 68 C. C. A. 380, 13 Am. B. R. 354; *In re* Sunseri, 156 Fed. Rep. 103, 18 Am. B. R. 231.

<sup>5</sup>For form of order appointing a receiver see Form No. 25, *post*, and for form refusing to appoint one, see Form No. 24, *post*.

<sup>6</sup>*Edinburg Coal Co. v. Humphreys* (C. C. A. 7th Cir.), 134 Fed. Rep. 839, 67 C. C. A. 435, 13 Am. B. R. 593.

<sup>7</sup>As was done in *Skubinsky v. Bodek* (C. C. A. 3d Cir.), 172 Fed. Rep. 332, 97 C. C. A. 116, 22 Am. B. R. 689; *In re* Oakland Lumber Co. (C. C. A. 2d Cir.), 174 Fed. Rep. 634, 98 C. C. A. 388, 23 Am. B. R. 181; *Faulk & Co. v. Steiner, Lobman & Frank* (C. C. A. 5th Cir.), 165 Fed. Rep. 861, 91 C. C. A. 547, 21 Am. B. R. 623; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 751.

<sup>8</sup>*Ross v. Strohe* (C. C. A. 3d Cir.), 165 Fed. Rep. 628, 91 C. C. A. 616, 21 Am. B. R. 644; *In re* Isaacson (C. C. A. 2d Cir.), 174 Fed. Rep. 406, 98 C. C. A. 614, 23 Am. B. R. 98.

<sup>9</sup>For form of order appointing a receiver in bankruptcy, see Form No. 25, *post*.

cases."<sup>10</sup> It should further require a bond to be given by the receiver before he takes possession of the property and fix the amount of the bond.<sup>11</sup> If it is desired that the receiver continue the business of the bankrupt, this may be included in the order of appointment.

A record should be made in the case of the acceptance by the receiver and his qualification. Before he takes possession of the bankrupt's property he must file a bond for the faithful performance of his duties, in the sum fixed by the court, with a surety to be approved as directed by the court.<sup>12</sup>

The appointment of a receiver dates from the entry of the order and not from the time of qualifying by giving bond.<sup>13</sup>

### § 215. Powers of a receiver.

A receiver in bankruptcy derives his power from the court exercising jurisdiction conferred by the statute.<sup>1</sup> He possesses such power only as the statute authorizes and as may be fairly inferred from the scope of the law of his appointment.<sup>2</sup>

A receiver in bankruptcy has such authority as the court may see fit to confer upon him by the order of appointment or by subsequent orders in respect to particular matters. He has

<sup>10</sup> See Form No. 25, *post*.

<sup>11</sup> B. A. 1898, Sec. 3e; *In re Haff* (C. C. A. 2d Cir.), 135 Fed. Rep. 742, 68 C. C. A. 380, 13 Am. B. R. 354; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 751.

<sup>12</sup> *In re Haff* (C. C. A. 2d Cir.), 135 Fed. Rep. 742, 68 C. C. A. 380, 13 Am. B. R. 354; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 751.

<sup>13</sup> *In re Alton Mfg. Co.*, 158 Fed. Rep. 367, 19 Am. B. R. 805.

<sup>1</sup> As to the power of a court to appoint a receiver in bankruptcy, see Sec. 212, *ante*.

<sup>2</sup> *Boonville Nat. Bank v. Blakey* (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 93, 6 Am. B. R. 13; *In re Kolin* (C. C. A. 7th Cir.), 134 Fed. Rep. 557, 67 C. C. A. 481, 13 Am. B. R. 531; *Guaranty Title & Trust Co. v. Pearlman*, 144 Fed. Rep. 550, 16 Am. B. R. 461; *Whitney v. Wenman*, 198 U. S. 553, 47 L. Ed. 1157, 14 Am. B. R. 45.



no authority outside of or beyond that conferred upon him by the court.<sup>3</sup>

If he is appointed to preserve the estate and take charge of the property of the bankrupt until a trustee is appointed, he is merely a custodian.<sup>4</sup> It is his duty to take possession of

<sup>3</sup> In *Whitney v. Wenman*, 198 U. S. 539, 553, 49 L. Ed. 1157, 14 Am. B. R. 45, Mr. Justice Day said: "It is insisted that in the present case the property was voluntarily turned over by the receiver, and thereby the jurisdiction of the district court, upon the ground herein stated, is defeated, as the property is no longer in the possession or subject to the control of the court. But the receiver had no power or authority under the allegations of this bill to turn over the property. He was appointed a temporary custodian, and it was his duty to hold possession of the property until the termination of the proceedings or the appointment of a trustee for the bankrupt. The circumstances alleged in this bill tend to show that the transfer of the property was collusive, and certainly if the allegations be true, it was made without authority of the court. The court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property by the receiver, without authority of the court." See also *In re Rose Shoe Mfg. Co.* (C. C. A. 2d Cir.), 168 Fed. Rep. 39, 93 C. C. A. 461, 21 Am. B. R. 725.

*In re Burkhalter & Co.*, 182 Fed. Rep. 353, 355, 25 Am. B. R. 378, Judge Grubb, speaking of the power of a receiver to borrow money,

said: "In this case, such express power was conferred on the receiver by the court. This express power, was, however, conferred upon him with limitations as to amount. When the receiver exceeded the amount so limited, he acted beyond and contrary to the express authority conferred on him. No authority could arise in his favor, by implication in conflict with that expressed. Hence the loans made by him, not covered by and in excess of the three orders, were made in violation of the authority conferred on him, and would bind the estate only upon a showing that the proceeds were used in conducting its business, and then only ratably with the claims of other creditors of the receiver."

*In re Fulton*, 153 Fed. Rep. 664, 18 Am. B. R. 591, it was held that a sale by a receiver without the express direction of the court conveyed no title.

<sup>4</sup> *Skubinsky v. Bodek* (C. C. A. 3d Cir.), 172 Fed. Rep. 332, 97 C. C. A. 116, 22 Am. B. R. 689; *Guaranty Title & Trust Co. v. Pearlman*, 144 Fed. Rep. 550, 16 Am. B. R. 461; *In re Kolin* (C. C. A. 7th Cir.), 134 Fed. Rep. 557, 67 C. C. A. 481, 13 Am. B. R. 531; *In re Rubel*, 166 Fed. Rep. 131, 21 Am. B. R. 566; *In re Leonard*, 177 Fed. Rep. 503, 24 Am. B. R. 97; *Whitney v. Wenman*, 198 U. S. 539, 553, 49 L. Ed. 1157, 14 Am. B. R. 45.

the property of the bankrupt and preserve it until the termination of the proceedings or the appointment of a trustee.<sup>5</sup> He does not exercise the powers of a trustee.<sup>6</sup> The receiver acquires no title to the property.<sup>7</sup> The title remains in the bankrupt until an adjudication and vests as of that date in the trustee, after he has been chosen and qualified.<sup>8</sup>

A receiver is entitled to have possession of all the assets and property of the bankrupt on demand. The bankrupt is not obliged to deliver property to an agent of the receiver without written authority.<sup>9</sup>

A receiver may be authorized by the court to take property of the bankrupt in the possession of adverse claimants.<sup>10</sup> The seizure in such cases does not present a question of title. The claimants must be given an opportunity in the court of bank-

<sup>5</sup> *In re Kolin* (C. C. A. 7th Cir.), 134 Fed. Rep. 557, 67 C. C. A. 481, 13 Am. B. R. 531; *Guaranty Title & Trust Co. v. Pearlman*, 144 Fed. Rep. 550, 16 Am. B. R. 461.

In *Whitney v. Wenman*, 198 U. S. 539, 553, 49 L. Ed. 1157, 14 Am. B. R. 45, the supreme court said: "But the receiver had no power or authority under the allegations of this bill to turn over the property. He was appointed a temporary custodian, and it was his duty to hold possession of the property until the termination of the proceedings or the appointment of a trustee for the bankrupt."

<sup>6</sup> *In re Kolin* (C. C. A. 7th Cir.), 134 Fed. Rep. 557, 67 C. C. A. 481, 13 Am. B. R. 531.

<sup>7</sup> *In re Rubel*, 166 Fed. Rep. 131, 21 Am. B. R. 566; *In re Guaranty Title & Trust Co. v. Pearlman*, 144 Fed. Rep. 550, 16 Am. B. R. 461.

<sup>8</sup> B. A. 1898, Sec. 70a; *In re La Plume Condensed Milk Co.*, 145 Fed. Rep. 1013, 16 Am. B. R. 729; *Rand v. Iowa Central R. Co.*, 186 N. Y. 58, 16 Am. B. R. 692; *Fuller*

*v. New York Ins. Co.*, 184 Mass. 12; *Conner v. Long*, 104 U. S. 228, 26 L. Ed. 723.

<sup>9</sup> *Skubinsky v. Bodek* (C. C. A. 3d Cir.), 172 Fed. Rep. 340, 97 C. C. A. 38.

<sup>10</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re Rose Shoe Mfg. Co.* (C. C. A. 2d Cir.), 168 Fed. Rep. 39, 92 C. C. A. 461, 21 Am. B. R. 725; *In re Rochford* (C. C. A. 8th Cir.), 124 Fed. Rep. 182, 59 C. C. A. 388, 10 Am. B. R. 608; *In re Muncie Pulp Co.* (C. C. A. 2d Cir.), 139 Fed. Rep. 546, 71 C. C. A. 530, 14 Am. B. R. 70; *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432, and 146 Fed. Rep. 109, 17 Am. B. R. 48; *In re Moody*, 131 Fed. Rep. 525, 12 Am. B. R. 718, and 134 Fed. Rep. 628, 14 Am. B. R. 472; *In re Haupt Bros.*, 153 Fed. Rep. 239, 18 Am. B. R. 585; *In re Sunseri*, 156 Fed. Rep. 103, 18 Am. B. R. 231.

But see *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 751.

ruptcy to propound their claims of title to the property and have them there determined.<sup>11</sup> A seizure of property in the possession of adverse claimants is rarely necessary for the preservation of the estate. Ordinarily an injunction restraining such adverse claimants from disposing of the property is sufficient.<sup>12</sup>

The court will protect the possession of a receiver from being interfered with by persons, or process from other courts.<sup>13</sup> Actual knowledge of the order appointing a receiver is sufficient notice without it being formally served.<sup>14</sup>

A receiver has power to take steps incident to the protection of the property in his custody. The court may authorize him to sell property of a perishable nature when the sale is necessary to preserve the value of the estate,<sup>15</sup> or to stipulate

<sup>11</sup> *In re Young* (C. C. A. 8th Cir.), 111 Fed. Rep. 158, 49 C. C. A. 283, 7 Am. B. R. 14. As was done *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432, s. c. 146 Fed. Rep. 109, 17 Am. B. R. 48; *In re Moody*, 131 Fed. Rep. 525, 12 Am. B. R. 718, s. c. 134 Fed. Rep. 628, 14 Am. B. R. 472.

*In re Rose Shoe Mfg. Co.* (C. C. A. 2d Cir.), 168 Fed. Rep. 39, 93 C. C. A. 461, 21 Am. B. R. 725, the court said: "No questions of title, rights or equities have been litigated. These questions can be determined in proper proceedings in the bankruptcy court after the present order has been complied with."

<sup>12</sup> *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 751; *In re Jersey Island Packing Co.* (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689; *In re Mundle*, 139 Fed. Rep. 691, 14 Am. B. R. 680.

<sup>13</sup> *In re Rose Shoe Mfg. Co.* (C. C. A. 2d Cir.), 168 Fed. Rep. 39, 93 C. C. A. 461, 21 Am. B. R. 725;

*In re Wilk*, 155 Fed. Rep. 943, 19 Am. B. R. 178; *In re Kleinhans*, 113 Fed. Rep. 107, 7 Am. B. R. 604, *In re Makoney*, 37 Wash. L. Rep. 147, 21 Am. B. R. 502; *In re Renda*, 149 Fed. Rep. 614, 17 Am. B. R. 52.

As to interference with property in *custodia legis* generally, see Sec. 33, *ante*.

<sup>14</sup> *In re Wilk*, 155 Fed. Rep. 943, 19 Am. B. R. 178.

<sup>15</sup> Gen. Order 18, par. 3. *In re Garner*, 153 Fed. Rep. 914, 18 Am. B. R. 733; *In re Harris*, 156 Fed. Rep. 875, 19 Am. B. R. 635; *In re Becker*, 98 Fed. Rep. 407, 3 Am. B. R. 412; *In re Styer*, 98 Fed. Rep. 290, 3 Am. B. R. 424; *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 4 Am. B. R. 529; *In re Maloney*, 37 Wash. L. Rep. 147, 21 Am. B. R. 502.

*In re Desrochers*, 183 Fed. Rep. 991, 26 Am. B. R. —, it was held that a sale of a bankrupt's assets by a receiver is justified only when the property is perishable, or is rapidly deteriorating, or depreciating on a falling market.

for a sale of property of an adverse claimant, the fund to stand for the property, and this agreement is binding on the trustee afterward appointed,<sup>16</sup> or to insure the property in his possession, or to make proof of loss under a fire insurance policy, where the bankrupt has absconded,<sup>17</sup> or to apply for an injunction to stay a suit for removal of goods of the bankrupt from leased premises for non-payment of rent when the goods are in his possession.<sup>18</sup>

**§216. Continuing the business by a receiver, marshal or trustee.**

The court may "authorize the business of bankrupts to be conducted for limited periods by receivers, or marshals, or trustees, if necessary in the best interests of the estate."<sup>1</sup>

The judge, or a referee after a general reference of the case, may order a continuance of the business of the debtor. This may be included in the order appointing a receiver or marshal to take charge of the property of the bankrupt, or by an order subsequently made.

Whether it is for the best interests of the estate to continue a going business rests in the sound judicial discretion of the court of bankruptcy.<sup>2</sup> It may be for the best interests of the estate that the business be continued to prevent deterioration of the plant or a stock of goods or to preserve the good will for the purpose of selling the business as a going concern, or for the purpose of realizing prospective profit out of unexecuted contracts of the bankrupt, or for other reasons.

The statute does not contemplate conducting the business of the bankrupt for a long period of time.<sup>3</sup> It authorizes this to be done for "limited periods." This is in accord with

<sup>16</sup> *Bryant v. Swofford Bros. Dry Goods Co.*, 201 U. S. 279, 291, 53 L. Ed. 997, 22 Am. B. R. 111; *Ommen v. Talcott*, 175 Fed. Rep. 261, 23 Am. B. R. 572.

<sup>17</sup> *Sims v. Union Assur. Soc.*, 129 Fed. Rep. 814.

<sup>18</sup> *In re Kleinhaus*, 113 Fed. Rep. 107, 7 Am. B. R. 604.

<sup>1</sup> B. A. 1898, Sec. 2, clause 5.

<sup>2</sup> *In re Isaacson* (C. C. A. 2d Cir.), 174 Fed. Rep. 406, 93 C. C. A. 614, 23 Am. B. R. 98.

<sup>3</sup> *In re Lisk Mfg. Co.*, 167 Fed. Rep. 411, 413, 21 Am. B. R. 674, Judge Hazel said: "To allow the receivers to conduct the business of the bankrupt for a prolonged period, to

the general object of the act that the property and assets of the bankrupt shall be collected and the amount realized distributed without unnecessary delay among the creditors.

The power to conduct the business implies the power to make debts and to provide for their payment which must include the power to borrow money for urgent necessities and for direct operating expenditures. To this end the court may authorize a receiver to borrow money and issue receiver's certificates.<sup>4</sup> Such debts and receiver's certificates are entitled to priority in payment over claims of the general creditors,<sup>5</sup> but not over existing lien creditors unless they participate in the transactions of or receive benefits from the receivership.<sup>6</sup>

The receiver should not be surcharged for losses during the continuance of the business,<sup>7</sup> unless he is grossly negligent.<sup>8</sup>

the exclusion of rights of creditors demanding the right given them by the bankruptcy act to elect a trustee and administer the estate, is unwarranted."

<sup>4</sup> People's Sav. Bank & Trust Co. v. Rogers (C. C. A. 5th Cir.), 177 Fed. Rep. 386, 100 C. C. A. 618; *In re* Erie Lumber Co., 150 Fed. Rep. 817, 17 Am. B. R. 689; *In re* Burkhalter & Co., 179 Fed. Rep. 403, 24 Am. B. R. 553; *In re* Clark Coal & Coke Co., 173 Fed. Rep. 658, 22 Am. B. R. 843; *In re* Restein, 162 Fed. Rep. 986, 20 Am. B. R. 832.

<sup>5</sup> *In re* Alaska Fishing & Development, 21 Am. B. R. 685.

<sup>6</sup> *In re* Clark Coal & Coke Co., 173 Fed. Rep. 658, 22 Am. B. R. 843; *In re* Erie Lumber Co., 150 Fed. Rep. 817, 826, 17 Am. B. R. 689; *In re* Bourlier Cornice & Roofing Co., 133 Fed. Rep. 958, 13 Am. B. R. 585.

*In re* Erie Lumber Co., 150 Fed. Rep. 817, 828, 829, 17 Am. B. R. 689, Judge Speer said: "The bank officers had actual, as well as constructive, notice that the Erie Lumber Company was being carried on

by the receivers as a going concern. This, in our judgment, will preclude them from insisting upon the priority of their mortgage over the operating expenses or other obligations incurred for carrying on the business, which was intended to conserve their security."

<sup>7</sup> *In re* Isaacson (C. C. A. 2d Cir.), 174 Fed. Rep. 406, 98 C. C. A. 614, 23 Am. B. R. 98.

*In re* Erie Lumber Co., 150 Fed. Rep. 817, 830, 17 Am. B. R. 689, referring to a claim for damages for breach of contract. Judge Speer said: "It is merely a claim for the difference between the contract price and the market price. If the receivers were guilty of any breach of contract with him, none of the creditors having interest in the fund are responsible for it. The receivers are *sui juris* and personally responsible for any wrong *ex contractu* or *ex delictu* which they may have committed."

<sup>8</sup> *In re* Consumers Coffee Co., 162 Fed. Rep. 786, 20 Am. B. R. 835, a receiver was charged with a portion of the loss sustained by his improper

Where a receiver occupies premises as a tenant he should pay the rent.<sup>9</sup>

A receiver, conducting the business of a bankrupt and authorized by the court to assume a contract, under which the bankrupt was to receive monthly deliveries, is entitled to enforce the contract and the seller is liable in damages for a failure to make deliveries pursuant to the contract.<sup>10</sup>

### § 217. Suits by and against receivers.

A receiver in bankruptcy can not maintain a suit to set aside a transfer of property by the bankrupt as fraudulent or preferential and recover the same for the estate.<sup>1</sup>

A receiver in bankruptcy may be sued in a state or federal court without leave of the court of bankruptcy "in respect to any act or transaction of his in carrying on the business connected with" the property in his charge.<sup>2</sup> This is by virtue of a statute permitting a receiver appointed by a federal court to be sued without leave of court contrary to the general rule with respect to receivers.<sup>3</sup> But a receiver in bankruptcy can not be sued without leave of court unless he is carrying

persistence in carrying on the business which he knew to be unprofitable from the beginning.

<sup>9</sup> *In re Youdelman-Walsh Foundry Co.*, 166 Fed. Rep. 381, 21 Am. B. R. 509; *In re Rubel*, 166 Fed. Rep. 131, 21 Am. B. R. 566.

<sup>10</sup> *In re Niagara Radiator Co.*, 164 Fed. Rep. 102, 21 Am. B. R. 55.

<sup>1</sup> *Boonville Nat. Bank v. Blakey* (C. C. A. 7th Cir.), 107 Fed. Rep. 891, 47 C. C. A. 43, 6 Am. B. R. 13; *In re Kolin* (C. C. A. 7th Cir.) 134 Fed. Rep. 557, 67 C. C. A. 481, 13 Am. B. R. 531; *Guaranty Title & Trust Co. v. Pearlman*, 144 Fed. Rep. 550, 16 Am. B. R. 461; *Frost v. Latham & Co.*, 181 Fed. Rep. 866, 25 Am. B. R. 313; *In re National*

*Mercantile Agency*, 128 Fed. Rep. 639, 12 Am. B. R. 189.

<sup>2</sup> *In re Kalb & Berger Mfg. Co.* (C. C. A. 2d Cir.), 165 Fed. Rep. 895, 91 C. C. A. 573, 21 Am. B. R. 393; *In re Kanter & Cohen* (C. C. A. 2d Cir.), 121 Fed. Rep. 984, 58 C. C. A. 260, 9 Am. B. R. 372; *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 4 Am. B. R. 528; *In re Smith*, 121 Fed. Rep. 1014, 9 Am. B. R. 603; *Orr & Co. v. Cushman* (City Ct. of N. Y.), 18 Am. B. R. 535.

<sup>3</sup> Sec. 2 of the Act of March 3, 1887, 24 Stat. at L. 554, as corrected by the Act of August 13, 1888, 25 Stat. at L. 436; *In re Kalb & Berger Mfg. Co.* (C. C. A. 2d Cir.), 165 Fed. Rep. 895, 91 C. C. A. 573, 21 Am. B. R. 393.

on the business of the bankrupt estate as he may be authorized to do by the court of bankruptcy.<sup>4</sup>

### § 218. Receiver's reports and account.

Upon taking possession of the property of the bankrupt, the receiver should make an inventory of it.<sup>1</sup> This is proper in order that there may be no misunderstanding as to the amount and character of the property in the custody of the receiver.

The receiver may file the inventory with the clerk of the court or with the referee. It is usually filed with the referee, if the case has been referred to him.

Where the business is being conducted by a receiver, he should file with the court statements showing the condition of the business from time to time at regular intervals, as weekly or monthly, as directed by the court. It is important that the court and the creditors should have an opportunity to know whether the business is being conducted at a profit or loss to the estate, in order to determine whether it is for the best interests of the estate that the business be continued.

A receiver is entitled to credits for legitimate expenses incurred in the preservation of the assets or in conducting the business.<sup>2</sup> It may include an attorney's fee in case the employment of an attorney is necessary,<sup>3</sup> but not otherwise.<sup>4</sup> A

<sup>1</sup>*In re Roberts* (C. C. A. 2d Cir.), 169 Fed. Rep. 1022, 94 C. C. A. 66, 22 Am. B. R. 909; *In re Kalb & Berger Mfg. Co.* (C. C. A. 2d Cir.), 165 Fed. Rep. 895, 91 C. C. A. 573, 21 Am. B. R. 393.

<sup>2</sup>*In re Leonard*, 177, Fed. Rep. 503, 506, 24 Am. B. R. 97.

<sup>3</sup>*In re Leonard* 177, Fed. Rep. 503, 24 Am. B. R. 97; *In re Desrochers*, 183 Fed. Rep. 991, 25 Am. B. R. —.

<sup>4</sup>See Sec. 110, *ante*. *In re Oppenheimer*, 146 Fed. Rep. 140, 17 Am.

B. R. 59; *In re Borgeson Co.*, 151 Fed. Rep. 780, 18 Am. B. R. 178. *In re Leonard*, 177 Fed. Rep. 503, 24 Am. B. R. 97; *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73; *In re Kelly Dry Goods Co.*, 102 Fed. Rep. 747, 4 Am. B. R. 538.

<sup>4</sup>*In re Oshwitz*, 183 Fed. Rep. 990, 26 Am. B. R. —; *In re Desrochers*, 183 Fed. Rep. 991, 25 Am. B. R. —.

receiver is not to be charged for losses during the continuance of the business unless he is grossly negligent.<sup>5</sup>

In every case as soon as a trustee is appointed, the receiver should file with the referee his report and account. This consists of an itemized statement of all the property coming into his possession and the moneys disbursed by him, specifying the date, the name of each person receiving or paying money and the nature of the transaction.<sup>6</sup> The report should be made under oath. The receiver should forthwith turn over to him all the property belonging to the estate and take a receipt from him for the property turned over.<sup>7</sup>

When the report and account is filed, notice is regularly given creditors. The referee audits and settles his accounts and fixes the amount of his compensation. Exceptions to the report may be taken by the trustee or creditors.<sup>8</sup> The objections should be made promptly. The court will not allow a re-examination after a report has been approved and a considerable period of acquiescence has elapsed thereafter.<sup>9</sup>

### § 219. Compensation of receivers.

The bankrupt act as originally passed contained no provision with respect to compensation of receivers. The matter was left wholly to the discretion of the court.<sup>1</sup>

<sup>5</sup> *In re Isaacson* (C. C. A. 2d Cir.), 174 Fed. Rep. 406, 98 C. C. A. 614, 23 Am. B. R. 98; *In re Consumers Coffee Co.*, 162 Fed. Rep. 786, 20 Am. B. R. 835; *In re Erie Lumber Co.*, 150 Fed. Rep. 817, 830, 17 Am. B. R. 689.

<sup>6</sup> Consult *In re Leonard*, 177 Fed. Rep. 503, 24 Am. B. R. 97, in which the receiver's report is set out and criticised.

<sup>7</sup> *In re Vogt*, 159 Fed. Rep. 317, 20 Am. B. R. 243, the court directed that certain property remain in the custody of the receiver, even after a trustee had been elected.

<sup>8</sup> *In re Ketterer Mfg. Co.*, 156 Fed. Rep. 719, 19 Am. B. R. 646, it was held that the exceptions should be verified.

<sup>9</sup> *In re Reliance Storage & Warehouse Co.*, 100 Fed. Rep. 619, 4 Am. B. R. 49; *In re Borgeson Co.*, 151 Fed. Rep. 780, 18 Am. B. R. 178.

<sup>1</sup> *In re Scott*, 99 Fed. Rep. 404, 3 Am. B. R. 625; *In re Adams Sartorial Co.*, 101 Fed. Rep. 215, 4 Am. B. R. 107; *In re Borgeson Co.*, 151 Fed. Rep. 780, 18 Am. B. R. 178.



The amendment of 1903 authorized additional compensation to receivers, marshals and trustees for conducting the business of the bankrupt.<sup>2</sup> The amended clause limited the amount of additional compensation to that which a trustee might receive under the act for similar services. It was intended in this way to limit the additional compensation so that it would not exceed once again the compensation of the trustee prescribed in section 48.<sup>3</sup> It did not effect the amount or manner of allowing compensation of a receiver put in charge of the estate as a custodian under section 2, clause 3.<sup>4</sup> It was left to the discretion of the court as before the amendment.

The amendment of 1910 now regulates the allowance of compensation of receivers and marshals put in charge of a debtor's property on the basis of commissions.<sup>5</sup> The statute fixes the maximum commission which the court may allow, but it may allow a less amount. It applies to receivers appointed under section 2, clause 3, to preserve the estate as a custodian, and also where he conducts the business of the bankrupt under section 2, clause 5.<sup>6</sup>

The allowance of compensation is made upon an application to the court to fix the amount.<sup>7</sup> A ten days' notice of the

<sup>2</sup> Section 2, clause 5, as amended by the Act of February 5, 1903, 32 Stat. at L. 797.

<sup>3</sup> B. A. 1898, Sec. 2, clause 5, as amended by the Act of February 5, 1903, 32 Stat. at L. 797. *In re* Richards, 127 Fed. Rep. 772, 11 Am. B. R. 581; *In re* Cambridge Lumber Co., 136 Fed. Rep. 983, 14 Am. B. R. 168; *In re* Kirkpatrick (C. C. A. 6th Cir.), 148 Fed. Rep. 811, 77 C. C. A. 501, 17 Am. B. R. 594.

<sup>4</sup> *In re* Kirkpatrick (C. C. A. 6th Cir.), 148 Fed. Rep. 811, 77 C. C. A. 501, 17 Am. B. R. 594; *In re* Sully, 133 Fed. Rep. 997, 13 Am. B. R. 22; *In re* Leonard, 177 Fed. Rep. 503, 24 Am. B. R. 97; *In re* Borge-

son Co., 151 Fed. Rep. 780, 18 Am. B. R. 178.

<sup>5</sup> See Sec. 366, *post*, B. A. 1898, Sec. 48d and e, as amended by the Act of June 25, 1910, 36 Stat. at L. 840.

<sup>6</sup> See Sec. 366, *post*, B. A. 1898, Sec. 48d and e, as amended by the Act of June 25, 1910, 36 Stat. at L. 840.

<sup>7</sup> *In re* Huddleston, 167 Fed. Rep. 428, 431, 21 Am. B. R. 669, Judge Speer, speaking of the practice prevailing in his district in respect to such applications, said: "It may be justifiable to state that the district court of the southern district of Georgia, immediately after the en-

application, specifying the amount asked for, is required to be given creditors in the manner indicated in section 58 of the act before an allowance is made.<sup>8</sup> The creditors are entitled to be heard in respect to the amount.

The commission to be allowed receivers and marshals as compensation is based "upon the moneys disbursed or turned over to any person, including lien holders, by them, and also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees."<sup>9</sup>

The maximum commission which may be allowed a receiver or marshal is six per centum on the first \$500 or less, four per centum on moneys in excess of \$500, and less than \$1,500, two per centum on moneys in excess of \$1,500, and less than \$10,000, and one per centum on moneys in excess of \$10,000.<sup>10</sup>

actment of the bankruptcy law, determined that it was proper to judicially investigate every application for compensation. This has been done by rule. It is required that a formal petition for compensation be filed, that it be served on the trustee or his attorneys, that notice of the hearing be given, that the master shall make and file with his report a stenographic report of the evidence, that the report itself shall show the value of the property, the extent of the services of counsel, and recommend the proper approximate fee to be allowed. Formal notices of the filing of this report are issued by the clerk to the trustee and to the attorneys of each party at interest, and the rule provides that the report shall remain on file for five days so that exceptions may be filed. If such exceptions are filed, they are considered, and argument heard by the District Judge. The fee is often reduced,

and very infrequently enlarged, as it may appear to be justified by the record. It is believed that this procedure has resulted in saving many thousands of dollars to the estates of bankrupts, and the trivial cost of the inquiry has proved no sort of a counterbalance to the large sums thus saved. In no case have the parties or attorneys been permitted to adjust fees by agreement among themselves. These separate records of the proceedings to fix compensation have been carefully filed, and may be found in the clerk's office in the record in each case."

<sup>8</sup> B. A. 1898, Sec. 48*d* and *e*, as amended by the Act of June 25, 1910, 36 Stat. at L. 638.

<sup>9</sup> B. A. 1898, Sec. 48*d* and *e*, as amended by the Act of June 25, 1910, 36 Stat. at L. 638.

<sup>10</sup> B. A. 1898, Sec. 48*d* and *e*, as amended by the Act of June 25, 1910, 36 Stat. at L. 638.

In case of the confirmation of a composition the commissions can not exceed one-half of one per centum of the amount to be paid creditors on such compositions.<sup>11</sup>

When a receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause 5, of section 2, he can not receive nor be allowed in any form or guise more than two per centum on the first \$1,000 or less, and one-half of one per centum on all above \$1,000, on moneys disbursed by him or turned over by him to the trustee, and on moneys subsequently realized from property turned over by him in kind to the trustee.<sup>12</sup>

Section 48 as amended in 1910 does not undertake to regulate the compensation of receivers or marshals in cases where the proceedings are dismissed. It is limited to cases in which it is paid out of the assets. In such cases the matter of compensation is wholly within the discretion of the court, or it may be settled by agreement with the parties, who have to pay it.

#### **§ 220. Costs and expenses of a receivership.**

The compensation of a receiver and his expenses in caring for the property, including his attorney's fee, is an expense of the administration of the estate, properly chargeable against it and entitled to priority under section 64b.<sup>1</sup>

The expenses of a receivership are not chargeable against the bankrupt's exemption.<sup>2</sup>

<sup>11</sup> B. A. 1898, Sec. 48d and e, as amended by the Act of June 25, 1910, 36 Stat. at L. 838.

<sup>12</sup> B. A. 1898, Sec. 48d and e, as amended by the Act of June 25, 1910, 36 Stat. at L. 838.

<sup>1</sup> *In re Oppenheimer*, 146 Fed. Rep. 140, 17 Am. B. R. 59; *In re De Lancy Stables Co.*, 170 Fed. Rep. 860, 22 Am. B. R. 406; *In re Hughes*, 170 Fed. Rep. 809, 22 Am. B. R. 303; *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C.

C. A. 263, 20 Am. B. R. 73; *In re Krause*, 155 Fed. Rep. 702, 19 Am. B. R. 93.

But see *In re Oshwitz*, 183 Fed. Rep. 990, 26 Am. B. R. —, and *In re Desrochers*, 183 Fed. Rep. 991, 26 Am. B. R. —, where attorney's fees and other expenses are denied on the ground of collusion and fraud.

<sup>2</sup> *Dunlap Hardware Co. v Hadleston* (C. C. A. 5th Cir.), 167 Fed. Rep. 433, 93 C. C. A. 69, 21

In case the proceedings are dismissed the petitioning creditors, who have procured the appointment of a receiver, may be required to pay the costs and expenses incurred by such receivership.<sup>3</sup> Where property has been improperly impounded it should be returned without charge of any kind against it by reason of the receivership proceedings.<sup>4</sup>

## § 221. Temporary injunction or restraining order.

One means of protecting the estate of the bankrupt is by a temporary injunction or restraining order. The court of bankruptcy is expressly authorized to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the bankrupt statute.<sup>1</sup>

Under this provision the court may, upon proper application and cause shown, restrain the debtor or any other party to the bankruptcy proceedings from making any transfer or disposition of any part of the debtor's property not excepted by the statute from the operation thereof, or from any interference therewith.<sup>2</sup> The court may restrain an adverse

Am. B. R. 731; *In re Huddleston*, 167 Fed. Rep. 428, 21 Am. B. R. 669; *In re Le Vay*, 125 Fed. Rep. 990, 11 Am. B. R. 114.

<sup>3</sup> *In re Aschenbach* (C. C. A. 2d Cir.), 183 Fed. Rep. 305, — C. C. A. —, 25 Am. B. R. 502; *In re Lacov* (C. C. A. 2d Cir.), 142 Fed. Rep. 960, 74 C. C. A. 130, 15 Am. B. R. 290; *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73.

<sup>4</sup> *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 125 Fed. Rep. 513, 60 C. C. A. 557, 11 Am. B. R. 104; *Linstroth Wagon Co. v. Bal-  
lew* (C. C. A. 5th Cir.), 149 Fed. Rep. 960, 79 C. C. A. 470, 18 Am. B. R. 28; *In re De Lancey Stables Co.*, 170 Fed. Rep. 860, 22 Am. B. R. 406.

<sup>1</sup> B. A. 1898, Sec. 2, clause 15.

<sup>2</sup> *In re Jersey Island Packing Co.* (C. C. A. 9th Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 116 Fed. Rep. 143, 53 C. C. A. 463, 8 Am. B. R. 751; *In re Gutwillig*, 90 Fed. Rep. 475, 1 Am. B. R. 78; *Blake, Moffitt & Towne v. Francis Valentine Co.*, 89 Fed. Rep. 691, 1 Am. B. R. 372; *Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. Rep. 295, 17 Am. B. R. 257; *In re Mundle*, 139 Fed. Rep. 691, 14 Am. B. R. 680; *In re Kinnel*, 183 Fed. Rep. 665.

*Stengel-Rothschild v. Leidigh Carriage Co.*, Southern District of Ohio (not reported). The Leidigh Carriage Co., of Dayton O., on July 13, 1898, made an assignment with preferences in the form of confessed judgments to the amount

claimant from removing property or encumbering it, or in making any change in its status.<sup>3</sup> But the court will not unduly interfere with property claimed by third persons.<sup>3\*</sup>

The application for an injunction may be made by any party in interest as a petitioning creditor, a receiver or trustee, or other creditor, or the bankrupt.<sup>3†</sup>

The mode of applying for a temporary restraining order is regularly by a separate petition or motion supported by affidavits.<sup>4</sup> The petition is entitled and filed in the bankruptcy proceedings. It should be positive in its averments, and not on information and belief,<sup>5</sup> and should contain a description of the property. It must be verified by the oath of the petitioner or his agent or attorney.<sup>6</sup> A bill in equity has also been used.<sup>7</sup>

The hearing may be had *ex parte*. An order may be passed and an injunction issued without notice to the adverse party.<sup>8</sup> A bond may be required by the court as a condition

of something like fifty thousand dollars. Attachments were issued and levies made under these judgments prior to the assignment, and some of the property had been sold, but funds arising therefrom had not been distributed. Upon an application for a temporary injunction filed with the petition of the creditors, Judge Thompson enjoined the assignee, the sheriff and the preferred creditors from disposing of or interfering with the property of the debtor.

<sup>3</sup> *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 115 Fed. Rep. 147, 53 C. C. A. 463, 8 Am. B. R. 751; *In re Smith*, 113 Fed. Rep. 993, 8 Am. B. R. 55; *In re Mundle*, 139 Fed. Rep. 691, 14 Am. B. R. 680.

<sup>3\*</sup> *In re Ward*, 104 Fed. Rep. 985, 5 Am. B. R. 215; *In re Smith*, 113 Fed. Rep. 993, 8 Am. B. R. 55.

<sup>3†</sup> *In re Barrett*, 132 Fed. Rep. 362, 12 Am. B. R. 626; *In re Jersey Island Packing Co.* (C. C. A. 9th

Cir.), 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689; *In re Latimer*, 141 Fed. Rep. 665, 15 Am. B. R. 461.

<sup>4</sup> *Irving v. Hughes*, No. 7076 Fed. Cas., 2 N. B. R. 61; *Creditors v. Cozens*, No. 3378, Fed. Cas., 3 N. B. R. 281.

<sup>5</sup> *In re Bloss*, No. 1569, Fed. Cas., 4 N. B. R. 427.

<sup>6</sup> *In re Goldberg*, 117 Fed. Rep. 692, 9 Am. B. R. 156; *In re Fendley*, No. 4728 Fed. Cas., 10 N. B. R. 250.

<sup>7</sup> *Horner-Gaylord Co. v. Miller & Bennett*, 147 Fed. Rep. 295, 17 Am. B. R. 257; *Blake, Moffitt & Towne v. Francis Valentine Co.*, 89 Fed. Rep. 691, 1 Am. B. R. 372; *In re Barrett*, 132 Fed. Rep. 362, 12 Am. B. R. 626; *In re Fendley*, No. 4728, Fed. Cas., 10 N. B. R. 250; *Blackburn v. Stannard*, No. 1468, Fed. Cas., 5 Law Rep. 250.

<sup>8</sup> *In re Muller*, No. 9912, Fed. Cas., Deady, 513 and cases cited in the opinion.

of granting the injunction.<sup>8\*</sup> This will not be required when the application is made by a receiver or trustee.<sup>8†</sup> The injunction or restraining order is merely temporary, but continues until vacated by order of the court. The present statute does not limit the duration of such injunction.

The writ of injunction issues out of the court under the seal thereof, and is tested by the clerk.<sup>9</sup> The writ is then served upon the parties by the marshal and a return made as upon other process. It is sufficient if a person has actual knowledge of the injunction order although no service is in fact made.<sup>9\*</sup>

Any party having an interest in the property covered by the injunction may appear and move for a dissolution thereof. At the hearing affidavits and counter affidavits may be read by either party.<sup>10</sup> When the affidavits filed upon a motion to dissolve an injunction do not sustain the allegation of the petition, but disclose the existence of another ground for an injunction, the petition may be amended so as to cover that ground.<sup>11</sup> It can not be urged as a ground for dissolving an injunction that the petition does not allege at what time the act of bankruptcy was committed or contain any positive charge of the act of bankruptcy, or because there is an irregularity in the proceedings. These are matters that may be corrected by amendment. Nothing would be gained by dissolving the injunction and then reissuing it upon the same state of facts.

In order to obtain the dissolution of an injunction the *prima facie* case made out by the petition and affidavits in support thereof must be rebutted.<sup>12</sup>

<sup>8\*</sup> *In re Hines*, 144 Fed. Rep. 147, 16 Am. B. R. 541; *In re Barrett*, 132 Fed. Rep. 362, 12 Am. B. R. 626; *In re Williams*, 120 Fed. Rep. 34, 9 Am. B. R. 736.

<sup>8†</sup> *In re Barrett*, 132 Fed. Rep. 362, 12 Am. B. R. 626.

<sup>9</sup> Rev. Stat., Sec. 911; Gen. Ord. 3.

<sup>9\*</sup> *In re Wilk*, 155 Fed. Rep. 943, 19 Am. B. R. 178.

<sup>10</sup> *In re Bloss*, No. 1562, Fed. Cas., 4 N. B. R. 147.

<sup>11</sup> *In re Bloss*, No. 1562 Fed. Cas., 4 N. B. R. 147.

<sup>12</sup> *In re Binns*, No. 1422 Fed. Cas., 4 Ben. 152; *In re Muller*, No. 9912 Fed. Cas., Deady, 513.

**§ 222. The seizure of a debtor's property by a marshal.**

A court of bankruptcy is expressly authorized by statute to issue a warrant to the marshal to seize and hold the property of the bankrupt after a petition is filed and prior to the adjudication.<sup>1</sup>

This is limited to cases in which "an involuntary petition has been filed." The object of putting a marshal in charge of the property is to preserve it in the interval between the filing of an involuntary petition and an adjudication or dismissal.<sup>2</sup> This remedy is rarely resorted to in practice, because the same object is accomplished by the appointment of a receiver under section 2, clause 3 of the act.<sup>3</sup> This latter method is more convenient for many reasons.

The application for the warrant must be made to the judge<sup>4</sup> except in case the clerk issues a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness or inability to act. In that event the referee is authorized to exercise the powers of the judge for the possession of the property of the bankrupt.<sup>5</sup>

The application should be made by a creditor. It is usually made by the petitioning creditors. It may be made at any time after the petition has been filed and while it is pending. It may be by petition or motion. It must be separate and distinct from the creditors' petition to have the debtor adjudged a bankrupt.<sup>6</sup>

The applicant must file an affidavit, which should be positive in its averments, not mere statements of opinion and conclusions, and establish all the essential facts.<sup>7</sup> The statute expressly provides that the affidavit shall show that the bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy or has neglected, or is neglecting, or is about to so neglect his property

<sup>1</sup> B. A. 1898, Sec. 69 and Sec. 3e.  
See R. S. Sec. 5024 for a similar provision under the Act of 1867.

<sup>2</sup> See Sec. 211, *ante*.

<sup>3</sup> See Secs. 212 to 220, *ante*.

<sup>4</sup> B. A. 1898, Sec. 69a.

<sup>5</sup> B. A. 1898, Sec. 38, clause 3.

<sup>6</sup> *In re Kelly*, 91 Fed. Rep. 504, 1 Am. B. R. 306.

<sup>7</sup> *In re Kelly*, 91 Fed. Rep. 504, 1 Am. B. R. 306; *In re Sarsar*, 120 Fed. Rep. 40, 9 Am. B. R. 576.

that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value.<sup>8</sup>

If satisfactory proof is made by the applicant the judge may issue a warrant to the marshal to seize and hold the property of the bankrupt, or any part of it, subject to further orders.<sup>9</sup> If section 69 is not complied with, a warrant of seizure will not be issued.<sup>10</sup>

Before a warrant can be issued, the petitioner applying therefor must enter into a bond with at least two good and sufficient sureties, who shall reside within the jurisdiction of the court, to be approved by the court or judge thereof.<sup>11</sup> A surety company is sufficient.<sup>12</sup>

The amount of the bond is fixed by the court and conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt.<sup>13</sup>

If such petition is dismissed by the court or withdrawn by the petitioner, the respondent or respondents are allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of such property.<sup>14</sup> Counsel fees, costs, expenses and damages are fixed and allowed by the court and paid by the obligors in such bond.<sup>15</sup> But the debtor

<sup>8</sup> B. A. 1898, Sec. 69; *In re Kelly*, 91 Fed. Rep. 504, 1 Am. B. R. 306; *In re Rockwood*, 91 Fed. Rep. 363, 1 Am. B. R. 272.

<sup>9</sup> B. A. 1898, Sec. 69.

<sup>10</sup> *In re Sarsar*, 120 Fed. Rep. 40, 9 Am. B. R. 576.

<sup>11</sup> B. A. 1898, Sec. 3 and Sec. 69.

<sup>12</sup> *In re Sears, Humbert & Co.* (Ref.), 10 Am. B. R. 389.

The Act of August 13, 1894, 28 Stat. at L. 279, provides that a surety company may execute bonds required under a law of the United States which requires one surety, or two or more sureties.

<sup>13</sup> B. A. 1898, Sec. 3e.

<sup>14</sup> B. A. 1898, Sec. 3e; *In re Nixon*, 110 Fed. Rep. 633, 6 Am. B. R. 693; *Nixon v. Fidelity & Deposit Co.* (C. C. A. 9th Cir.), 150 Fed. Rep. 574, 80 C. C. A. 336, 18 Am. B. R. 174.

*In re Spalding* (C. C. A. 2nd Cir.), 150 Fed. Rep. 120, 80 C. C. A. 74, 17 Am. B. R. 667, it was held that only respondents at the time the bond was given were entitled to recover. Subsequent respondents should require an additional bond.

<sup>15</sup> B. A. 1898, Sec. 3e; *In re Nixon*, 110 Fed. Rep. 633, 6 Am. B. R. 693; *Hill & Co. v. Contractor's Supply & Equip. Co.* (Opp. Ct. of Ill.), 24 Am. B. R. 84.



can only recover on the bond such costs, expenses and damages as were incident to the taking and withholding of the property, as distinguished from such as were incident to bankruptcy proceedings.<sup>16</sup>

When the marshal receives a warrant general in its nature, it is his duty to take possession of the bankrupt's property. If the warrant commands him to seize certain entire property, it is his duty to take possession only of the property specified. The marshal may take possession of the goods and property of the bankrupt in the possession of third persons claiming title thereto.<sup>17</sup> The Act of 1867 contained a similar provision.<sup>18</sup> In construing it the supreme court decided that this authority existed under that act.<sup>19</sup> The supreme court

<sup>16</sup> *Selkregg v. Hamilton Bros.*, 144 Fed. Rep. 556, 16 Am. B. R. 474; *In re Smith* (Okla.), 16 Am. B. R. 478, *In re Moehs & Rechnitzer*, 174 Fed. Rep. 165, 22 Am. B. R. 286; *In re Hines*, 144 Fed. Rep. 147, 16 Am. B. R. 541.

See also *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609.

<sup>17</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623.

In *Goldman, Bettman & Co. v. Smith*, 7 Cin. Court Index, No. 70, Dec. 24, 1898, s. c. Vol. 41, W. L. Bul. 4, a petition for involuntary bankruptcy was filed by four Cincinnati creditors against one Newton M. Smith. It was alleged that some four weeks before the filing of the petition Smith came to Cincinnati, in pursuance of a scheme to defraud his creditors, and with money that was advanced him by his brother-in-law, paid his creditors such amounts as he was then owing them on account. He immediately purchased large amounts of merchandise, and two weeks thereafter transferred to his brother-in-law his entire stock including the

merchandise last purchased. The conveyance was founded upon a pretended consideration of a pre-existing debt, consisting largely of the money advanced as above. Upon application of the petitioning creditors and proof of the facts by affidavit, Judge Barr issued an order directing the marshal to forthwith, seize the property and hold it, subject to the further order of the court, the creditors being required to give bond for the value of the property.

But see *In re Andre* (C. C. A. 2d Cir.), 135 Fed. Rep. 736, 68 C. A. 374, 13 Am. B. R. 132; *In re Rockwood*, 91 Fed. Rep. 363, 1 Am. B. R. 272.

<sup>18</sup> R. S. Sec. 5024.

<sup>19</sup> In *Sharpe v. Doyle*, 102 U. S. 686, 690, 26 L. Ed. 277, after pointing out the danger of loss to the estate between the filing of the petition and the appointment of an assignee, Mr. Justice Miller said: "It was the purpose of the act of Congress to remedy this evil. It, therefore, provides that as soon as the petition in bankruptcy is filed, the

has applied the same rule under the present act.<sup>20</sup> The claimant may apply to the court of bankruptcy to try the title and return the property.<sup>21</sup>

In case the bankrupt desires to have possession of his property until the adjudication, and a bond has been given by the petitioning creditors, the property must be released to him upon his giving a bond in the sum which is fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property to pay the value thereof in money to the trustee in the event of his being adjudged a bankrupt pursuant to such petition.<sup>22</sup>

court may issue to the marshal a provisional warrant, directing him to take possession of all the property and effects of the bankrupt, and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purpose of the writ. There is, therefore, no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to

seize the property of the defendant wherever found; so here it is made his duty to take into his possession the bankrupt's property wherever he may find it."

A like decision was made in *Feibelman v. Packard*, 109 U. S. 421, 27 L. Ed. 984.

<sup>20</sup> *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 623.

<sup>21</sup> *In re Bender*, 106 Fed. Rep. 873, 5 Am. B. R. 632; *In re Harthill*, No 6161 Fed. Cas., 4 Ben. 448.

As to the power of the court to deal with property in *custodia legis* see Sec. 31, *ante*.

<sup>22</sup> B. A. 1898, Sec. 69.

## CHAPTER XVI.

## THE DEFENSE AND TRIAL IN INVOLUNTARY PROCEEDINGS.

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| <p><b>SEC.</b><br/>           223. Pleading to the petition.<br/>           224. A person may appear for himself or by attorney.<br/>           225. Creditors may intervene to oppose the petition.<br/>           226. Time to plead.<br/>           227. Demurrer.<br/>           228. The answer.<br/>           229. Defense that the debtor is exempt from adjudication.<br/>           230. Defense that requisite domicile, residence or place of business is wanting.<br/>           231. Defense that petitioners are not creditors.<br/>           232. Defense that amount of petitioners' debts are less than \$500.00.<br/>           233. Defense that debtor has not committed an act of bankruptcy.<br/>           234. Defense of solvency.<br/>           235. Defense that there are more than twelve creditors.</p> | <p><b>SEC.</b><br/>           236. Whether to reply or set the case for hearing on petition and answer.<br/>           237. The hearing before the judge when a jury is not demanded.<br/>           238. Hearing before a judge when a jury is demanded.<br/>           239. The right to a jury trial.<br/>           240. The trial by jury.<br/>           241. Burden of proof.<br/>           242. Order of adjudication.<br/>           243. The effect of an adjudication—<i>res judicata</i>.<br/>           244. An adjudication is subject to collateral attack only in the absence of jurisdiction.<br/>           245. Setting aside an adjudication.<br/>           246. Order of reference.<br/>           247. Dismissing a petition.<br/>           248. Reinstating proceedings dismissed.<br/>           249. Costs.<br/>           250. Proceedings subsequent to the adjudication.</p> |
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**§ 223. Pleading to the petition.**

As soon as a petition in bankruptcy has been filed and the respondent is served with process, he should consider his response to such petition.

The time within which the debtor or any creditor may plead to the petition is limited by the statute to five days after the return day, or within such further time as the court may allow.<sup>1</sup>

The statute does not expressly require a written demurrer, plea or answer, but it evidently contemplates a formal written pleading of some kind. The supreme court has provided that

<sup>1</sup> As to the time to plead, see Sec. 226, *post*. B. A. 1898, Sec. 18*b*, as amended February 5, 1903, 32 Stat.

at L. 797. As this section was originally enacted it allowed ten days for pleading.

the rules of equity practice established by the supreme court shall be followed as nearly as may be.<sup>2</sup>

In what way the bankrupt or a creditor may properly plead to the petition depends upon the circumstances in each particular case. Where the averments of the petition are not sufficiently precise and distinct, the debtor may file exceptions, declining to answer upon that ground and ask that the allegations be made more definite and certain or be stricken out.<sup>3</sup> If the averments are not sufficient in law to sustain the proceedings he may demur<sup>4</sup> or may move to dismiss the petition.<sup>5</sup>

He should consider before making any of these dilatory pleas whether he desires a jury trial as to insolvency. If he desires a trial by jury of this question, it is necessary to file a written application therefor at or before the time within which the answer may be filed.<sup>6</sup> If no such application is filed within such time, a trial by jury is deemed to have been waived.<sup>6</sup>

Where a demurrer or exceptions or a motion to dismiss is filed, it should be set down for hearing and disposed of before proceeding further in the case. If an answer to the whole petition is filed, a demurrer pending undisposed of is treated as waived.<sup>7</sup> If a demurrer, motion or exception is sustained, the court will ordinarily allow the petition to be amended.<sup>8</sup> If it is overruled the court will allow the respondent to answer within a time fixed in the order.

<sup>2</sup> Gen. Ord. 37. *In re* Cooper Bros., 159 Fed. Rep. 956, 20 Am. B. R. 392; *Goldman v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re* Broadway Trust Co. (C. C. A. 8th Cir.), 152 Fed. Rep. 152, 81 C. C. A. 58, 18 Am. B. R. 254.

<sup>3</sup> *In re* Randall, No. 11551 Fed. Cas., Deady, 557.

<sup>4</sup> *In re* Benham, 8 N. B. R. 94; *Orem v. Harley*, No. 10567 Fed. Cas., 3 N. B. R. 263.

See also *In re* Vastbinder, 126 Fed. Rep. 417, 11 Am. B. R. 118;

*In re* Hark, 135 Fed. Rep. 603, 14 Am. B. R. 400; *In re* Brett, 130 Fed. Rep. 981, 12 Am. B. R. 492; *In re* Hammond, 163 Fed. Rep. 548, 20 Am. B. R. 776.

<sup>5</sup> *In re* Melick, No. 9399, Fed. Cas., s. c. 4 N. B. R. 97.

<sup>6</sup> B. A. 1898, Sec. 19.

<sup>7</sup> *In re* Cooper Bros., 159 Fed. Rep. 956, 20 Am. B. R. 392.

<sup>8</sup> *In re* Brett, 130 Fed. Rep. 981, 12 Am. B. R. 492; *In re* Hammond, 163 Fed. Rep. 548, 20 Am. B. R. 776

As soon as the petition is adjudged to be correct, or is made so by amendment, or when no dilatory pleading is resorted to, the debtor should put in his defense, if any, on the merits. This is regularly done by answer.<sup>9</sup>

By pleading to the merits in the first instance he waives objection to formal defects in the petition which do not go to the jurisdiction of the court.<sup>10</sup>

A debtor, who has appeared to contest the petition, may afterwards withdraw his contest without notice to creditors.<sup>11</sup>

**§ 224. A person may appear for himself or by attorney.**

The proceedings in bankruptcy may be conducted by the person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest.<sup>1</sup>

Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court.<sup>2</sup> The name of the attorney or counsellor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be endorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion.<sup>3</sup>

An attorney will be presumed to be authorized to act for the party whom he claims to represent.<sup>4</sup> Notices and orders

<sup>9</sup> See Sec. 228, *et seq.*, *post*.

<sup>10</sup> *Leidigh Carriage Co. v. Stengel* (C. C. A., 6th Cir.), 95 Fed. Rep. 637, 37 C. C. A. 210, 2 Am. B. R. 383; *Simonson v. Sinsheimer* (C. C. A. 6th Cir.), 95 Fed. Rep. 948, 37 C. C. A. 337; *In re Mason*, 99 Fed. Rep. 256, 3 Am. B. R. 599; *In re Cliffe*, 94 Fed. Rep. 354, 2 Am. B. R. 317, 94; *Green River Deposit Bank v. Craig*, 110 Fed. Rep. 137, 6 Am. B. R. 381.

<sup>11</sup> *In re Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 80.

<sup>1</sup> Gen. Ord. 4.

<sup>2</sup> Gen. Ord. 4.

An attorney at the time of filing the petition not admitted to practice will not be recognized; *In re O'Halloran*, No. 10463 Fed. Cas., 8 Ben. 128.

<sup>3</sup> Gen. Ord. 4.

<sup>4</sup> *In re Gasser* (C. C. A. 8th Cir.), 104 Fed. Rep. 537, 44 C. C. A. 20, 5 Am. B. R. 32; *Gage v. Bell*, 124 Fed. Rep. 371, 10 Am. B. R. 696.

which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

**§ 225. Creditors may intervene to oppose the petition.**

Creditors other than original petitioners may at any time enter their appearance and file an answer and be heard in opposition to the prayer of the petition.<sup>1</sup> But creditors can not be compelled to intervene.<sup>2</sup>

The words "at any time" in this clause are limited by section 18*b* of the act. A creditor should intervene and plead within five days after the return of the subpoena, or such further time as the court may allow.<sup>3</sup> It is within the discretion of the court to permit a creditor to plead after the expiration of the five days' period.<sup>4</sup> The better practice is to obtain an extension of time for this purpose within the five days.

Leave will ordinarily be denied a creditor to intervene to set aside an adjudication and contest the prayer of the petition, unless the application is promptly made. Creditors have been held barred from intervening for this purpose, by their own neglect to appear within a reasonable time,<sup>5</sup> or because

<sup>1</sup> B. A. 1898, Sec. 59*f*; *Mattoon Nat. Bank v. First Nat. Bank* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *Goldman v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re C. Moench & Sons Co.*, 123 Fed. Rep. 977, 10 Am. B. R. 590.

<sup>2</sup> *In re Gillette*, 104 Fed. Rep. 769, 5 Am. B. R. 119.

<sup>3</sup> *In re Mutual Mercantile Agency*, 111 Fed. Rep. 152, 6 Am. B. R. 607; *In re Cooper Bros.* 159 Fed. Rep. 956, 20 Am. B. R. 392; *In re Jemison Mercantile Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 966, 50 C. C. A. 641, 7 Am. B. R. 588; *In re*

*Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 80.

<sup>4</sup> *In re Cooper Bros.*, 159 Fed. Rep. 956, 20 Am. B. R. 392.

*In re Simonson*, 92 Fed. Rep. 904, 1 Am. B. R. 197, Judge Evans said: "The pleading, technically considered, being offered too late, it is within the sound discretion of the court to allow, or not to allow it to be filed; but, if it contained any defense whatever to the action, the court would not hesitate to exercise its discretion in the direction of permitting the defense to be made."

<sup>5</sup> *In re First Nat. Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265; *In re Jemison Mercantile Co.* (C. C. A.

they had acquiesced in the adjudication.<sup>6</sup> Where an adjudication was prematurely made,<sup>7</sup> or where the intervenor was not guilty of *laches*,<sup>8</sup> a creditor has been permitted to intervene to set the adjudication aside.

A creditor may ordinarily intervene at any time before an adjudication or dismissal of the petition for the purpose of opposing the prayer of the petition.<sup>9</sup> By creditor is meant any one "who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy."<sup>10</sup>

A preferred creditor may intervene without surrendering his preference.<sup>11</sup> A trustee of one bankrupt estate, having a provable claim against the estate which is being administered in bankruptcy, may intervene to contest the prayer of the petition.<sup>12</sup> Administrators, executors, receivers, and other persons who are assignees by mere operation of law, having provable claims, may intervene like other creditors. Where a

5th Cir.), 112 Fed. Rep. 966, 50 C. C. A. 641, 7 Am. B. R. 588; *In re Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 80; *In re Worsham* (C. C. A. 8th Cir.), 142 Fed. Rep. 121, 73 C. C. A. 665, 15 Am. B. R. 672.

<sup>6</sup> *In re Worsham* (C. C. A. 8th Cir.), 142 Fed. Rep. 121, 73 C. C. A. 665, 15 Am. B. R. 672.

<sup>7</sup> *Day v. Beck & Gregg Hardware Co.* (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 52 C. C. A. 468, 8 Am. B. R. 175.

<sup>8</sup> *In Altonwood Park Co. v. Gwynne* (C. C. A. 2d Cir.), 160 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31, Judge Noyes said: "While the adjudication was made March 28, 1907, it does not appear that the petitioner was notified of the proceedings until about June 14, 1907. The order to show cause upon the petitioner's application was entered August 2, 1907. It does not appear that there are any interven-

ing rights and we think the delay shown quite insufficient to constitute such laches as should debar a creditor from showing that the whole bankruptcy proceedings were invalid."

<sup>9</sup> B. A. 1898, Sec. 59f; *Mattoon Nat. Bank v. First Nat. Bank* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *Goldman v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re C. Moench & Sons Co.*, 123 Fed. Rep. 977, 10 Am. B. R. 590.

<sup>10</sup> B. A. 1898, Sec. 1, clause 9.

<sup>11</sup> *In re Moench & Sons Co.*, 123 Fed. Rep. 977, 10 Am. B. R. 590; *Goldman v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266.

<sup>12</sup> See *Hays v. Wagner* (C. C. A. 6th Cir.), 150 Fed. Rep. 533, 80 C. C. A. 275, 18 Am. B. R. 163.

claim has been assigned in good faith and for a valuable consideration prior to the filing of the petition, the assignee is a creditor entitled to oppose the petition.

A person who has no provable claim is not entitled to intervene for the purpose of opposing a petition.<sup>13</sup> A creditor whose debt is fully secured is not entitled to intervene. Where the debt is more than the security, the secured creditor may intervene for such excess of the debt over the security. With respect to the excess he is deemed an unsecured creditor.

When a creditor intervenes he has the same right as the bankrupt and may file an answer or other pleading and be heard in opposition to the prayer of the petition.<sup>14</sup>

A receiver of a corporation has been permitted to intervene to oppose an adjudication against the corporation.<sup>15</sup> This was done on the theory that, for the purpose of opposing an adjudication, the receiver was the alleged bankrupt and acted for it and in its name under the authority contained in the order appointing him.

Objections to an intervention by creditors may be properly made by motion to strike from the files the application, but not by demurrer.<sup>16</sup>

<sup>13</sup> *In re* Columbia Real Estate Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 643, 50 C. C. A. 406, 7 Am. B. R. 441; *In re* Sully, 142 Fed. Rep. 895, 15 Am. B. R. 321; *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531.

In *New York Tunnel Co.*, *supra*, Judge Ward, speaking for the circuit court of appeals for the second circuit said: "The petitioners and appellants have proceeded throughout under the bankruptcy act. But they are strangers to the bankruptcy proceedings, having no right to prove their claims, to defend or to appeal. The most they can do is to call the attention of the court as

*amici curiae* to a want of jurisdiction of the subject-matter appearing on the face of the record."

<sup>14</sup> *Mattoon Nat. Bank v. First Nat. Bank* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *Goldman v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559.

<sup>15</sup> *In re Hudson River Electric Power Co.*, 173 Fed. Rep. 934, 956, 23 Am. B. R. 191; *In re Storck Lumber Co.*, 114 Fed. Rep. 360, 8 Am. B. R. 86.

<sup>16</sup> *In re Neustadter v. Chicago Dry Goods Co.*, 96 Fed. Rep. 830 3 Am. B. R. 96.



**§ 226. Time to plead.**

The statute provides that the bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.<sup>1</sup>

In the act as originally passed the time for pleading was ten days. This was changed to five days by the amendment of 1903.

In computing the time allowed the defendant to plead, the first day is excluded and the last day included.<sup>2</sup>

Where a respondent waives service and files a written admission of the truth of the allegations of the petition, it is better practice not to make an adjudication until after the expiration of the five days within which creditors may intervene and plead.<sup>3</sup> The filing of the petition confers jurisdiction as to all creditors and expressly provides that they may intervene and defend.<sup>4</sup> They are entitled to an opportunity to defend as well as the bankrupt.

It is within the discretion of the court to permit or refuse to allow a pleading to be filed after the expiration of the five days' period.<sup>5</sup> It is better practice to obtain an extension of time for this purpose within the time limit.

The defendant or a creditor, who has appeared in the bankruptcy proceedings, is entitled to a reasonable time to plead

<sup>1</sup> B. A. 1898, Sec. 18*b*, as amended February 5, 1903, 32 Stat. at L. 797.

<sup>2</sup> B. A. 1898, Sec. 31. *Day v. Beck & Gregg Hardware Co.* (C. C. A. 6th Cir.), 114 Fed. Rep. 834, 52 C. C. A. 468, 8 Am. B. R. 175.

<sup>3</sup> *In re Humbert Co.*, 100 Fed. Rep. 439, 4 Am. B. R. 76; *In re Western Investment Co.*, 170 Fed. Rep. 677, 21 Am. B. R. 367; *Day v. Beck & Gregg Hardware Co.* (C. C. A. 5th Cir.), 114 Fed. Rep. 84, 52 C. C. A. 468, 8 Am. B. R. 175.

But see *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965, 4 Am. B. R. 411.

<sup>4</sup> B. A. 1898, Sec. 59*f*.

<sup>5</sup> *In re Cooper Bros.*, 159 Fed. Rep. 956, 20 Am. B. R. 392; *In re First Nat. Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265.

*In re Simonson*, 92 Fed. Rep. 904, 1 Am. B. R. 197, Judge Evans said: "The pleading, technically considered, being offered too late, it is within the sound discretion of the court to allow, or not to allow it to be filed; but, if it contained any defense whatever to the action, the court would not hesitate to exercise its discretion in the direction of permitting the defense to be made."

to an amended petition.<sup>6</sup> But a creditor, who fails to appear or answer a petition within the time limit, waives all objections to subsequent amendments which do not change the substance of the cause of action stated, nor the extent of the relief sought in the original petition.<sup>7</sup>

### § 227. Demurrer.

A bankrupt, or a creditor, may demur to a petition when the averments are not sufficient in law to support an adjudication.<sup>1</sup>

A demurrer lies to a petition when it fails to state facts essential to support an adjudication. This may occur when material averments are omitted<sup>2</sup> or are defectively alleged.<sup>3</sup> In other words, if the defect is apparent from the petition, a demurrer will hold it.

Where an answer and demurrer are filed, each going to the whole petition, the demurrer will be deemed waived by the answer.<sup>4</sup> The demurrer should be disposed of before filing the answer.

<sup>6</sup> *Lockman v. Lang* (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 65 C. C. A. 621, 12 Am. B. R. 497; *In re Broadway Sav. & Trust Co.* (C. C. A. 8th Cir.), 152 Fed. Rep. 152, 81 C. C. A. 58, 18 Am. B. R. 254.

<sup>7</sup> *In re Broadway Sav. & Trust Co.* (C. C. A. 8th Cir.), 152 Fed. Rep. 152, 81 C. C. A. 58, 18 Am. B. R. 254.

<sup>1</sup> *In re Ewing* (C. C. A. 2d Cir.), 115 Fed. Rep. 707, 53 C. C. A. 289, 8 Am. B. R. 269; *In re Hammond*, 163 Fed. Rep. 548, 20 Am. B. R. 776; *Green River Deposit Bank v. Craig*, 110 Fed. Rep. 137, 6 Am. B. R. 381; *In re Brett*, 130 Fed. Rep. 981, 12 Am. B. R. 492; *In re Hark*, 135 Fed. Rep. 603, 14 Am. B. R. 400; *In re Vastbinder*, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20

Am. B. R. 527; *In re Stein*, 130 Fed. Rep. 377, 12 Am. B. R. 364.

<sup>2</sup> *In re Stein*, 130 Fed. Rep. 377, 12 Am. B. R. 364; *In re Brett*, 130 Fed. Rep. 981, 12 Am. B. R. 492.

<sup>3</sup> *In re Hammond*, 163 Fed. Rep. 548, 20 Am. B. R. 776; *In re Brett*, 130 Fed. Rep. 981, 12 Am. B. R. 492; *In re Hark*, 135 Fed. Rep. 603, 14 Am. B. R. 400; *In re Vastbinder*, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20 Am. B. R. 527; *In re Flint Hill Stone & Const. Co.*, 149 Fed. Rep. 1007, 18 Am. B. R. 781.

<sup>4</sup> *In re Cooper Bros.*, 159 Fed. Rep. 956, 20 Am. B. R. 392; *In re Stern* (C. C. A. 2d Cir.), 116 Fed. Rep. 604, 54 C. C. A. 60, 8 Am. B. R. 569.

If the demurrer is sustained, leave is regularly given to amend the petition within a time fixed by the court, if the petition may be amended to state a case.<sup>5</sup> If the petition can not be amended to state a case it should be dismissed.<sup>6</sup> If the demurrer is overruled leave is regularly given to answer within a time fixed by the court.<sup>7</sup>

A demurrer will not lie to an answer in bankruptcy.<sup>8</sup> The sufficiency of an answer can only be raised by setting the case for hearing upon the petition and answer. This is the practice in equity as well as in bankruptcy.<sup>9</sup>

### § 228. The answer.

The general defense to a petition in bankruptcy is regularly put in by answer.<sup>1</sup>

The supreme court has prescribed the form of answer in bankruptcy.<sup>2</sup> This form should be followed, as nearly as may be, in answering a petition in involuntary proceedings.<sup>3</sup>

<sup>5</sup> *In re* Hammond, 163 Fed. Rep. 548, 20 Am. B. R. 776; *In re* Brett, 130 Fed. Rep. 981, 12 Am. B. R. 492; *In re* Vastbinder, 126 Fed. Rep. 417, 11 Am. B. R. 118; *In re* Flint Hill Stone & Const. Co., 149 Fed. Rep. 1007, 18 Am. B. R. 781.

<sup>6</sup> *In re* Stovall Grocery Co. 161 Fed. Rep. 882, 20 Am. B. R. 527; Woolford v. Diamond State Steel Co., 138 Fed. Rep. 582, 599, 15 Am. B. R. 31.

<sup>7</sup> As was done in *Bradley Timber Co. v. White* (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 58 C. C. A. 55, 10 Am. B. R. 329.

<sup>8</sup> *Goldman v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *Vitzthum v. Large*, 162 Fed. Rep. 685, 20 Am. B. R. 666.

<sup>9</sup> *Banks v. Manchester*, 124 U. S. 244, 32 L. Ed. 425; *Grether v. Wright* (C. C. A. 6th Cir.), 75 Fed. Rep. 743, 23 C. C. A. 500; *Walker v. Jack* (C. C. A. 6th Cir.), 88

Fed. Rep. 576, 31 C. C. A. 462; *Vitzthum v. Large*, 162 Fed. Rep. 685, 20 Am. B. R. 666.

<sup>1</sup> For forms of answer, see Form No. 9 and Form No. 11, *post*.

<sup>2</sup> See Official Form No. 6, Form No. 9, *post*.

<sup>3</sup> *Mather v. Coe*, 92 Fed. Rep. 333, 1 Am. B. R. 504; *In re* Paige, 99 Fed. Rep. 538, 3 Am. B. R. 679.

*In re* *Bradley Timber Co. v. White* (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 58 C. C. A. 55, 10 Am. B. R. 329, the court said: "The plaintiff in error also contends that the court erred in striking from the files the first answer filed by the Bradley Timber Company, but we think that in this he can hardly be serious, because the said answer seems obnoxious on all the grounds alleged in the motion to strike. The alleged answer does not conform to the form for answers prescribed by the United

This form is to be signed, verified and filed by the respondent or a creditor. In this respect it differs from Form No. 61 under the act of 1867, which was in the same words, but was signed and filed by the clerk.<sup>4</sup> It was held under that act that the defendant was required to file an answer in the usual form, setting up each defense separately.<sup>5</sup> Form No. 6 was evidently intended to simplify the pleading by the respondent under the present act.

The answer should be entitled in the court in which the petition is filed, followed by a caption and the style of the case as it appears upon the docket. The answer provided by the supreme court is a general denial. It is in these words: "And now the said X. Y. appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged." In case two or more acts of bankruptcy are alleged in the petition, the respondent may deny "each and every act of bankruptcy," etc. It has been held that a denial of the commission of the act of bankruptcy, without denying insolvency, is sufficient, where the parties so treated it, and insolvency was an essential element of the act of bankruptcy charged.<sup>6</sup>

The effect of this answer, like a general denial under code pleading, meets all the averments of the petition without going over them in detail. It puts in issue every allegation of the

States supreme court orders. It is prolix, and admixed with supposed grounds of the demurrer to the original petition, which had already been disposed of by the court. It is not properly verified, and it did not admit, nor unequivocally deny, upon the oath of a competent person, the material facts alleged in the petition. Besides, another answer was filed."

<sup>4</sup> *In re Sutherland*, No. 13638 Fed. Cas., Deady, 344.

<sup>5</sup> *In re Ouimette*, No. 10622 Fed. Cas., 1 Saw. 47; *In re Sutherland*, No. 13638 Fed. Cas., Deady, 344; *In re Finlay*, No. 4789 Fed. Cas., 5 Biss. 480.

<sup>6</sup> *Troy Wagon Works v. Vastbinder*, 130 Fed. Rep. 332, 12 Am. B. R. 352.

petition so that petitioners must introduce proof to support them;<sup>7</sup> and permits the defendant to put in proof tending to disprove any allegation in the petition.

It may be shown that the debtor belongs to one of the exempt classes and is not subject to an adjudication, or that he has not had a domicile, residence, or place of business within the district for the requisite length of time, or that he was solvent, or that he did not commit the act of bankruptcy charged, or that the debts of the petitioning creditors do not amount to \$500, or that his total indebtedness is less than \$1,000. These defenses are separately considered in the next few sections.<sup>8</sup>

The answer, which the respondent may file, is not confined to the form prescribed by the supreme court.<sup>9</sup> It may admit certain allegations of the petition to be true.<sup>10</sup> It may allege additional defenses and may contain new matter for the purpose of confession and avoidance,<sup>11</sup> such as the statute of limitations to bar a debt, or to set up a counterclaim or set off, or to plead the infancy, coverture or insanity of the debtor, or to aver that a petitioner is estopped to join in the petition, or any other special defense which may defeat an adjudication. It may aver the existence of more than twelve creditors when less than three have joined in the petition.<sup>12</sup>

<sup>7</sup> *In re West* (C. C. A. 2d Cir.), 108 Fed. Rep. 440, 48 C. C. A. 155, 5 Am. B. R. 734.

<sup>8</sup> See Sec. 229, *et seq.*, *post*.

<sup>9</sup> *In re Paige*, 99 Fed. Rep. 538, 3 Am. B. R. 679.

<sup>10</sup> *In Brinkley v. Smithwick*, 126 Fed. Rep. 686, 11 Am. B. R. 500, it was held that an act of bankruptcy was admitted in the answer, which would support an adjudication, although it was not the act charged in the petition.

*In re Cleary*, 179 Fed. Rep. 990, 24 Am. B. R. 742, an adjudication was entered upon an admission of the bankrupt.

<sup>11</sup> *In re Paige*, 99 Fed. Rep. 538, 3 Am. B. R. 679, Judge Ricks said: "The respondent denies insolvency, but sets up, with great particularity, defenses and counterclaims which he alleges show him to have been solvent at the times charged, and when the act of bankruptcy was committed. The same defense, it is alleged, has been used to defend against a suit filed in the court of common pleas of Summit County, Ohio. I think the respondent is entitled to set forth these facts as fully as he has done."

<sup>12</sup> B. A. 1898, Sec. 59*d*. See Sec. 235, *post*.

An objection to the authority of an attorney to appear for petitioning creditors is not properly raised in an answer.<sup>13</sup>

The answer regularly concludes according to whether the debtor wishes a trial by the court or a jury in these words: "and this he prays may be inquired of by the court," or "he demands that the same may be inquired of by a jury." The demand for a jury must be in writing, but may be made in a separate paper from the answer.

The answer should be signed and verified under oath by the person answering, or his agent or attorney.<sup>14</sup> It may be amended in this respect by adding the affidavit at any time before an adjudication.<sup>15</sup>

The answer is filed with the clerk of the court, and not with a referee. It should be filed within five days after the return day of the subpoena or within such further time as the court may allow.<sup>16</sup> A debtor is entitled to a reasonable time to answer an amended petition.<sup>17</sup>

## § 229. Defense that the debtor is exempt from adjudication.

The respondent, or an intervening creditor, may oppose an adjudication on the ground that the debtor belongs to one of the exempted classes and is not subject to be adjudged a bankrupt under the act.<sup>1</sup>

<sup>13</sup> *Gage v. Bell*, 134 Fed. Rep. 371, 10 Am. B. R. 696.

<sup>14</sup> B. A. 1898, Sec. 18c; *In re Harris*, 155 Fed. Rep. 216, 19 Am. B. R. 204.

<sup>15</sup> *In re Harris*, 155 Fed. Rep. 216, 19 Am. B. R. 204.

<sup>16</sup> B. A. 1898, Sec. 18b as amended Feb. 5, 1903, 32 Stat. at L. 797; as to time to plead, see Sec. 226, *ante*.

<sup>17</sup> *Lockman v. Lang* (C. C. A. 8th Cir.), 132 Fed. Rep. 1, 65 C. C. A. 621, 12 Am. B. R. 497; *In re Broadway Sav. & Trust Co.* (C. C.

A. 8th Cir.), 152 Fed. Rep. 152, 81 C. C. A. 58, 18 Am. B. R. 254.

<sup>1</sup> *Flickinger v. First Nat. Bank* (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678; *In re Taylor* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *Gregg v. Mitchell* (C. C. A. 6th Cir.), 166 Fed. Rep. 725, 92 C. C. A. 415, 21 Am. B. R. 559; *In re Yoder*, 127 Fed. Rep. 894, 11 Am. B. R. 445; *In re Pilger*, 118 Fed. Rep. 206, 9 Am. B. R. 244; *In re Thompson*, 102 Fed. Rep. 287, 4 Am. B. R. 340.

If this defense is established by proof, it ends the proceeding and the petition must be dismissed for want of jurisdiction.<sup>2</sup>

The petitioning creditors must aver and prove that the defendant is within the class of persons subject to adjudication and not within the excepted classes.<sup>3</sup> If the petition contains no averment that the defendant is not within the excepted classes, this defense may be raised by demurrer or answer. If the petition contains such allegation and the defendant wishes to contest it, he must do so by answer.

The answer may in either case set out facts to show that the debtor is within the exemptions specified in section 4*b* of the act. It may aver that he is a wage earner or a farmer,<sup>4</sup> or in case of a corporation that it is a municipal, railroad, insurance or banking corporation.<sup>5</sup> But such allegations are not necessary because the general denial of the answer raises this issue.

It may be shown that the debtor's total indebtedness does not amount to \$1,000.<sup>6</sup> If a person does not owe that amount, the bankrupt act does not reach him and he is exempt from being adjudged a bankrupt.

<sup>2</sup> *Flickinger v. First Nat. Bank* (C. C. A. 6th Cir.), 145 Fed. Rep. 162, 76 C. C. A. 132, 16 Am. B. R. 678; *In re Yoder*, 127 Fed. Rep. 894, 11 Am. B. R. 445; *In re Pilger*, 118 Fed. Rep. 206, 9 Am. B. R. 244; *In re Thompson*, 102 Fed. Rep. 287, 4 Am. B. R. 340.

<sup>3</sup> *In re Taylor* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *Beach v. Macon Grocery Co.* (C. C. A. 5th Cir.), 120 Fed. Rep. 736, 57 C. C. A. 150, 9 Am. B. R. 762; *In re Bellah*, 116 Fed. Rep. 69, 8 Am. B. R. 310; *In re Mero*, 128 Fed. Rep. 630, 12 Am. B. R. 171.

<sup>4</sup> *Flickinger v. First Nat. Bank* (C. C. A. 6th Cir.), 145 Fed. Rep.

162, 76 C. C. A. 132, 16 Am. B. R. 678; *In re Yoder*, 127 Fed. Rep. 894, 11 Am. B. R. 445; *In re Pilger*, 118 Fed. Rep. 206, 9 Am. B. R. 244.

As to who are included within this exemption see Sec. 118, *et seq.*, *ante*.

<sup>5</sup> B. A. 1898, Sec. 4*b*, as amended June 25, 1910, 36 Stat. at L. 838.

<sup>6</sup> *Taft & Co. v. Century Sav. Bank & Trust Co.* (C. C. A. 8th Cir.), 141 Fed. Rep. 369, 72 C. C. A. 671, 15 Am. B. R. 594; *In re Tirre*, 95 Fed. Rep. 425, 2 Am. B. R. 493; *In re McMurtrey & Smith* (Ref.), 15 Am. B. R. 427; *In re Cain* (Ref.), 2 Am. B. R. 378; *In re Jacobson* (Ref.), 21 Am. B. R. 921.

The respondent may show as a defense the infancy of the debtor,<sup>7</sup> or that the debtor was *non compos mentis* at the time the alleged act of bankruptcy was committed.<sup>8</sup> Where a married woman has no separate property rights and can not contract debts she may defend on the ground of coverture.<sup>9</sup> These defenses should be specially pleaded in the answer, when they are relied on to defeat an adjudication.

**§ 230. Defense that requisite domicile, residence or place of business is wanting.**

The respondent, or an intervening creditor, may oppose an adjudication on the ground that the debtor has not had his domicile, or residence, or place of business, within the district for the greater portion of the six months preceding the filing of the petition.<sup>1</sup>

If this defense is established by proof, it ends the proceedings, because the court has no jurisdiction, and the petition should be dismissed.<sup>2</sup>

**§ 231. Defense that petitioners are not creditors.**

The respondent, or an intervening creditor, may oppose an adjudication on the ground that the petitioners, or any of them

<sup>7</sup> See Sec. 133, *ante*; *In re Dunningan*, 95 Fed. Rep. 428, 2 Am. B. R. 628; *In re Eidemiller*, 105 Fed. Rep. 595, 5 Am. B. R. 570; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re Derby*, No. 3815 Fed. Cas., 6 Ben. 232; *Belton v. Hodges*, 9 Bing. 365.

<sup>8</sup> See Sec. 134, *ante*. *In re Funk* 101 Fed. Rep. 244, 4 Am. B. R. 96; *In re Maroin*, No. 9178, Fed. Cas., 1 Dill. 178; *In re Pratt*, No. 11371 Fed. Cas., 2 Low. 96; *In re Weitzel*, No. 17365, Fed. Cas., 7 Biss. 289; *In re Murphy*, No. 9946, Fed. Cas., 10 N. B. R. 48.

<sup>9</sup> See Sec. 135, *ante*. *In re Rachel Goodman*, No. 5540, Fed. Cas., 5

Biss. 401; *In re Howland*, No. 6791 Fed. Cas., 2 N. B. R. 357.

<sup>1</sup> See Secs. 193 to 196; *In re Plotke* (C. C. A. 7th Cir.), 104 Fed. Rep. 964, 44 C. C. A. 282, 5 Am. B. R. 171; *In re Pennsylvania Consolidated Coal Co.*, 163 Fed. Rep. 579, 20 Am. B. R. 872; *In re Perry Aldrich Co.*, 165 Fed. Rep. 249, 21 Am. B. R. 244; *In re Williams*, 120 Fed. Rep. 34, 9 Am. B. R. 736.

<sup>2</sup> *In re Plotke* (C. C. A. 7th Cir.), 104 Fed. Rep. 964, 44 C. C. A. 282, 5 Am. B. R. 171; *In re Perry Aldrich Co.*, 165 Fed. Rep. 249, 21 Am. B. R. 244; *In re Williams*, 120 Fed. Rep. 34, 9 Am. B. R. 736.



are not creditors entitled to join in a petition in bankruptcy.<sup>1</sup>

If this defense is established by proof so that the remaining petitioners are less than the required number at the time of the hearing, the petition should be dismissed.<sup>2</sup> If other creditors, qualified to become petitioners, join in the petition so as to make up the required number of petitioning creditors before the hearing, this defense fails.<sup>3</sup>

To establish this defense it may be shown that a petitioner does not own a provable claim in bankruptcy and therefore is not entitled to join in the petition;<sup>4</sup> or it may be shown that a petitioner is estopped by his own act to join in the petition as where he has participated in and received benefits under a general assignment for the benefit of creditors,<sup>5</sup> or a receivership,<sup>6</sup> or in obtaining a judicial lien,<sup>7</sup> charged as an act of bankruptcy.

<sup>1</sup> *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; *In re Ellis* (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 74 C. C. A. 297, 16 Am. B. R. 221; *In re Windt*, 177 Fed. Rep. 584, 24 Am. B. R. 536; *In re Hudson River Electric Power Co.*, 173 Fed. Rep. 934, 23 Am. B. R. 191; *First Nat. Bank v. Barnum*, 160 Fed. Rep. 245, 20 Am. B. R. 439; *Beers v. Hanlin*, 99 Fed. Rep. 695, 3 Am. B. R. 745.

<sup>2</sup> *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; *In re Independent Thread Co.*, 113 Fed. Rep. 998, 7 Am. B. R. 704; *In re Brown*, 111 Fed. Rep. 979, 7 Am. B. R. 102.

<sup>3</sup> See Sec. 187, *ante*; *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re Smith*, 176 Fed. Rep. 426, 23 Am. B. R. 864.

<sup>4</sup> See Sec. 182, *ante*; *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C.

A. 68, 23 Am. B. R. 695; *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 556, 20 Am. B. R. 25; *In re Hudson River Electric Power Co.* 173 Fed. Rep. 934, 23 Am. B. R. 191; *First Nat. Bank v. Barnum*, 160 Fed. Rep. 245, 20 Am. B. R. 439.

<sup>5</sup> See Sec. 189, *ante*; *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; *Moulton v. Coburn* (C. C. A. 1st Cir.), 131 Fed. Rep. 201, 66 C. C. A. 90, 12 Am. B. R. 553; *Clark v. Henne & Meyer* (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 62 C. C. A. 173, 11 Am. B. R. 583; *Simonson v. Sinsheimer* (C. C. A. 6th Cir.), 95 Fed. Rep. 948, 37 C. C. A. 337, 3 Am. B. R. 824.

<sup>6</sup> *Woolford v. Diamond State Steel Co.*, 138 Fed. Rep. 582, 15 Am. B. R. 31; *Lowenstein v. McShane Mfg. Co.*, 130 Fed. Rep. 1007, 12 Am. B. R. 602.

<sup>7</sup> *In re Weiss*, 142 Fed. Rep. 279, 15 Am. B. R. 459.

**§ 232. Defense that amount of petitioners' debts are less than five hundred dollars.**

The respondent, or an intervening creditor, may oppose an adjudication on the ground that the aggregate debts claimed by the petitioning creditors, including the debts of creditors intervening to join in the petition do not amount to \$500.<sup>1</sup>

He may contest the validity, in whole or in part, of any petitioner's claim,<sup>2</sup> or may plead a set-off for the purpose of reducing the amount of the debt,<sup>3</sup> or may aver that the debts claimed are barred by the statute of limitations.<sup>4</sup>

Where a petitioner's debt consists of an unliquidated claim it may be contested as to its amount, and a liquidation may be ordered on the filing of the petition to ascertain the amount of the claim.<sup>5</sup>

<sup>1</sup> *In re* Bevins (C. C. A. 2d Cir.), 165 Fed. Rep. 434, 91 C. C. A. 302, 21 Am. B. R. 344; *Hays v. Wagner* (C. C. A. 6th Cir.), 150 Fed. Rep. 533, 80 C. C. A. 275, 18 Am. B. R. 163; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Ferguson, 127 Fed. Rep. 407, 11 Am. B. R. 371; *In re* Etheridge Furniture Co. 92 Fed. Rep. 329, 1 Am. B. R. 112; *In re* Ouimette, No. 10622 Fed. Cas., 1 Saw. 47; *In re* California Pac. R. Co., No. 2315 Fed. Cas., 3 Saw. 240.

<sup>2</sup> *Hays v. Wagner* (C. C. A. 6th Cir.), 150 Fed. Rep. 533, 80 C. C. A. 275, 18 Am. B. R. 163; *In re* Bevins (C. C. A. 2d Cir.), 165 Fed. Rep. 434, 91 C. C. A. 302, 21 Am. B. R. 344; *In re* Etheridge Furniture Co., 92 Fed. Rep. 329, 1 Am. B. R. 112; *In re* Ferguson, 127 Fed. Rep. 407, 11 Am. B. R. 371.

<sup>3</sup> *In re* Osage, etc., R. Co., No. 10592 Fed. Cas., 9 N. B. R. 281; *In re* Skelley, No. 12921 Fed. Cas., 3 Biss. 260; *In re* Sheehan, No. 12738 Fed. Cas., 8 N. B. R. 353.

*In re* Bevins, 165 Fed. Rep. 434, 91 C. C. A. 302, 21 Am. B. R. 344, it was held that a claim in a different right could not be set off to reduce the debt of petitioners to less than \$500.

<sup>4</sup> *In re* Cornwall, No. 3250 Fed. Cas., 9 Blatch. 114.

<sup>5</sup> See Sec. 183, *ante*; *Grant v. Laird Shoe Co.*, 212 U. S. 445, 448, 53 L. Ed. 591, 21 Am. B. R. 484.

*In re* Manhattan Ice Co., 114 Fed. Rep. 400, note, 7 Am. B. R. 409, note. The following opinion was handed down May 21, 1901, by Judge Brown: "The practice in this district is that a creditor having a provable debt may be a petitioning creditor, though the debt is unliquidated. These creditors evidently have a present fixed debt to some amount. Only a trial can determine the amount of the debts. If insufficient in amount, the petition will be dismissed, unless others join. The defense must be taken by answer. Motion denied."

A plea of payment, in whole or in part, of the debt of the petitioning creditor will not ordinarily defeat the petition for adjudication in bankruptcy.<sup>6</sup> If the debtor is insolvent he has no right to offer payment, or the creditor to accept it. This would amount to a preference, which can be avoided by the trustee. But a plea of payment may be made as a defense to the petition, when there is only one creditor of the debtor,<sup>7</sup> or when payment is made with the consent of the other petitioner.<sup>8</sup>

A petitioning creditor will not be permitted to withdraw from the proceedings where it will reduce the debts of the petitioning creditors to less than \$500, especially where the claim was paid in order to induce the withdrawal.<sup>9</sup>

If it is established by proof that the total amount of petitioners' claims is less than \$500, the petition should be dismissed, unless other creditors, qualified to become petitioners, join in the petition so as to make up the required amount of

<sup>6</sup> *In re* Stovall Grocery Co., 161 Fed. Rep. 882, 20 Am. B. R. 537; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Ouimette, No. 10622 Fed. Cas., 1 Saw. 47; *In re* Williams, No. 17703 Fed. Cas., 1 Low. 406.

But see *In re* Skelley, No. 12921 Fed. Cas., 3 Biss. 260.

<sup>7</sup> *In re* Sheehan, No. 12738 Fed. Cas., 8 N. B. R. 353.

<sup>8</sup> *Cummins Grocer Co. v. Talley* (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. —, 26 Am. B. R. 484.

<sup>9</sup> *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355.

*In re* Stovall Grocery Co., 161 Fed. Rep. 882, 20 Am. B. R. 537, Judge Newman said: "The petition in bankruptcy in this case was made by a number of creditors whose

debts aggregated \$529.72. Two creditors have withdrawn their claims, leaving the total amount of indebtedness contained in the petition less than \$500. I doubt if this can be done, especially in view of what seems to be the fact that these two claims that were withdrawn were purchased by a son of the members of the bankrupt firm. While the amount paid for the claims is not shown, such conduct, if tolerated, allows an alleged bankrupt, after bankruptcy proceedings have been instituted, to buy up the claims of creditors filing a petition against him, and thereby give the creditors whose claims are so purchased a preference; doing in this way the very thing which it is the purpose of the Bankruptcy Act to prevent."

claims.<sup>10</sup> A general denial in the answer is sufficient to defeat an adjudication in the absence of proof as to the amount of petitioners' debts.<sup>11</sup>

### § 233. Defense that the debtor has not committed an act of bankruptcy.

The respondent, or an intervening creditor, may oppose an adjudication on the ground that the debtor has not committed the act of bankruptcy charged in the petition within four months of the filing of the petition.

To support an adjudication the petitioning creditors must allege and prove that the debtor has committed one of the acts of bankruptcy specified in the statute.<sup>1</sup> No other acts of the debtor will constitute an act of bankruptcy, which will support an adjudication.<sup>2</sup> If two or more acts of bankruptcy are charged in the petition and any one is established by proof it is sufficient.<sup>3</sup>

<sup>10</sup> *In re* Bevins (C. C. A. 2d Cir.), 165 Fed. Rep. 434, 91 C. C. A. 302, 21 Am. B. R. 344; *In re* Crenshaw, 156 Fed. Rep. 638, 19 Am. B. R. 502; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355.

*In re* Plymouth Cordage Co. (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 1008, 68 C. C. A. 434, 13 Am. B. R. 665, Judge Sanborn, after stating that an opportunity should have been given creditors to intervene to join in the petition, said: "Whether the suit should proceed to an adjudication upon the merits or the petition should be dismissed, should have been determined by an ascertainment of the fact whether at that time three or more creditors, who had provable claims which amounted in the aggregate to \$500 or over, had become petitioners."

<sup>11</sup> *In re* West (C. C. A. 2d Cir.), 108 Fed. Rep. 940, 48 C. C. A. 155, 5 Am. B. R. 734.

<sup>1</sup> B. A. 1898, Sec. 3. As to what are acts of bankruptcy, see Sec. 137, *ante*.

<sup>2</sup> *In re* Empire Metallic Bedstead Co. (C. C. A. 2d Cir.), 98 Fed. Rep. 981, 39 C. C. A. 372, 3 Am. B. R. 575, the court said: "When acts of bankruptcy are classified, as they are in statute of 1891, it is not the province of a court to enlarge the classification because the omitted class seems to partake of the sin of the classes named."

<sup>3</sup> *Bradley Timber Co. v. White* (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 58 C. C. A. 55, 10 Am. B. R. 329; *In re* Riggs Restaurant Co. (C. C. A. 2d Cir.), 130 Fed. Rep. 691, 66 C. C. A. 48, 11 Am. B. R. 508; *In re* Lyman (C. C. A. 2d Cir.), 127 Fed. Rep. 123, 62 C. C. A. 123, 11 Am. B. R. 466.

The requisite elements of the several acts of bankruptcy are considered in another place to which the reader is referred to ascertain what is essential to be established with respect to each act of bankruptcy that may be charged.<sup>4</sup>

An adjudication may be made upon the admission of a bankrupt in his answer.<sup>5</sup>

An act of bankruptcy may be contested on the ground that it was committed more than four months before the petition was filed,<sup>6</sup> or that the petitioners failed to establish acts of the debtor which constitute an act of bankruptcy, because an essential element is wanting.<sup>7</sup> If, upon the whole evidence, either fact is found to be true, it will defeat an adjudication and the petition is regularly dismissed.<sup>8</sup>

#### § 234. Defense of solvency.

Whether the respondent, or an intervening petitioner may oppose an adjudication on the ground of the solvency of the debtor depends upon the act of bankruptcy charged in the petition.<sup>1</sup>

The defense of solvency may relate to the financial condition of the debtor at the time, *first*, that the petition is filed, or *second*, that the act of bankruptcy is committed.

<sup>4</sup> See Chapter X.

<sup>5</sup> Brinkley v. Smithwick, 126 Fed. Rep. 686, 11 Am. B. R. 500; *In re* Cleary, 179 Fed. Rep. 990, 24 Am. B. R. 742.

<sup>6</sup> Sec. 159, *ante*; *In re* Mingo Valley Creamery Co., 100 Fed. Rep. 282, 4 Am. B. R. 67.

<sup>7</sup> Clark v. Henne & Meyer (C. C. A. 5th Cir.), 127 Fed. Rep. 288; 62 C. C. A. 162, 11 Am. B. R. 583; *In re* Rome Planing Mill, 96 Fed. Rep. 812, 3 Am. B. R. 123; Macon Grocery Co. v. Beach, 156 Fed. Rep. 1009, 19 Am. B. R. 558; Richmond

Standard Steel Co. v. Allen (C. C. A. 4th Cir.), 148 Fed. Rep. 657, 78 C. C. A. 389, 17 Am. B. R. 583; *In re* Spalding (C. C. A. 2nd Cir.), 139 Fed. Rep. 244, 71 C. C. A. 370, 14 Am. B. R. 129.

<sup>8</sup> See orders in Clark v. Henne & Meyer (C. C. A. 5th Cir.), 127 Fed. Rep. 288, 62 C. C. A. 162, 11 Am. B. R. 583; *In re* Spalding (C. C. A. 2nd Cir.), 139 Fed. Rep. 244, 71 C. C. A. 370, 14 Am. B. R. 129.

<sup>1</sup> As to what constitutes and is evidence of insolvency, see Secs. 140-141, *ante*.

*First.* Solvency at the time the petition is filed is a complete defense to a petition charging an act of bankruptcy under the first clause of section 3 of the act.<sup>2</sup>

It has been held that a debtor was entitled to a hearing on the question of solvency at the time the petition is filed, where the appointment of a receiver is charged as an act of bankruptcy.<sup>3</sup> It is hard to see the reason for a different rule in this respect in the case of putting a receiver, than in the case of putting an assignee in charge of the property of the debtor. In the case of an assignee, solvency at the time of filing the petition is no defense.<sup>4</sup>

Solvency at the time the petition is filed is no defense to a petition charging a preference as an act of bankruptcy, under the second and third clauses of section 3 of the act,<sup>5</sup> or to a petition charging the act of bankruptcy to consist in making a general assignment for the benefit of creditors,<sup>6</sup> or to a petition charging an act of bankruptcy to consist in an admission in writing of the debtor's inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. The court will accept the statement of the debtor to be true. He is not entitled to make an issue of solvency at the time of filing the petition.

*Second.* Solvency at the time the act of bankruptcy is committed is a complete defense to a petition charging a pref-

<sup>2</sup> B. A. 1898, Sec. 3c; *West v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550; *In re Schenkein*, 113 Fed. Rep. 421, 7 Am. B. R. 162; *In re Ward*, 161 Fed. Rep. 755, 20 Am. B. R. 482; *In re West* (C. C. A. 2nd Cir.), 108 Fed. Rep. 940, 48 C. C. A. 155, 5 Am. B. R. 734.

<sup>3</sup> *In re Pickens Mfg. Co.*, 158 Fed. Rep. 894, 20 Am. B. R. 202; *In re*

*Belfast Mesh Underwear Co.*, 153 Fed. Rep. 224, 18 Am. B. R. 620; *In re Zeltner Brewing Co.*, 117 Fed. Rep. 799, 9 Am. B. R. 63.

<sup>4</sup> *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>5</sup> *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550.

<sup>6</sup> *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

erence, by transfer or legal proceedings, as an act of bankruptcy under the second or third clauses of section 3 of the act.<sup>7</sup>

Solvency at the time the debtor applied for a receiver or trustee for his property is a complete defense to a petition alleging that as an act of bankruptcy.<sup>8</sup>

Where a receiver is put in charge of the property of the debtor at the instance of another, the solvency of the debtor at the time is not in itself a defense. The defense must go to the question of whether a receiver was appointed on the ground of insolvency.<sup>9</sup> If the record of the court making the appointment shows that insolvency was a ground for the appointment of the receiver or trustee, it can not be shown that the debtor was in fact solvent.<sup>10</sup> If it was not one of the substantial reasons for such appointment, this defense will defeat an adjudication.<sup>11</sup>

<sup>7</sup> *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re Rome Planing Mill*, 96 Fed. Rep. 813, 3 Am. B. R. 123; *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 15 Am. B. R. 550; *In re Hines*, 144 Fed. Rep. 142, 16 Am. B. R. 295; *Chicago Title & Trust Co. v. Roebeling's Sons Co.*, 107 Fed. Rep. 71, 5 Am. B. R. 368.

<sup>8</sup> *In re Zeltner Brewing Co.*, 117 Fed. Rep. 799, 9 Am. B. R. 63.

<sup>9</sup> See Sec. 156, *ante*.

<sup>10</sup> See Sec. 156, *ante*. *In re Spalding* (C. C. A. 2nd Cir.), 139 Fed. Rep. 244, 71 C. C. A. 370, 14 Am. B. R. 129; *In re Electric Supply Co.*, 175 Fed. Rep. 612, 23 Am. B. R. 647; *In re Kennedy Tailoring Co.*, 175 Fed. Rep. 871, 23 Am. B. R. 656; *Hooks v. Aldridge* (C. C. A. 5th Cir.), 145 Fed. Rep. 855, 76 C. C. A. 409, 16 Am. B. R. 664;

*Beatty v. Anderson Min. Co.* (C. C. A. 1st Cir.), 150 Fed. Rep. 293, 80 C. C. A. 181, 17 Am. B. R. 738; *Blue Mt. Iron & Steel Co. v. Portner* (C. C. A. 4th Cir.), 131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 577.

<sup>11</sup> *Moss Nat. Bank v. Arend* (C. C. A. 6th Cir.), 146 Fed. Rep. 351, 76 C. C. A. 629, 16 Am. B. R. 855; *In re Golden Malt Cream Co.* (C. C. A. 7th Cir.), 164 Fed. Rep. 326, 90 C. C. A. 258, 21 Am. B. R. 36; *In re Spalding* (C. C. A. 2nd Cir.), 139 Fed. Rep. 244, 71 C. C. A. 370, 14 Am. B. R. 129; *In re Boston & Oaxaca Min. Co.*, 181 Fed. Rep. 422, 24 Am. B. R. 923; *In re Douglas Coal & Coke Co.*, 131 Fed. Rep. 769, 12 Am. B. R. 539; *In re Edward Ellsworth Co.*, 173 Fed. Rep. 699, 23 Am. B. R. 284; *In re Hudson River Electric Power Co.*, 173 Fed. Rep. 934, 943, 23 Am. B. R. 191.

Solvency at the time of making a general assignment for the benefit of creditors is not a defense to a petition charging that as an act of bankruptcy.<sup>12</sup>

Where a petition is filed by less than all the partners to have the firm adjudged bankrupt, the nonassenting partner may defend on the ground of solvency.<sup>13</sup>

### § 235. Defense that there are more than twelve creditors.

The respondent,<sup>1</sup> or an intervening creditor,<sup>2</sup> may allege the existence of a larger number of creditors than twelve, when less than three creditors have joined as petitioners.

In such cases the statute provides that "there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard."<sup>3</sup>

The list of creditors required by the statute should contain the names and addresses of the creditors, a statement of the amount due each creditor, the date of the debt, when due, whether due by note or account or by some other form of contract, the consideration therefor, whether owed jointly with another, as partner or otherwise, and should give, as nearly as may be, the same fullness of information as is required in the schedule.<sup>4</sup>

<sup>12</sup> *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>13</sup> See Sec. 258, *post*; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787.

<sup>1</sup> B. A. 1898, Sec. 59*d*; *In re Haff* (C. C. A. 2nd Cir.), 136 Fed. Rep. 78, 68 C. C. A. 646, 13 Am. B. R. 362; *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 34, 13 Am. B. R.

665; *In re Brown*, 111 Fed. Rep. 979, 7 Am. B. R. 102.

<sup>2</sup> *First State Bank v. Haswell* (C. C. A. 8th Cir.), 174 Fed. Rep. 209, 98 C. C. A. 217, 23 Am. B. R. 330.

<sup>3</sup> B. A. 1898, Sec. 59*d*.

<sup>4</sup> *Gage & Co. v. Bell*, 124 Fed. Rep. 371, 10 Am. B. R. 696; *Cummins Grocer Co. v. Talley* (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. 484, 26 Am. B. R. 484.



The list of creditors should be a separate paper from the answer, but may be annexed to it. It should be verified and filed with the answer. Until a list of creditors is filed the court will not consider an averment in the answer that there are more than twelve creditors.

The statute does not prescribe in what mode the court shall cause the other creditors to be notified, whether the notice shall be served personally or by mail, or by whom the service shall be made. It is proper for a referee to serve notice by mail as in other cases.<sup>5</sup>

The court may permit other creditors to join in the petition at any time before the adjudication to make three petitioning creditors.<sup>6</sup> The statute expressly provides that "if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."<sup>7</sup>

### **§ 236. Whether to reply or set the case for hearing on petition and answer.**

Where an answer is a general denial of the allegations of the petition, no reply or replication is needed.<sup>1</sup>

If the petitioning creditors wish to contest a defense in an answer raising new matter, they must file a reply and have

<sup>5</sup> *In re Tribelhorn* (C. C. A. 2nd Cir.), 137 Fed. Rep. 3, 69 C. C. A. 601, 14 Am. B. R. 491, the court said: "While we can not commend the procedure which was sanctioned in the present case, and think it would be safer to cause the service to be made by some officer of the court, instead of by a person not sustaining this relation, and designated by a party to the proceeding, we can not say that it was unwarranted."

<sup>6</sup> B. A. 1898, Sec. 59d; *In re Plymouth Cordage Co.* (C. C. A.

8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665; *In re Haff* (C. C. A. 2nd Cir.), 136 Fed. Rep. 78, 68 C. C. A. 646, 13 Am. B. R. 362; *First State Bank v. Haswell* (C. C. A. 8th Cir.), 174 Fed. Rep. 209, 98 C. C. A. 217, 23 Am. B. R. 330; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626.

<sup>7</sup> B. A. 1898, Sec. 59d; *In re Brown*, 111 Fed. Rep. 979, 7 Am. B. R. 102.

<sup>1</sup> *In re Dunham* No. 4143, Fed. Cas., 2 Ben. 488; *In re Hawkeye Smelting Co.*, 8 N. B. R. 385.

a trial before an adjudication is made.<sup>2</sup> If the parties put in proofs as if a replication had been filed, they waive any objection to the failure to file it.<sup>3</sup>

When the petitioners wish to test the sufficiency of an answer as a defense to the petition, they should set the case down for hearing upon petition and answer.<sup>4</sup> A demurrer to an answer is unknown to bankruptcy practice,<sup>5</sup> or to equity practice.<sup>6</sup> If a demurrer is filed to an answer, it may be treated as a submission of the case on petition and answer.<sup>7</sup>

Where the case is submitted on petition and answer, the allegations of the petition not denied, and the allegations of the answer are taken to be true.<sup>7</sup> On a hearing on petition and answer the parties are entitled to an adjudication or a dismissal of the petition.<sup>8</sup>

<sup>2</sup> *In re Taylor* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *Brinkley v. Smithwick*, 126 Fed. Rep. 686, 11 Am. B. R. 500; *In re Doddy, Jourdan & Co.*, 127 Fed. Rep. 771, 11 Am. B. R. 344; *In re Waugh* (C. C. A. 9th Cir.), 133 Fed. Rep. 281, 66 C. C. A. 659, 13 Am. B. R. 187; *Rise v. Border*, 140 Fed. Rep. 566, 15 Am. B. R. 297.

<sup>3</sup> *Clements v. Moore*, 6 Wall. 299, 310, 18 L. Ed. 786; *Fischer v. Wilson*, No. 4812 Fed. Cas., 16 Blatch. 220; *In re Thomas*, 45 Fed. Rep. 784; *Jones v. Brittan*, No. 7455 Fed. Cas., 1 Woods, 667.

<sup>4</sup> *Goldman, Beckman & Co. v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *Vitzthum v. Large*, 162 Fed. Rep. 685, 20 Am. B. R. 666.

<sup>5</sup> *Goldman, Beckman & Co. v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *Vitzthum v. Large*, 162 Fed. Rep. 685, 20 Am. B. R. 666.

<sup>6</sup> *Banks v. Manchester*, 128 U. S. 224, 250, 32 L. Ed. 425; *In re Sanford Fork & Tool Co.*, 160 U. S.

247, 257, 40 L. Ed. 414; *Grether v. Wright* (C. C. A. 6th Cir.), 75 Fed. Rep. 742, 20 C. C. A. 500.

<sup>7</sup> *Vitzthum v. Large*, 162 Fed. Rep. 685, 20 Am. B. R. 666; *Goldman, Beckman & Co. v. Smith*, 93 Fed. Rep. 182, 1 Am. B. R. 266; *In re Taylor* (C. C. A. 7th Cir.), 102 Fed. Rep. 728, 42 C. C. A. 1, 4 Am. B. R. 515; *In re Waugh* (C. C. A. 9th Cir.), 133 Fed. Rep. 281, 66 C. C. A. 659, 13 Am. B. R. 187; *Vitzthum v. Large*, 162 Fed. Rep. 685, 20 Am. B. R. 666; *Brinkley v. Smithwick*, 126 Fed. Rep. 686, 11 Am. B. R. 500; *In re Doddy, Jourdain & Co.*, 127 Fed. Rep. 771, 11 Am. B. R. 344.

<sup>8</sup> *In re Waugh* (C. C. A. 9th Cir.), 133 Fed. Rep. 281, 66 C. C. A. 659, 13 Am. B. R. 187; *In re Doddy, Jourdain & Co.*, 127 Fed. Rep. 771, 11 Am. B. R. 344; *Brinkley v. Smithwick*, 126 Fed. Rep. 686, 11 Am. B. R. 500.

In *Vitzthum v. Large*, 162 Fed. Rep. 685, 20 Am. B. R. 666, the court granted leave to each of the

It may be observed that where the answer contains pleas which are irrelevant and immaterial, it is proper to move to have them stricken out.<sup>9</sup>

**§ 237. The hearing before the judge when a jury is not demanded.**

If the bankrupt or any of his creditors appear within the time limited and controvert the facts alleged in the petition, a hearing or trial is had as soon as may be thereafter upon the issues presented by the pleadings.<sup>1</sup>

It is the duty of the judge to hear and determine, without the intervention of a jury, all issues in cases of contested bankruptcy, except where a jury trial is given by the statute.<sup>2</sup> When the case is ripe for hearing it may be set for trial by either party for any date when the judge can hear it. Notice should be served upon opposing party of the day of hearing. The judge may proceed with the hearing in the absence of the bankrupt after notice served upon him.<sup>3</sup>

In case a composition is offered before an adjudication, the hearing on the petition should be delayed until it is determined whether the composition shall be confirmed.<sup>4</sup>

If a jury trial is not seasonably demanded, all the issues are triable by the judge and can not be delegated to the referee or a special master.<sup>5</sup> In such cases three methods of procedure are open:

parties to amend his pleadings so that no injustice might be done to the parties, who did not intend to submit on petition and answer by filing a demurrer to the answer.

<sup>9</sup> *In re* Paige, 99 Fed. Rep. 538, 3 Am. B. R. 679.

<sup>1</sup> B. A. 1898, Sec. 18*d*; *In re* King (C. C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606.

<sup>2</sup> B. A. 1898, Sec. 19*a*; *In re* King (C. C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606; *In re* Lacov (C. C. A.

2nd Cir.), 134 Fed. Rep. 237, 67 C. C. A. 19, 13 Am. B. R. 400; *Morss v. Franklin Coal Co.*, 125 Fed. Rep. 998, 11 Am. B. R. 423; *Simonson v. Sinsheimer* (C. C. A. 6th Cir.), 100 Fed. Rep. 426, 40 C. C. A. 474, 3 Am. B. R. 824.

<sup>3</sup> *Young & Holland Co. v. Brande Bros.*, 162 Fed. Rep. 663, 20 Am. B. R. 12.

<sup>4</sup> B. A. 1898, Sec. 12*a*, as amended June 25, 1910, 36 Stat. at L. 838.

<sup>5</sup> *In re* King (C. C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606; *In re* Nea-

*First.* The judge may hear the testimony and make an adjudication or dismiss the petition.<sup>6</sup> This course should be pursued if practicable. The statute clearly requires the judge to weigh and consider testimony and exercise his personal judgment in the determination of each issue.

Where the case is submitted to the judge without the intervention of a jury, the evidence is not usually introduced with the same formality as in a jury trial. If witnesses are examined orally the testimony presented should be taken down or its substance stated in writing and made a part of the record. If this is not done the circuit court of appeals can not consider it on an appeal under section 25a of the act.<sup>7</sup>

The court determines the issues presented by the pleadings upon the proofs after arguments of counsel, and either makes an adjudication of the bankruptcy or dismisses the petition.

*Second.* The judge may refer the proceedings to a referee or special master to hear and report the evidence with or without advisory findings.<sup>8</sup>

This method of taking testimony is the usual one in courts of equity, and the bankrupt act does not provide that all the testimony shall be taken in the presence and hearing of the judge. The practice in equity in this respect is followed by the courts of bankruptcy.

The referee or special master can not decide the issues.<sup>9</sup> He should return the evidence with his report for the consideration of the judge. On the coming in of the report either with or without recommendation, it is the duty of the judge

smith (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128.

<sup>6</sup> *In re King* (C. C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606.

<sup>7</sup> *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521.

<sup>8</sup> *In re Lacov* (C. C. A. 2nd Cir.), 134 Fed. Rep. 237, 67 C. C. A. 19, 13 Am. B. R. 400; *In re King* (C.

C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606; *Clark v. American Mfg. Co.* (C. C. A. 4th Cir.), 101 Fed. Rep. 962, 42 C. C. A. 120, 4 Am. B. R. 451.

<sup>9</sup> *In re King* (C. C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606; *In re Lacov* (C. C. A. 2nd Cir.), 134 Fed. Rep. 237, 67 C. C. A. 19, 13 Am. B. R. 400.

to determine the issues and make the order of adjudication or dismissal.<sup>10</sup>

*Third.* The judge may seek the aid of a jury in solving a question of fact, although the alleged bankrupt does not demand a jury or expressly waives it.<sup>11</sup>

Whether the judge will submit an issue of fact to a jury in such cases rests in the discretion of the court. It is like the trial of an issue out of chancery, which a court of equity is not bound to grant, nor bound by the verdict if such trial be granted. In case a jury is not demanded as of right, and an issue is submitted to a jury, the verdict is advisory only as in equity.<sup>12</sup> It is the duty of the judge ultimately to determine the issues.

### § 238. Hearing before a judge when a jury is demanded.

The right to a trial by jury is limited to the question of the insolvency of the defendant and whether he has committed any act of bankruptcy charged in the petition.<sup>1</sup>

With respect to these two issues the trial is according to common law, and the verdict of the jury is binding on the

<sup>10</sup> *In re King* (C. C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606; *In re Lacov* (C. C. A. 2nd Cir.), 134 Fed. Rep. 237, 67 C. C. A. 19, 13 Am. B. R. 400.

<sup>11</sup> *In re Neasmith* (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128; *Oil Well Supply Co. v. Hall* (C. C. A. 4th Cir.), 128 Fed. Rep. 875, 63 C. C. A. 343, 11 Am. B. R. 738.

In *Barton v. Barbour*, 104 U. S. 126, 134, 26 L. Ed. 672, Mr. Justice Woods said: "The bankruptcy court may, and in cases peculiarly requiring such a course, will direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion."

<sup>12</sup> *In re Neasmith* (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128; *Oil Well Supply Co. v. Hall* (C. C. A. 4th Cir.), 128 Fed. Rep. 875, 63 C. C. A. 343, 11 Am. B. R. 738; *Carpenter v. Cudd* (C. C. A. 4th Cir.), 174 Fed. Rep. 603, 98 C. C. A. 449, 23 Am. B. R. 463.

<sup>1</sup> *Simonson v. Sinsheimer* (C. C. A. 6th Cir.), 100 Fed. Rep. 426, 40 C. C. A. 474, 3 Am. B. R. 824; *Stephens v. Merchants Nat. Bank* (C. C. A. 7th Cir.), 154 Fed. Rep. 341, 83 C. C. A. 119, 18 Am. B. R. 560; *Carpenter v. Cudd* (C. C. A. 4th Cir.), 174 Fed. Rep. 603, 98 C. C. A. 449, 23 Am. B. R. 463; *Morss v. Franklin Coal Co.*, 125 Fed. Rep. 998, 11 Am. B. R. 423.

judge. If other issues are made by the pleadings, it is the duty of the judge to hear and decide such issues without submitting them to the jury.<sup>2</sup> These issues may be heard by the judge before or after the jury trial on the question of insolvency or the commission of an act of bankruptcy.

The orderly procedure in cases of this kind is for the judge to determine the issues involving the jurisdiction of the court in advance of the jury trial. If the court is without jurisdiction to proceed, a jury trial would be improper. If the judge overrules these other defenses, a jury trial, as to insolvency and the act of bankruptcy is held as a matter of right.

The judgment on the verdict will regularly be an adjudication or dismissal of the proceedings. Where issues are left undetermined by the judge until after a jury trial, a judgment should be entered upon the verdict. But the order of adjudication should not be made until after the issues left undetermined have been decided. If the verdict is in favor of the defendant, it ends the proceedings and a judgment of dismissal may be entered on the verdict.

### **§ 239. The right to a jury trial.**

A person against whom an involuntary petition has been filed is entitled to have a trial by jury in respect to the question of his insolvency, where the question is material, except as otherwise provided in the act, and any act of bankruptcy alleged in such petition to have been committed.<sup>1</sup> Such trials have frequently been had. A few of the leading cases are collated in the note.<sup>2</sup>

<sup>2</sup> *Carpenter v. Cudd* (C. C. A. 4th Cir.), 174 Fed. Rep. 603, 98 C. C. A. 449, 23 Am. B. R. 463; *Stephens v. Merchants Nat. Bank* (C. C. A. 7th Cir.), 154 Fed. Rep. 341, 83 C. C. A. 119, 18 Am. B. R. 560; *Morss v. Franklin Coal Co.*, 125 Fed. Rep. 998, 11 Am. B. R. 423; *In re Pilger*, 118 Fed. Rep. 206, 9 Am. B. R. 244.

<sup>1</sup> B. A. 1898, Sec. 19a.

<sup>2</sup> *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; *Grant Shoe Co. v. Laird*, 203 U. S. 502, 61 L. Ed. 292, 17 Am. B. R. 1; *Duncan v. Landis* (C. C. A. 3rd Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649; *Carpenter v. Cudd* (C. C. A. 4th Cir.), 174 Fed. Rep. 603, 98 C. C. A. 449, 23

The right to trial by jury in bankruptcy is not founded upon any provision of the constitution, but exists solely by virtue of the bankrupt act.<sup>3</sup> That statute limits the right to demand a trial by jury to the alleged bankrupt alone. A creditor is not entitled to demand a trial by jury with respect to any issue.<sup>4</sup>

If the defendant wishes a jury trial, he is required by the statute to file a written application for it at or before the time within which an answer may be filed, or he will be deemed to have waived it.<sup>5</sup>

If he demands it in writing within the time limited, he is entitled, as a matter of right, to a trial by jury according to the course of the common law.<sup>6</sup> This right is absolute and can not be withheld at the discretion of the court.<sup>7</sup> In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court can not, as the chancellor may, enter judgment contrary to the verdict, but the

Fed. Rep. 463; *Schloss v. Strellow & Co.* (C. C. A. 3rd Cir.), 156 Fed. Rep. 662, 84 C. C. A. 374, 19 Am. B. R. 359; *Acme Food Co. v. Meier* (C. C. A. 6th Cir.), 153 Fed. Rep. 74, 82 C. C. A. 208, 18 Am. B. R. 550; *Blue Mountain Iron & Steel Co. v. Portner* (C. C. A. 4th Cir.), 131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 559; *Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co.* (C. C. A. 6th Cir.), 131 Fed. Rep. 215, 65 C. C. A. 201, 12 Am. B. R. 610; *Buffalo Milling Co. v. Lewisburg Dairy Co.*, 159 Fed. Rep. 319, 20 Am. B. R. 279; *In re Ward*, 161 Fed. Rep. 755, 20 Am. B. R. 482; *Morss v. Franklin Coal Co.*, 125 Fed. Rep. 998, 11 Am. B. R. 423.

<sup>3</sup> *In re Christensen*, 101 Fed. Rep.

243, 4 Am. B. R. 99; *In re Herzikopf*, 121 Fed. Rep. 544, 9 Am. B. R. 99.

<sup>4</sup> *In re Herzikopf*, 121 Fed. Rep. 544, 9 Am. B. R. 745; *In re Christensen*, 101 Fed. Rep. 243, 4 Am. B. R. 99.

<sup>5</sup> *In re Neasmith* (C. C. A. 6th Cir.), 147 Fed. Rep. 160, 77 C. C. A. 402, 17 Am. B. R. 128; *Bray v. Cobb*, 91 Fed. Rep. 102, 1 Am. B. R. 153.

<sup>6</sup> *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; *Duncan v. Landis* (C. C. A. 3rd Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649.

<sup>7</sup> *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; *Day v. Beck & Gregg Hdw. Co.* (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 52 C. C. A. 468, 8 Am. B. R. 175.

verdict may be set aside or the judgment may be reversed for error of law as in common law cases.<sup>8</sup>

The statute also limits the scope of the inquiry by a jury. It gives a jury trial of right with respect to the debtor's insolvency and any act of bankruptcy alleged in the petition to have been committed, but in no other instance.<sup>9</sup> Although a jury trial is limited to these two questions, the respondent is entitled to go to the jury upon everything which affects or enters into either or both of these issues.<sup>10</sup>

### § 240. The trial by jury.

When a jury trial is seasonably demanded the statute contemplates a trial according to the course of the common law.<sup>1</sup>

The trial may be had before any jury in attendance upon the district court.<sup>2</sup> If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed.<sup>3</sup> The bankrupt act also provided for certifying the case for trial to a jury in the circuit court. These courts have been abolished by the Judicial Code of 1911.

<sup>8</sup> Grant Shoe Co. v. Laird, 203 U. S. 502, 51 L. Ed. 292, 17 Am. B. R. 1; Elliott v. Toepfner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; Duncan v. Landis (C. C. A. 3rd Cir.), 106 Fed. Rep. 839, 45 C. C. A. 666, 5 Am. B. R. 649.

<sup>9</sup> Stephens v. Merchants Nat. Bank (C. C. A. 7th Cir.), 154 Fed. Rep. 341, 83 C. C. A. 119, 18 Am. B. R. 560; Morss v. Franklin Coal Co., 125 Fed. Rep. 998, 11 Am. B. R. 423; *In re* Pilger, 118 Fed. Rep. 206, 9 Am. B. R. 244; Simonson v. Sinsheimer (C. C. A. 6th Cir.), 100 Fed. Rep. 426, 40 C. C. A. 474, 3 Am. B. R. 824; Carpenter v. Cudd (C. C. A. 4th Cir.), 174 Fed. Rep.

603, 98 C. C. A. 449, 23 Am. B. R. 463.

<sup>10</sup> Buffalo Milling Co. v. Lewisburg Dairy Co., 159 Fed. Rep. 319, 20 Am. B. R. 279; Schloss v. Strelow & Co. (C. C. A. 3rd Cir.), 156 Fed. Rep. 662, 84 C. C. A. 374, 19 Am. B. R. 359; Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. (C. C. A. 6th Cir.), 131 Fed. Rep. 215, 65 C. C. A. 201, 12 Am. B. R. 610; *In re* Ward, 161 Fed. Rep. 755, 20 Am. B. R. 482.

<sup>1</sup> Elliott v. Toepfner, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; *In re* Ward, 161 Fed. Rep. 755, 20 Am. B. R. 482.

<sup>2</sup> B. A. 1898, Sec. 19b.

<sup>3</sup> B. A. 1898, Sec. 19b.



The bankrupt act provides that the issues of insolvency and the commission of an act of bankruptcy may be submitted to the jury.<sup>4</sup> The alleged bankrupt is not entitled, as of right, to go to the jury on any other issue.<sup>5</sup> With respect to these two issues he is entitled to go to the jury upon everything which affects or enters into either or both of them.<sup>6</sup> Where other issues are made by the pleadings, they should not be submitted to the jury.<sup>7</sup> Such issues may be heard and determined by the judge before or after the jury trial.<sup>8</sup>

The evidence is put in in the same manner as at any other civil trial. The court may summon any person who is a competent witness to appear in court to be examined.<sup>9</sup> The right to take depositions at such a trial is determined by and enjoyed according to the United States laws in force at that time relating to the taking of depositions.<sup>10</sup> An alleged bank-

<sup>4</sup> B. A. 1898, Sec. 19a.

Day v. Beck & Gregg Hardware Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 52 L. Ed. 468, 8 Am. B. R. 175.

<sup>5</sup> Carpenter v. Cudd (C. C. A. 4th Cir.), 174 Fed. Rep. 603, 98 C. C. A. 449, 23 Am. B. R. 463; Stephens v. Merchants Nat. Bank (C. C. A. 7th Cir.), 154 Fed. Rep. 341, 83 C. C. A. 119, 18 Am. B. R. 560; Morss v. Franklin Coal Co., 125 Fed. Rep. 998, 11 Am. B. R. 423; Simonson v. Sinsheimer (C. C. A. 6th Cir.), 100 Fed. Rep. 426, 40 C. C. A. 474, 3 Am. B. R. 824.

<sup>6</sup> Buffalo Milling Co. v. Lewisburg Dairy Co., 159 Fed. Rep. 319, 20 Am. B. R. 279; Schloss v. Strelow & Co. (C. C. A. 3rd Cir.), 156 Fed. Rep. 662, 84 C. C. A. 374; 19 Am. B. R. 359; Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. (C. C. A. 6th Cir.), 131 Fed. Rep. 215, 65 C. C. A. 201, 12 Am. B. R. 610; *In re* Ward, 161 Fed. Rep. 755, 20 Am. B. R. 482; Blue

Mt. Iron & Steel Co. v. Portner (C. C. A. 4th Cir.), 131 Fed. Rep. 57, 65 C. C. A. 295, 12 Am. B. R. 559.

<sup>7</sup> Carpenter v. Cudd (C. C. A. 4th Cir.), 174 Fed. Rep. 603, 98 C. C. A. 449, 23 Am. B. R. 463; Stephens v. Merchants Nat. Bank (C. C. A. 7th Cir.), 154 Fed. Rep. 341, 83 C. C. A. 119, 18 Am. B. R. 560; Morss v. Franklin Coal Co., 125 Fed. Rep. 998, 11 Am. B. R. 423; *In re* Pilger, 118 Fed. Rep. 206, 9 Am. B. R. 244.

<sup>8</sup> As to a hearing before a judge when a jury is demanded, see Sec. —, *ante*.

<sup>9</sup> B. A. 1898, Sec. 21a, as amended Feb. 5, 1903, 32 Stat. at L. 797. *In re* Woodward, No. 18000, Fed. Cas., 8 Ben. 112.

<sup>10</sup> B. A. 1898, Sec. 21b. The sections of the Revised Statutes which apply particularly to the right to take depositions are found in chap. 17 of the Revised Statutes relating to evidence and particularly sections 861 to 870. This subject has been

rupt can not be required to submit himself to an examination as to his sanity before trial.<sup>11</sup>

When the evidence in chief, evidence in reply and evidence in rebuttal has been introduced the case is closed and the arguments of counsel of the parties heard. The court submits the case to the jury with instructions as in a common-law action. When there is no conflicting testimony the court may direct a verdict.<sup>12</sup> A scintilla of conflicting testimony is not sufficient to require a submission to the jury. If both parties move for a peremptory instruction, it is equivalent to a request for a finding of facts by the court, and if the court directs the jury to find a verdict for one of them both are concluded in the findings of fact.<sup>13</sup> The court may set aside a verdict upon the grounds recognized in other civil actions.<sup>14</sup>

Where there are no other issues in the case than insolvency or the commission of an act of bankruptcy, the judgment on the verdict is regularly an adjudication or a dismissal of the proceedings. The same judgment may be entered where the judge has disposed of all the other issues before the jury trial.

If there are any other issues undisposed of, judgment should be entered upon the verdict, but the order of adjudication or dismissal should not be made until these other issues are determined.<sup>15</sup> It is proper to enter judgment on the verdict because the rulings in a jury trial can be reviewed only on writ of error after final judgment.<sup>16</sup> Where other issues are devolved the order adjudging or refusing to adjudge the defendant a bankrupt is reviewable by appeal. A case may be

quite fully discussed by the supreme court in an opinion by Mr. Justice Miller in *ex parte Fisk*, 113 U. S. 713, 28 L. Ed. 1117.

<sup>11</sup> *In re Ward*, 161 Fed. Rep. 755, 20 Am. B. R. 482.

<sup>12</sup> *Hardy v. Clark*, No. 1420 Fed. Cas., 3 N. B. R. 385; *In re Jelsh*, No. 7257 Fed. Cas., 9 N. B. R. 412.

<sup>13</sup> *Bradley Timber Co. v. White* (C. C. A. 5th Cir.), 121 Fed. Rep. 779, 58 C. C. A. 55, 10 Am. B. R.

329; *Beuttel v. McGone*, 157 U. S. 154, 39 L. Ed. 654.

<sup>14</sup> *In re Dunn*, No. 41713 Fed. Cas., 12 Blatch. 42; *In re De Forest*, No. 2745 Fed. Cas., 9 N. B. R. 278.

<sup>15</sup> *In re Pilger*, 118 Fed. Rep. 206, 9 Am. B. R. 244.

<sup>16</sup> *Elliott v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 9 Am. B. R. 50; *Grant Shoe Co. v. Laird*, 203 Fed. Rep. 502, 51 L. Ed. 292, 17 Am. B. R. 1.

taken to the circuit court of appeals both on writ of error and appeal, where there has been a jury trial and also a hearing before the judge.

### § 241. Burden of proof.

At the hearing or trial the petitioners must establish by proof the truth of the facts alleged in the petition. The burden of proof rests upon the petitioners in all cases; except in respect to the question of insolvency.<sup>1</sup>

With reference to the question of solvency the burden of proof is regulated by the statute.<sup>2</sup> It declares that it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of section 3, to allege and prove that the party proceeded against was not insolvent, as defined in the statute, at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one, the burden of proving solvency shall be on the alleged bankrupt.

Whenever a person, against whom a petition has been filed, under the second and third subdivisions of section 3, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit

<sup>1</sup> *In re* Rome Planing Mills, 96 Fed. Rep. 812, 3 Am. B. R. 123; *In re* Lange, 97 Fed. Rep. 197, 3 Am. B. R. 232; *Philpot v. O'Brion* (C. C. A. 1st Cir.), 126 Fed. Rep. 167, 61 C. C. A. 111; 11 Am. B. R. 205; *In re* Foster, 126 Fed. Rep. 1014, 11 Am. B. R. 131; *Troy Wagon Works v. Vastbinder*, 130 Fed. Rep. 232, 12 Am. B. R. 352;

*In re* Price, No. 11411 Fed. Cas., 8 N. B. R. 514; *Brock v. Hoppock*, No. 1912 Fed. Cas., 2 N. B. R. 7; *In re* Oregon Bulletin Co., No. 10559 Fed. Cas., 13 N. B. R. 503.

<sup>2</sup> B. A. 1898, Sec. 3c and 3d; *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463; *In re* Schenkein, 113 Fed. Rep. 421, 7 Am. B. R. 162.

to examination the burden of proving his solvency shall rest upon him. If he does so attend, the burden is upon the petitioners.<sup>3</sup>

Where a bankrupt contests the debt of a petitioning creditor on the ground that it is illegal because founded on a gambling or wagering contract, the burden of proof is upon the bankrupt.<sup>4</sup>

## § 242. Order of adjudication.

If the allegations of the petition are sufficient and are established by proof in a contested case, it is the duty of the judge to make an order of adjudication.<sup>5</sup> If the answer is insufficient in law, an order of adjudication may be made upon a submission of the case on petition and answer.<sup>1</sup>

The judge and not the referee should make the order of adjudication, whether the trial is by jury or to the court.<sup>2</sup> The form of adjudication in bankruptcy is prescribed by the supreme court in Form No. 12.<sup>3</sup> This order will be entered by the clerk of record. A mere memorandum not conforming to this form is not an adjudication.<sup>4</sup>

An order of adjudication should not be made until the expiration of the time for creditors to intervene and oppose the petition, although the bankrupt appears and files a written admission of the acts of bankruptcy and waives service.<sup>5</sup> The

<sup>3</sup> *M'Gowan v. Knittel* (C. C. A. 3rd Cir.), 137 Fed. Rep. 453, 69 C. C. A. 595, 14 Am. B. R. 208; *Cummins Grocery Co. v. Talley* (C. C. A. 6th Cir.), 187 Fed. Rep. 507, 109 C. C. A. —, 26 Am. B. R. 484.

<sup>4</sup> *Hill v. Levy*, 98 Fed. Rep. 94, 3 Am. B. R. 374, 2 N. B. N. 180. See also as to presumption of legality of contracts, *Irwin v. Williar*, 110 U. S. 507, 28 L. Ed. 225.

<sup>5</sup> B. A. 1898, Sec. 18*d*.

<sup>1</sup> *In re Waugh* (C. C. A. 9th Cir.), 133 Fed. Rep. 281, 66 C. C. A. 659, 13 Am. B. R. 187.

<sup>2</sup> *In re King* (C. C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606; *In re Humbert & Co.*, 100 Fed. Rep. 439, 4 Am. B. R. 76.

<sup>3</sup> See Form No. 29, *post*.

<sup>4</sup> B. A. 1898, Sec. 1, clause 2; *In re Hill*, No. 6484 Fed. Cas., 7 Ben. 378; *In re Boston, H. & E. R. Co.*, No. 1678 Fed. Cas., 9 Blatch. 409.

<sup>5</sup> *In re Humbert Co.*, 100 Fed. Rep. 439, 4 Am. B. R. 76; *In re Western Investment Co.*, 170 Fed. Rep. 677, 21 Am. B. R. 367; *Day*

filing of the petition confers jurisdiction as to all creditors and expressly provides that they may intervene and defend.<sup>6</sup> They are entitled to an opportunity to defend, as well as the bankrupt, before the order of adjudication is made.

An adjudication of bankruptcy against a partnership will be denied, where the existence of the partnership is put in issue by some of the members, until the existence of the partnership is established.<sup>7</sup>

An adjudication may be made on default of the alleged bankrupt or any creditor to appear and plead within the time limited for pleading.<sup>8</sup> An adjudication on default is as binding as one made upon a trial or hearing.<sup>9</sup>

A referee is authorized to make an adjudication, where the clerk refers the case to him on account of the absence of the judge from the district.<sup>10</sup> This may be done by a deputy clerk.<sup>11</sup>

The clerk can send a case of involuntary bankruptcy to the referee for adjudication only in cases in which no issue is made by the bankrupt or a creditor upon the facts averred in the petition, and the judge is absent from the district or division in which the case is pending on the next day after the

v. Beck & Gregg Hdwe. Co. (C. C. A. 5th Cir.), 114 Fed. Rep. 834, 52 C. C. A. 468, 8 Am. B. R. 175.

But see *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

<sup>6</sup> B. A. 1898, Sec. 59f.

<sup>7</sup> *In re* McLaren, 125 Fed. Rep. 835, 11 Am. B. R. 144.

<sup>8</sup> B. A. 1898, Sec. 18e; Young & Holland Co. v. Brande Bros. (C. C. A. 1st Cir.), 162 Fed. Rep. 663, 89 C. C. A. 455, 20 Am. B. R. 612; *In re* American Brewing Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 752, 50 C. C. A. 517, 7 Am. B. R. 463; *In re* Billing, 145 Fed. Rep. 395, 17 Am. B. R. 80.

<sup>9</sup> *In re* American Brewing Co. (C. C. A. 7th Cir.), 112 Fed. Rep.

752, 50 C. C. A. 517, 7 Am. B. R. 463; *In re* Billing, 145 Fed. Rep. 395, 17 Am. B. R. 80; *In re* Le Favour, No. 8208 Fed. Cas., 8 Ben. 43.

As to the binding force of a decree in equity *pro confesso*, see Thomson v. Wooster, 114 U. S. 104, 29 L. Ed. 105.

<sup>10</sup> B. A. 1898, Sec. 18f; Official Form No. 15 Form No. 32, *post*. B. A. 1898, Sec. 38, clause 1.

<sup>11</sup> Gilbertson v. United States (C. C. A. 7th Cir.), 168 Fed. Rep. 672, 94 C. C. A. 158, 22 Am. B. R. 32.

But see Bray v. Cobb, 91 Fed. 102, 1 Am. B. R. 153.

B. A. 1898, Sec. 18f; *In re* Humbert Co., 100 Fed. Rep. 439, 4 Am. B. R. 76.

last day on which pleadings may be filed.<sup>11</sup> The order of the referee in such cases is subject to review by the judge.<sup>12</sup> The referee is not authorized to make an adjudication in other cases.<sup>13</sup>

### § 243. The effect of an adjudication; *res judicata*.

An adjudication of bankruptcy, which is correct in form and made by a district court having jurisdiction of the bankrupt, is conclusive on the bankrupt and creditors of the facts decreed.<sup>1</sup> An adjudication by default is as conclusive as an adjudication on full hearing.<sup>2</sup>

An adjudication is conclusive only as to facts directly and distinctly put in issue, and the finding of which is necessary to uphold the adjudication.<sup>3</sup> A fact or matter in issue is that upon which the petitioning creditors seek to procure an adjudication and which the alleged bankrupt or a creditor controverts in his pleading. It is a well settled rule that matters which have been once litigated and determined by the judgment of a court can not again be made the subject of legal contention as between the parties to such judgment and their privies, but the estoppel does not go farther than this.

General creditors are parties and therefore bound by an adjudication.<sup>4</sup> Secured creditors and strangers to the proceed-

<sup>12</sup> B. A. 1898, Sec. 38a.

<sup>13</sup> *In re King* (C. C. A. 7th Cir.), 179 Fed. Rep. 694, 103 C. C. A. 240, 24 Am. B. R. 606.

<sup>1</sup> *In re First Nat. Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 269; *In re American Brewing Co.* (C. C. A. 7th Cir.), 112 Fed. Rep. 752, 50 C. C. A. 517, 7 Am. B. R. 463; *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965, 4 Am. B. R. 411; *In re Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 80, *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520.

<sup>2</sup> *In re American Brewing Co.* (C. C. A. 7th Cir.), 112 Fed. Rep. 752, 50 C. C. A. 517, 7 Am. B. R. 463; *In re Billing*, 145 Fed. Rep. 395, 17

Am. B. R. 80; *In re Imperial Corporation*, 133 Fed. Rep. 73, 13 Am. B. R. 199.

<sup>3</sup> *Manson v. Williams*, 213 U. S. 453, 53 L. Ed. —, 22 Am. B. R. 22; *In re Henry Ulfelder Clothing Co.*, 98 Fed. Rep. 409, 3 Am. B. R. 425; *Silvey & Co. v. Tift*, 123 Ga., 804, 17 Am. B. R. 9; *Ayres v. Cone* (C. C. A. 8th Cir.), 138 Fed. Rep. 778, 71 C. C. A. 144, 14 Am. B. R. 739; *In re Letson*, 157 Fed. Rep. 78, 19 Am. B. R. 506.

<sup>4</sup> *In re American Brewing Co.* (C. C. A. 7th Cir.), 112 Fed. Rep. 752, 50 C. C. A. 517, 7 Am. B. R. 463; *In re Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 80.

ings are not bound by the adjudication and may litigate the same issues in another proceeding.<sup>5</sup> In such cases the adjudication is *prima facie* evidence of what is therein decreed.<sup>6</sup>

An adjudication is conclusive on the parties and their privies in all subsequent proceedings, where an issue was made and decided in respect to the bankrupt's residence,<sup>7</sup> or as to insolvency when that question is necessarily involved,<sup>8</sup> or that the debtor was subject to be adjudged an involuntary bankrupt.<sup>9</sup>

Where an adjudication is based upon a single act of bankruptcy, it is conclusive in respect to the elements of such act essential to support an adjudication.<sup>10</sup> But an adjudication is not conclusive as to matters not necessarily involved, or

<sup>5</sup> *Manson v. Williams*, 213 U. S. 453, 53 L. Ed. —, 22 Am. B. R. 22.

<sup>6</sup> *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

In *Shawhan v. Wherritt*, 7 How. 627, 642, 12 L. Ed. 847, the court said: "Even if the record in the bankrupt court be not conclusive as against the defendants, it is at least *prima facie* evidence that all facts necessary to sustain the decree were proved before the court."

<sup>7</sup> *In re Hintze*, 134 Fed. Rep. 141, 13 Am. B. R. 721.

<sup>8</sup> *In re Virginia Hardwood Mfg. Co.*, 139 Fed. Rep. 209, 15 Am. B. R. 135; *In re American Brewing Co.* (C. C. A. 7th Cir.), 112 Fed. Rep. 752, 50 C. C. A. 517, 7 Am. B. R. 463; *In re Chappell*, 113 Fed. Rep. 545, 7 Am. B. R. 608; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Ia., 432, 12 Am. B. R. 781; *In re V. & M. Lumber Co.*, 182 Fed. Rep. 231.

<sup>9</sup> *In re First Nat. Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265;

*In re New York Tunnel Co.* (C. C. A. 2nd Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re Marion Contracting & Const. Co.*, 166 Fed. Rep. 618, 22 Am. B. R. 81; *In re Niagara Contracting Co.*, 127 Fed. Rep. 782, 11 Am. B. R. 643; *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965, 4 Am. B. R. 411; *In re Urban & Suburban Realty Title Co.*, 132 Fed. Rep. 140, 12 Am. B. R. 687.

<sup>10</sup> *In re Hecox* (C. C. A. 8th Cir.), 164 Fed. Rep. 823, 825, 90 C. C. A. 627, 21 Am. B. R. 314, the court said: "That adjudication determined that the bankrupt was insolvent, and while insolvent, within four months of the filing of the petition in involuntary bankruptcy, and because of its insolvency, a receiver had been put in charge of its property by order of the state court. \* \* \* \* Until avoided in a direct proceeding therefor, that adjudication was binding and conclusive on the bankrupt and creditors, as much as a judgment, *inter partes*, on due hearing in a court of competent jurisdiction."



against persons not entitled to be heard.<sup>11</sup> An adjudication on the ground of a fraudulent or preferential transfer will not bind the person to whom the bankrupt conveyed the property on the question of intent.<sup>12</sup> Where there are several acts of bankruptcy and the adjudication is general in form, it is not conclusive with respect to any one act, because it might be supported by proof of any one or more of the facts charged.<sup>13</sup>

An adjudication forecloses the question of the sufficiency of the debts of the petitioning creditors to uphold an adjudication.<sup>14</sup> Whether a creditor may contest the amount or validity of the claim of a petitioner, when it is subsequently offered to be proved, depends upon whether that was a material issue in the proceedings leading to the adjudication. If the judge must have found in favor of the validity and amount of the claim to uphold the adjudication, it is conclusive on the bankrupt and his creditors and can not be again contested.<sup>15</sup> If

<sup>11</sup> *In re Letson* (C. C. A. 8th Cir.), 157 Fed. Rep. 78, 84 C. C. A. 582, 19 Am. B. R. 506; *In re Larkin*, 168 Fed. Rep. 100, 21 Am. B. R. 711.

In *Manson v. Williams*, 213 U. S. 453, 53 L. Ed. 869, 22 Am. B. R. 22, the court said: "The adjudication put the two brothers into bankruptcy for the purpose of administering whatever property there might be, as against all the world. But it did not establish the facts upon which it was founded, no matter how necessary the connection, except as against parties entitled to be heard."

<sup>12</sup> *In re Larkin*, 168 Fed. Rep. 100, 21 Am. B. R. 711.

<sup>13</sup> *In re Letson* (C. C. A. 8th Cir.), 157 Fed. Rep. 78, 84 C. C. A. 582, 19 Am. B. R. 506.

<sup>14</sup> *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832; *In re Cleveland Ins. Co.*, 22 Fed. Rep. 200, 204.

<sup>15</sup> *Ayres v. Cone* (C. C. A. 8th Cir.), 138 Fed. Rep. 778, 71 C. C.

A. 144, 14 Am. B. R. 739; *In re Henry Ulfelder Clothing Co.*, 98 Fed. Rep. 409, 3 Am. B. R. 425.

In *Ayres v. Cone*, *supra*, Judge Riner speaking for the majority of the circuit court of appeals for the eighth circuit said: "We do not think that the bankrupt act contemplates that in a case where, upon issues involving the validity of the petitioning creditors' claim in the proceedings for an adjudication, the question has been fully heard and determined in favor of the validity of the claim, the bankrupt shall thereafter be allowed, when these same creditors present their claims for mere formal proof before the referee, to file the same answer and demand that the same issue shall again be tried before the referee and finally before the same judge who heard the application of the petitioning creditors for an adjudication, and this is precisely what is sought to be done in this case."



it was not necessary to go into the amount or validity further than to find that the claims amounted to \$500, the creditor or the trustee may contest the claims offered for proof before the referee.<sup>16</sup> The adjudication binds only as to what is actually determined by the judge in making the order.

**§ 244. An adjudication is subject to collateral attack only in the absence of jurisdiction.**

An adjudication of bankruptcy, which is correct in form and made by a district court having jurisdiction of the bankrupt, is binding and conclusive on the bankrupt and creditors.<sup>1</sup> An adjudication by default is as conclusive as an adjudication on full hearing.<sup>2</sup>

Until an order of adjudication, made by a court having jurisdiction, is vacated by a direct proceeding in the court of bankruptcy, or on appeal, it can not be attacked collaterally in any proceeding, civil or criminal.<sup>3</sup> It can not be assailed

<sup>16</sup> *In re* Henry Ulfelder Clothing Co., 98 Fed. Rep. 409, 3 Am. B. R. 425; *In re* Harper, 175 Fed. Rep. 412, 23 Am. B. R. 918; *In re* Continental Corporation (Ref.), 14 Am. B. R. 538; *In re* Cleveland Ins. Co., 22 Fed. Rep. 204.

But see *Ayres v. Cone* (C. C. A. 8th Cir.), 138 Fed. Rep. 778, 71 C. C. A. 144, 14 Am. B. R. 739, and the vigorous dissent of Judge Sanborn.

<sup>1</sup> *In re* First Nat. Bank (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 269; *In re* American Brewing Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 752, 50 C. C. A. 517, 7 Am. B. R. 463; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411; *In re* Billing, 145 Fed. Rep. 395, 17 Am. B. R. 80; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520.

<sup>2</sup> *In re* American Brewing Co. (C. C. A. 7th Cir.), 112 Fed. Rep. 752, 50 C. C. A. 517, 7 Am. B. R. 463; *In re* Billing, 145 Fed. Rep. 395, 17 Am. B. R. 80; *In re* Imperial Corporation, 133 Fed. Rep. 73, 13 Am. B. R. 199.

<sup>3</sup> *In re* First Nat. Bank (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 269; *In re* Hecox (C. C. A. 8th Cir.), 164 Fed. Rep. 823, 90 C. C. A. 627, 21 Am. B. R. 214; *In re* Dempster (C. C. A. 8th Cir.), 172 Fed. Rep. 353, 97 C. C. A. 51, 22 Am. B. R. 751; *Gilbertson v. United States* (C. C. A. 7th Cir.), 168 Fed. Rep. 672, 94 C. C. A. 158, 22 Am. B. R. 32; *Huttig Mfg. Co. v. Edwards* (C. C. A. 8th Cir.), 160 Fed. Rep. 619, 87 C. C. A. 521, 20 Am. B. R. 349; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411; *Michaels*

in the bankruptcy proceeding on a motion to set it aside by a person not having a provable claim,<sup>4</sup> or on the application of the bankrupt for a discharge.<sup>5</sup>

If the record shows a lack of jurisdiction, the adjudication is null and void and may be assailed in a collateral proceeding.<sup>6</sup> In order to render an adjudication void, the absence of jurisdiction must affirmatively appear on the record.<sup>7</sup>

This may occur where an adjudication is made upon the petition of two creditors, the law requiring three, or where the petition is filed against a farmer or wage earner, or a municipal, railroad, insurance or banking corporation, being expressly exempt from bankruptcy by the act,<sup>8</sup> or where it appears that the debtor has not had his residence, domicile or place of business within the district the requisite length of time, or that the petitioners' debts do not amount to \$500, or that the total indebtedness of the alleged bankrupt is less than \$1000.

v. Post, 21 Wall. 398, 22 L. Ed. 520; New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, 23 L. Ed. 336; Shawhan v. Wherritt, 7 How. 643, 12 L. Ed. 847; Sloan v. Lewis, 22 Wall. 150, 22 L. Ed. 832; Chapman v. Brewer, 114 U. S. 158, 29 L. Ed. 83.

<sup>4</sup> *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

As to setting aside an adjudication, see Sec. 245, *post*.

<sup>5</sup> *In re* Mason, 99 Fed. Rep. 255, 3 Am. B. R. 599; *In re* Walrath, 175 Fed. Rep. 243, 24 Am. B. R. 541; Allen v. Thompson, 10 Fed. Rep. 116.

See also *In re* Worsham (C. C. A. 8th Cir.), 142 Fed. Rep. 121, 73 C. C. A. 665, 15 Am. B. R. 672.

<sup>6</sup> *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 166 Fed. Rep. 284.

92 C. C. A. 202, 21 Am. B. R. 531; *In re* Columbia Real Estate Co., 101 Fed. Rep. 965, 4 Am. B. R. 411.

<sup>7</sup> *In re* Urban & Suburban Realty Title Co., 132 Fed. Rep. 140, 12 Am. B. R. 687, Judge Lanning said: "The second objection is that the Urban & Suburban Realty Title Company is not such a corporation as may be adjudged an involuntary bankrupt. The point of this objection is that it does not appear on the face of the petition that the company is a corporation engaged principally in trading, or in any of the other pursuits mentioned in section 4b. But neither does it appear that it is not such a corporation. Whether the petition would have been demurrable before adjudication of bankruptcy for this reason it is not necessary to consider."

<sup>8</sup> B. A. 1898, Sec. 4, as amended June 25, 1910; 36 Stat. at L. 838.

But if an issue of fact is made concerning these matters the adjudication is not void.<sup>9</sup> The decision of such issues may be erroneous and invalid. The court has jurisdiction to determine whether the case is within its jurisdiction.<sup>10</sup> If the adjudication is erroneous, it can be corrected only by a direct proceeding to that end, or on appeal.<sup>11</sup>

Defective allegations of jurisdictional requisites, which state enough in law to predicate jurisdiction do not render the adjudication void, although it may be set aside in a direct pro-

<sup>9</sup> *In re Riggs*, 214 U. S. 9, 14, 53 L. Ed. —, 22 Am. B. R. 720; *In re New England Breeders' Co.* (C. C. A. 1st Cir.), 169 Fed. Rep. 586, 95 C. C. A. 84, 22 Am. B. R. 125; *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re Marion Contracting & Const. Co.* 166 Fed. Rep. 618, 22 Am. B. R. 81; *In re Niagara Contracting Co.*, 127 Fed. Rep. 782, 11 Am. B. R. 643.

*In re New York Tunnel Co.*, *supra*, Judge Ward speaking for the circuit court of appeals for the second circuit said: "If a petition for adjudication were made by only two creditors, the law requiring three, there would be a jurisdictional defect on the face of the record, making any adjudication void. On the other hand, if the aggregate amount of claims were stated to be \$500 as required by law, and because of set-offs or other reasons was in point of fact less, an adjudication would be an error to be corrected by appeal. So if the petition were against a railroad company there would be on the face of the record such a jurisdictional defect as would make an adjudication void. Whereas, if the corporation might or might

not be considered within the Act an adjudication, even if erroneous, would have to be corrected by appeal."

<sup>10</sup> *In Denver First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. Ed. 1127, the supreme court said: "The district court had and exercised jurisdiction. The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the court had jurisdiction to so determine, and its jurisdiction over the subject-matter was not and could not be questioned."

*In re Riggs*, 214 U. S. 9, 14, 53 L. Ed. —, 22 Am. B. R. 720, the supreme court said: "We rest our conclusion upon the proposition that the district court in adjudicating the tunnel company a bankrupt was called upon to decide, and did decide, a question of fact or of mixed law and fact, and that such adjudication can not be reviewed by proceedings in *mandamus*."

<sup>11</sup> *In re Riggs*, 214 U. S. 9, 14, 53 L. Ed. —, 22 Am. B. R. 720; *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re Dempster* (C. C. A. 8th Cir.), 172 Fed. Rep. 353, 97 C. C. A. 51, 22 Am. B. R. 751.

ceeding as invalid.<sup>12</sup> Failure to aver a jurisdictional requisite is not in all cases sufficient to render the adjudication void. If the jurisdictional requisite exists it may be cured by proof, and the petition treated as amended to conform to the proof.<sup>13</sup> The presumption arising from an adjudication is that this was done before the adjudication was made.<sup>14</sup> On a direct proceeding or on appeal, it might appear otherwise and the adjudication be held to be invalid.

The distinction, therefore, between a void and an invalid adjudication is important. If the record shows an absence of jurisdiction, the adjudication is void. In such cases it is never too late to make the objection that the court is without jurisdiction, and the adjudication may be even collaterally attacked. If the record shows jurisdiction, an order of adjudi-

<sup>12</sup> *In re* New England Breeders' Club (C. C. A. 1st Cir.), 169 Fed. Rep. 586, 95 C. C. A. 84, 22 Am. B. R. 125; *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *Altonwood Park Co. v. Gwynne* (C. C. A. 2d Cir.), 160 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31; *In re* Marion Contracting & Const. Co., 166 Fed. Rep. 618, 22 Am. B. R. 81; *In re* First Nat. Bank (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265.

*In re* Riggs, 214 U. S. 9, 14, 53 L. Ed. —, 22 Am. B. R. 720, Mr. Justice Brewer uses this language: "The allegation in the petition in bankruptcy is general in its terms that the tunnel company is engaged in the business of building and contracting, but it fails to disclose the particular kind of work for which it is contracting or which it is engaged in building. It might be inferred from the work which it was shown it was doing in this particular

case, as well as from its name, that its principal business was that of contracting for the construction of tunnels, but that would be only an inference and not conclusive. Its principal business may have been that of manufacturing and contracting for such manufacturing, and this particular work only a small part of that which it was generally engaged in. What evidence was presented to the district court to sustain the application for an adjudication in bankruptcy is not disclosed. We may not assume that it was insufficient or that it failed to make certain or probable that the principal business of the company was that of manufacturing and contracting for such manufacturing."

<sup>13</sup> See Amendments to a Petition, Sec. 202, *ante*; *In re* First Nat. Bank (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 67, 81 C. C. A. 260, 18 Am. B. R. 265.

<sup>14</sup> See *In re* First Nat. Bank (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265.

cation may be erroneous and invalid, but it is not void. It is binding upon the bankrupt and creditors until set aside in a direct proceeding or on an appeal, and can not be collaterally attacked. In the one case the court acts without authority, and that action of the court is void; but in the other the court only errs in judgment upon a question properly before the court for adjudication, and of course the order of the court is only voidable.

### § 245. Setting aside an adjudication.

A court of bankruptcy has power to set aside an order of adjudication at any time during the pendency of the bankruptcy proceedings.<sup>1</sup>

After an order of adjudication has been entered an application may be made to set it aside and grant a new trial or hearing. This is regularly done by motion. Mandamus will not lie to compel the court of bankruptcy to vacate an adjudication.<sup>2</sup> The application should be made to the judge and not to the referee.<sup>3</sup> Notice of the hearing on the motion should be given petitioning creditors, including those who have intervened to join in the petition.

The application must be made within a reasonable time, but not necessarily at the same term of the district court at which the adjudication is made.<sup>4</sup> A court of bankruptcy has no

<sup>1</sup> *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *Altonwood Park Co. v. Gwynne* (C. C. A. 2d Cir.), 160 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31; *In re New England Breeders' Club* (C. C. A. 1st Cir.), 169 Fed. Rep. 586, 95 C. C. A. 84, 22 Am. B. R. 125; *In re Dunn*, No. 4173 Fed. Cas., 12 Blatch. 42; *In re De Forest*, No. 3745 Fed. Cas., 9 N. B. R. 278; *In re Great Western Telegraph Co.*, No. 5739 Fed. Cas., 5 Biss. 359.

<sup>2</sup> *In re Riggs*, 214 U. S. 9, 53 L. Ed. —, 22 Am. B. R. 720.

<sup>3</sup> *In re Imperial Corporation*, 133 Fed. Rep. 73, 13 Am. B. R. 199.

<sup>4</sup> *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *In re Niagara Contracting Co.*, 127 Fed. Rep. 782, 11 Am. B. R. 643; *In re Jemison Mercantile Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 966, 50 C. C. A. 641, 7 Am. B. R. 588.

separate terms.<sup>5</sup> What is a reasonable time within which an adjudication may be assailed depends upon the circumstances of each case, including the diligence of the objectors and the rights which have become vested under the order and which will be disturbed by its revocation.<sup>6</sup>

The bankrupt, or a creditor having a provable claim, may file a motion to vacate an adjudication.<sup>7</sup> A creditor not having a provable claim can not do so.<sup>8</sup> A receiver or an assignee of the alleged bankrupt, acting in his behalf, may move to vacate an adjudication.<sup>9</sup> A stranger as *amicus curiae*, may call to the attention of the court, or the court may *sua sponte* notice, the want of jurisdiction appearing on the face of the record.<sup>10</sup>

A creditor may be estopped to challenge an adjudication. If he had acquiesced in the adjudication, by proving his claim and participating in the proceedings, he will not be permitted thereafter to assail the adjudication.<sup>11</sup> A creditor, with full

<sup>5</sup> *Sandusky v. Bank*, 23 Wall. 289, 23 L. Ed. 153; *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692; *Tucker v. Curtin* (C. C. A. 1st Cir.), 153 Fed. Rep. 91, 82 C. C. A. 225, 18 Am. B. R. 378; *In re Bimberg*, 121 Fed. Rep. 942, 9 Am. B. R. 601.

<sup>6</sup> *In Altonwood Park Co. v. Gwynne* (C. C. A. 2d Cir.), 150 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31, it was held that six weeks after knowledge of the adjudication was a reasonable time under the facts of that case.

*In re First National Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265, it was held that six weeks after the adjudication was too late under the facts of that case.

<sup>7</sup> *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965, 4 Am. B. R. 411; *In re New England Breeders' Club* (C. C. A. 1st Cir.), 169 Fed. Rep. 586, 95 C. C. A. 84, 22 Am. B. R. 125; *Altonwood Park Co. v. Gwynne*

(C. C. A. 2d Cir.), 160 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31; *In re Derby*, No. 3815 Fed. Cas., 6 Ben. 232; *Fogarty v. Gerrity*, No. 4895 Fed. Cas., 1 Saw. 233.

<sup>8</sup> *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965, 4 Am. B. R. 411.

<sup>9</sup> See *In re Hudson River Electric Power Co.*, 173 Fed. Rep. 934, 956, 23 Am. B. R. 191.

<sup>10</sup> *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re Columbia Real Estate Co.*, 101 Fed. Rep. 965, 4 Am. B. R. 411; *In re Garneau* (C. C. A. 7th Cir.), 127 Fed. Rep. 677, 62 C. C. A. 403, 11 Am. B. R. 679; *In re Waxelbaum*, 98 Fed. Rep. 589, 3 Am. B. R. 395.

<sup>11</sup> *In re Worsham* (C. C. A. 8th Cir.), 142 Fed. Rep. 121, 73 C. C. A. 665, 15 Am. B. R. 672; *In re New York Tunnel Co.* (C. C. A.

knowledge of the pendency of proceedings in bankruptcy, who does not intervene to resist the adjudication before it is made is not entitled to have it set aside to permit him to plead to the original petition, unless he shows a satisfactory reason for the delay.<sup>12</sup>

Any party in interest, as a petitioner, or intervening creditor having a provable claim, or a trustee, or the bankrupt, may oppose setting aside the adjudication.

The granting or refusing to grant an order setting aside an adjudication rests in the sound discretion of the judge,<sup>13</sup> and may be reviewed on petition for revision.<sup>14</sup> The judge may set aside an adjudication on proper showing made, due regard being had to rights which have become vested under it and which will be disturbed by its revocation.<sup>15</sup>

2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re Hintze*, 134 Fed. Rep. 141, 13 Am. B. R. 721, 3 Am. B. R. 599.

<sup>12</sup> *In re Marion Contract & Const. Co.*, 166 Fed. Rep. 618, 22 Am. B. R. 81; *In re Urban & Suburban Realty Title Co.*, 132 Fed. Rep. 140, 12 Am. B. R. 687; *In re Billing*, 145 Fed. Rep. 395, 17 Am. B. R. 80; *In re First Nat. Bank* (C. C. A. 6th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265; *In re Jemison Mercantile Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 966, 50 C. C. A. 641, 7 Am. B. R. 588.

<sup>13</sup> *In re Marion Contract & Const. Co.*, 166 Fed. Rep. 618, 22 Am. B. R. 81.

*In re First Nat. Bank* (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265, the court said: "In view of the delay and neglect of the petitioners, and the changes in the condition of the property and in the relations of the parties interested in this estate, between the filing of the petition and

the presentation of their motion, the record fails to persuade us that the court below was guilty of any abuse of its discretion when it denied it."

<sup>14</sup> *Brady v. Bernard & Kittinger* (C. C. A. 6th Cir.), 170 Fed. Rep. 576, 95 C. C. A. 656, 22 Am. B. R. 342; *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

<sup>15</sup> *In re First Nat. Bank* (C. C. A. 8th Cir.), 153 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265; *In re New England Breeders' Club* (C. C. A. 1st Cir.), 169 Fed. Rep. 586, 95 C. C. A. 84, 22 Am. B. R. 125; *In re Imperial Corporation*, 133 Fed. Rep. 73, 13 Am. B. R. 199; *In re Niagara Contracting Co.*, 127 Fed. Rep. 782, 11 Am. B. R. 643.

*In Altonwood Park Co. v. Gwynne* (C. C. A. 2d Cir.), 160 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31, the court said: "It does not appear that there are any intervening rights, and we think the delay shown quite insufficient to constitute



A motion by a creditor to vacate an adjudication, seasonably made, is a direct proceeding by a party. It is in the nature of an application for a new trial or rehearing. The well settled rules regulating rehearings generally should govern the vacation of a judgment of adjudication in bankruptcy. It is sufficient if it is made to appear that the court was without jurisdiction either upon the face of the record or as matter of fact,<sup>16</sup> or that the adjudication was prematurely made.<sup>17</sup>

such alleged laches as to debar a creditor from showing that the whole bankruptcy proceedings were invalid. The order of the district court is reversed with costs."

<sup>16</sup> *Altonwood Park Co. v. Gwynne* (C. C. A. 2d Cir.), 160 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31; *In re New England Breeders' Club* (C. C. A. 1st Cir.), 169 Fed. Rep. 586, 95 C. C. A. 84, 22 Am. B. R. 125; *In re Imperial Corporation*, 133 Fed. Rep. 73, 13 Am. B. R. 199; *In re Niagara Contracting Co.*, 127 Fed. Rep. 782, 11 Am. B. R. 643.

*In re New England Breeders' Club*, *supra*, Judge Lowell speaking for the circuit court of appeals for the first circuit said: "We are compelled therefore to reverse the order of the district court vacating the adjudication. We do not decide that that court was without authority to vacate the adjudication upon the Hub Company's petition, if the Hub Company was found not to have lost its right of objection, and if the creditors would not be too greatly prejudiced thereby. We do not decide that the district court was without authority to reopen its decree for sufficient cause shown, but that it had general jurisdiction to pass upon the sufficiency of the cause. The master reported certain findings of fact concerning the Hub Company's laches, its interest in the pro-

ceedings, and the consequences to the creditors of a vacation of the adjudication. We prefer not to deal with these findings in the first instance, but to leave them to the district court, which has full knowledge of the whole course of the case. The trustee urged before us that the Hub Company had shown no interest in the vacation of the adjudication, but we hold that its interest as a creditor, without more, was sufficient for that purpose."

*In re Niagara Contracting Co.*, *supra*, Judge Hazel said: "In this case the lack of jurisdiction is not apparent upon the face of the petition to have the corporation adjudged bankrupt. Whether the court is without jurisdiction depends entirely upon facts which must first be proved. Under such circumstances the application to open default in pleading must be promptly made, and upon sufficient cause shown in the moving papers. The facts appearing on argument and by the affidavit of the trustee tending to show another motive for this application are not such as predispose looking with favor upon this creditor's request to set aside the adjudication, with leave to oppose the same."

<sup>17</sup> *Day v. Beck & Gregg Hdwe. Co.* (C. C. A. 5th Cir.), 114 Fed. :



But a creditor will not be permitted in such application to retry issues determined on the first hearing without a plain showing of error.

A person not having a provable claim is not a party. He is a stranger who has no other right than as *amicus curiae* to direct the court's attention to an entire absence of jurisdiction such as renders the adjudication void.<sup>18</sup> Defective allegations of jurisdictional requisites, which state enough on which to predicate jurisdiction, do not render the adjudication void, although it may be erroneous.<sup>19</sup>

It is not a sufficient ground for setting aside an adjudication in bankruptcy, where the debtor has admitted an act of bankruptcy, that the admission was not true,<sup>20</sup> or that a prior petition was pending in another district,<sup>21</sup> or on the ground that there was a misjoinder or a nonjoinder of creditors who filed the petition, unless there is proof that the adjudication was obtained by fraud or in bad faith.<sup>22</sup>

### § 246. Order of reference.

At the time of making the order adjudging the debtor to be bankrupt, the judge regularly refers the case for subse-

Rep. 834, 52 C. C. A. 468, 8 Am. B. R. 175.

<sup>18</sup> *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 166 Fed. Rep. 284, 92 C. C. A. 202, 21 Am. B. R. 531; *In re* Columbia Real Estate Co. 101 Fed. Rep. 965, 4 Am. B. R. 411.

<sup>19</sup> *In re* Riggs, 214 U. S. 9, 14, 53 L. Ed. —, 22 Am. B. R. 720; *In re* New England Breeders' Club (C. C. A. 1st Cir.), 169 Fed. Rep. 586, 95 C. C. A. 84, 22 Am. B. R. 125; *Altonwood Park Co. v. Gwynne* (C. C. A. 2d Cir.), 160 Fed. Rep. 448, 87 C. C. A. 409, 20 Am. B. R. 31;

*In re* First Nat. Bank (C. C. A. 8th Cir.), 152 Fed. Rep. 64, 81 C. C. A. 260, 18 Am. B. R. 265; *In re* Marion Contracting & Const. Co., 166 Fed. Rep. 618, 22 Am. B. R. 81.

<sup>20</sup> *In re* Thomas, No. 13891 Fed. Cas., 11 N. B. R. 330; *Lea v. West Co.*, 91 Fed. Rep. 237, 1 Am. B. R. 261.

<sup>21</sup> *In re* Harris, No. 6111 Fed. Cas., 6 Ben. 375.

<sup>22</sup> *In re* McKinley, No. 8864 Fed. Cas., 7 Ben. 562; *In re* Duncan, No. 4131 Fed. Cas., 8 Ben. 365; *In re* Funkenstein, No. 5158 Fed. Cas., 3 Saw. 605.

quent proceedings to a referee within the county of which the debtor is a resident or has his principal place of business.<sup>1</sup>

He may refer the case to any referee within the territorial jurisdiction of the court, if the convenience of the parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside or have his domicile in the district.<sup>2</sup>

All the proceedings thereafter except as required by the statute or by the general orders to be had before a judge, are had before the referee,<sup>3</sup> subject to be reviewed by the judge.<sup>4</sup> Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a state must be heard and decided by the judge.<sup>5</sup> But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.<sup>5</sup>

A person claiming to be the owner of property in the hands of the trustee is entitled to a jury trial and can not be compelled to submit his claims to a referee.<sup>6</sup>

Upon the filing of an answer to an involuntary petition in bankruptcy, it is quite usual to have one of the referees take the evidence and report upon the various questions presented.<sup>7</sup>

A special reference is superseded on making an adjudication and an order of general reference.<sup>8</sup>

The order referring a case to a referee must name a day upon which the bankrupt shall attend before the referee, and

<sup>1</sup> Order of Reference, Official Form No. 14. Form No. 31, *post*; *In re Western Inv. Co.*, 170 Fed. Rep. 677, 21 Am. B. R. 367.

<sup>2</sup> B. A. 1898, Sec. 22.

*In re Schenectady Eng. & Const. Co.*, 147 Fed. Rep. 868, 17 Am. B. R. 279, it was held that: "This section refers to the referees in bankruptcy appointed within the district where the case is pending, and the court has no jurisdiction or power to refer the case to a referee appointed by and residing in another district."

<sup>3</sup> Gen. Ord. 12.

<sup>4</sup> Gen. Ord. 27. See Sec. 93, *ante*.

<sup>5</sup> Gen. Ord. 12.

As to the power to grant injunctions, see Sec. 88, *ante*.

<sup>6</sup> *In re Russell* (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323; 3 Am. B. R. 658.

<sup>7</sup> *Clark v. American Mfg., etc., Co.* (C. C. A. 4th Cir.), 101 Fed. Rep. 962, 42 C. C. A. 120, 4 Am. B. R. 351.

<sup>8</sup> *In re Ruos*, 164 Fed. Rep. 749, 21 Am. B. R. 257.

from that day the bankrupt is subject to the orders of the court in matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court.<sup>9</sup>

A copy of the order must forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. The time when and the place where the referee shall act upon the matters arising under the several cases referred to him shall be fixed by special order of the judge, or by the referee; and at such times and places the referee may perform the duties which he is empowered by the act to perform.<sup>9</sup>

#### § 247. Dismissing a petition.

After an involuntary petition has been filed in court it can not be dismissed by the petitioning creditors, or for want of prosecution, or by consent of parties until notice to creditors.<sup>1</sup>

Prior to the amendment of 1910, it was the practice in some districts to dismiss a petition by consent of the petitioners, without notice to other creditors, after the time had expired within which such creditors might intervene.<sup>2</sup> Notice is indispensable since that amendment.

Section 59g as amended<sup>3</sup> provides that: "The court shall, before entertaining an application for dismissal, require the bankrupt to file a list, under oath, of all his creditors, with their addresses, and shall cause notice to be sent to all such creditors of the pendency of such application, and shall delay

<sup>9</sup> Gen. Ord. 12.

<sup>1</sup> B. A. 1898, Sec. 59g, as amended by the Act of June 25, 1910, 36 Stat. at L. 838.

<sup>2</sup> *In re* Levi & Klauber (C. C. A. 2d Cir.), 142 Fed. Rep. 962, 74 C. C. A. 132, 15 Am. B. R. 294; *In re* Jemison Mercantile Co. (C. C. A.

5th Cir.), 112 Fed. Rep. 966, 50 C. C. A. 641, 7 Am. B. R. 588.

But see *In re* Plymouth Cordage Co. (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665.

<sup>3</sup> B. A. 1898, Sec. 59g, as amended by the Act of June 25, 1910, 36 Stat. at L. 838.

the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard."

The statute requires that creditors shall have, at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, of the proposed dismissal of the proceedings.<sup>4</sup> The clerk may give this notice if the case has not been sent to a referee.

The referee has power to dismiss the petition in cases referred to him by the clerk in the absence of the judge.<sup>5</sup> But he has no power to dismiss a petition referred to him by the judge.<sup>6</sup> The dismissal must be by the judge.<sup>7</sup>

If any creditor objects to the dismissal of the proceedings he should intervene to join in the petition.<sup>8</sup> He then has all the rights of a petitioning creditor.<sup>9</sup> If one or more of the petitioners object, the court will not dismiss the petition in the absence of fraud, oppression or mistake shown, although the other petitioners consent to the dismissal.<sup>10</sup>

The court will not permit a petitioning or intervening creditor to withdraw to reduce the number of petitioners or the amount of debts, where such action will defeat the jurisdiction of the court and require a dismissal of the petition.<sup>11</sup> A creditor has been permitted to withdraw where he was misled or there was a mistake of fact.<sup>12</sup>

The provisions of the bankrupt act with reference to notice to creditors before dismissal of proceedings, relates to dismissal for want of prosecution or by consent of parties and

<sup>4</sup> B. A. 1898, Sec. 59a, clause 8.

3 Am. B. R. 552; *In re* Lewis, 129 Fed. Rep. 147, 11 Am. B. R. 683.

<sup>5</sup> B. A. 1898, Sec. 38, clause 1. Official Form No. 11, Form No. 28, *post*.

<sup>11</sup> *In re* Stovall Grocery Co., 161 Fed. Rep. 882, 20 Am. B. R. 537; *In re* Bedingfield, 96 Fed. Rep. 190, 2 Am. B. R. 355; *In re* Quincy Granite Quarries Co., 147 Fed. Rep. 279, 16 Am. B. R. 823.

<sup>6</sup> *In re* Elby, 159 Fed. Rep. 935, 19 Am. B. R. 734.

<sup>7</sup> *In re* Elby, 159 Fed. Rep. 935, 19 Am. B. R. 734.

<sup>12</sup> *In re* Coburn, 126 Fed. Rep. 218, 11 Am. B. R. 212, affirmed *Moulton v. Coburn* (C. C. A. 1st Cir.), 131 Fed. Rep. 201, 66 C. C. A. 90, 12 Am. B. R. 553.

For form of dismissal, see Official Form No. 11, Form No. 28, *post*.

<sup>8</sup> B. A. 1898, Sec. 59f.

<sup>9</sup> Sec. 186, *ante*.

<sup>10</sup> *In re* Cronin, 98 Fed. Rep. 584,

not by order of court after a hearing on the merits.<sup>13</sup> If upon a hearing on the merits the debtor is adjudged not to be a bankrupt, the petition should be dismissed with costs against the petitioning creditors.<sup>14</sup> The costs and expenses of a receivership are taxable against the petitioning creditors.<sup>15</sup>

The death of a person against whom an involuntary petition has been filed after the service of the subpoena and before the return day does not authorize a dismissal of the petition.<sup>16</sup>

If the court is satisfied that a petition in involuntary bankruptcy was not presented in good faith, or for sinister, oppressive and vexatious purposes, it has power to dismiss the proceedings after notice to the creditors.<sup>17</sup> The court has dismissed a petition upon condition that the majority of the creditors desiring a dismissal give security for the payment of the debts of the objecting creditors.<sup>18</sup>

#### § 248. Reinstating proceedings dismissed.

Creditors may move to have the proceedings reinstated, but delay in doing so is fatal.<sup>1</sup> A petition to reopen the case after a dismissal has been denied with leave to creditors, who had no notice, to institute new proceedings.<sup>2</sup>

<sup>13</sup> *Neustadter v. Chicago Dry Goods Co.*, 96 Fed. Rep. 830, 3 Am. B. R. 96.

<sup>14</sup> Gen. Ord. No. 34. *In re Haeseler-Kohlhoff Carbon Co.*, 135 Fed. Rep. 867, 14 Am. B. R. 381; *In re Ghiglione*, 93 Fed. Rep. 186, 1 Am. B. R. 580.

But see *In re Williams*, 120 Fed. Rep. 34, 9 Am. B. R. 736.

<sup>15</sup> *In re Aschenbach Co.* (C. C. A. 2d Cir.), 183 Fed. Rep. 305, 98 C. C. A. 290, 25 Am. B. R. 502; *In re Lacov* (C. C. A. 2d Cir.), 142 Fed. Rep. 960, 74 C. C. A. 130, 15 Am. B. R. 290; *In re Hill Co.* (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73.

<sup>16</sup> *In re Hicks*, 107 Fed. Rep. 910, 6 Am. B. R. 182; *Shute v. Patter-*

*son* (C. C. A. 8th Cir.), 147 Fed. Rep. 509, 78 C. C. A. 75, 17 Am. B. R. 99.

<sup>17</sup> *In re Hemlin*, No. 5994 Fed. Cas., 8 Biss. 122. See also *Ex parte Ashworth*, 18 L. R. Eq. 705; *Ex parte Harcourt*, 2 Rose. 203; *Ex parte Bourne*, 2 Glyn. & J. 137.

<sup>18</sup> *In re Indianapolis, etc.*, R. C. No. 7023 Fed. Cas., 5 Biss. 287.

<sup>1</sup> *In re Jemison Mercantile Co.* (C. C. A. 5th Cir.), 112 Fed. Rep. 966, 50 C. C. A. 641, 7 Am. B. R. 588; *In re Plymouth Cordage Co.* (C. C. A. 8th Cir.), 135 Fed. Rep. 1000, 68 C. C. A. 434, 13 Am. B. R. 665.

<sup>2</sup> *Neustadter v. Chicago Dry Goods Co.*, 96 Fed. Rep. 830, 3 Am. B. R. 96.

The power of a court to set aside a dismissal of the proceedings expires with the term as in other cases.<sup>3</sup> The whole period from the filing of the petition to the final settlement or dismissal of the proceeding constitutes one case and orders may be set aside without regard to term of court, but the final order disposing of the case is subject to the same rules as a final decree in equity. The court may after the term, correct a mistake or inadvertence in an order of dismissal to make it conform to the motion on which it was based.<sup>4</sup>

### § 249. Costs.

Where a petition is contested the petitioning creditors, if successful, may recover the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor may recover like costs against the petitioners.<sup>1</sup>

This does not authorize the taxation of attorneys' fees.<sup>2</sup> Upon an application for a warrant of seizure, the court may allow attorneys' fees as costs of the proceedings when the petition is dismissed.<sup>3</sup> Witness fees must be paid according to statute; one dollar and fifty cents per day for actual attendance and mileage.<sup>4</sup> No allowance will be made for expert witnesses.<sup>4</sup>

Where an adjudication is made the petitioning creditors are entitled to have the deposit of thirty dollars refunded

<sup>3</sup> *Bernard v. Abel* (C. C. A. 9th Cir.), 156 Fed. Rep. 649, 84 C. C. A. 434, 19 Am. B. R. 388.

<sup>4</sup> *Bernard v. Abel* (C. C. A. 9th Cir.), 156 Fed. Rep. 649, 84 C. C. A. 434, 19 Am. B. R. 388.

<sup>1</sup> Gen. Ord. 34. *In re Haeseler-Kohlhoff Carbon Co.*, 135 Fed. Rep. 867, 14 Am. B. R. 381.

<sup>2</sup> *In re Ghiglione*, 93 Fed. Rep. 186, 1 Am. B. R. 580; *In re Morris*,

115 Fed. Rep. 591, 7 Am. B. R. 709; *In re Williams*, 120 Fed. Rep. 34, 9 Am. B. R. 736.

As to attorneys' fees, see Secs. 105 to 113, *ante*.

<sup>3</sup> *In re Abraham*, 93 Fed. Rep. 767 (785), 2 Am. B. R. 266. As to attorneys' fees, see Sec. 113, *ante*.

<sup>4</sup> *In re Carolina Cooperage Co.*, 96 Fed. Rep. 604, 3 Am. B. R. 154, 2 N. B. N. 23.

to them out of the estate.<sup>5</sup> It is competent for the court to make a reasonable allowance as indemnity for costs and expenses in preserving the estate,<sup>6</sup> but no such allowance will be made for vain attempts to discover concealed assets made at the suggestion of the attorney for the creditors and against the objection of labor claimants, whose claims will exhaust the entire estate.<sup>7</sup>

A person can not recover expenses and costs incurred by him in an attachment suit to enforce a lien, which was invalidated by the bankruptcy proceedings.<sup>8</sup> An assignee is entitled to pay for services in a state assignment proceedings when the property is subsequently administered in bankruptcy.<sup>9</sup>

The costs and expenses of administration of an estate in bankruptcy must be paid out of the estate before there is any distribution to creditors.<sup>10</sup>

The petitioning creditors who have procured the appointment of a receiver may be required to pay the costs and ex-

<sup>5</sup> *In re Silverman*, 97 Fed. Rep. 325, 4 Am. B. R. 83, 2 N. B. N. 760; *In re Harrison Mercantile Co.*, 96 Fed. Rep. 123, 2 Am. B. R. 419.

<sup>6</sup> *In re Carolina Cooperage Co.*, 96 Fed. Rep. 604, 3 Am. B. R. 154, 2 N. B. N. 23; *In re Lesser*, 100 Fed. Rep. 433, 3 Am. B. R. 758, 2 N. B. N. 599.

<sup>7</sup> *In re Rozinsky*, 101 Fed. Rep. 229, 3 Am. B. R. 830, 2 N. B. N. 787.

<sup>8</sup> *In re Young*, 96 Fed. Rep. 606, 2 Am. B. R. 673; *In re Copper King*, 144 Fed. Rep. 689; *In re Beaver Coal Co.*, 107 Fed. Rep. 98, 5 Am. B. R. 587.

But see *In re Lewis*, 99 Fed. Rep. 935, 4 Am. B. R. 51; *In re Goldberg & Bros.*, 144 Fed. Rep. 566, 16 Am. B. R. 521.

<sup>9</sup> *Randolph v. Scrugg*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re Pauly* (Ref. Op.), 2 Am. B. R. 333; *In re Scholtz*, 106 Fed. Rep. 834, 5 Am. B. R. 782.

*In Sinsheimer v. Simonson* (C. C. A. 6th Cir.), 107 Fed. Rep. 898, 47 C. C. A. 51, 5 Am. B. R. 537, the circuit court of appeals held that where an assignee in a state court had been paid a fee and had paid his attorney for services rendered in a state proceeding, that such sum could not be recovered in a court of bankruptcy by a rule to show cause. Affirmed *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 46 L. Ed. 413, 7 Am. B. R. 421.

<sup>10</sup> B. A. 1898, Sec. 64; See Sec. 582, *post*. *In re Tebo*, 101 Fed. Rep. 419, 4 Am. B. R. 235.

penses incurred by such receivership upon the dismissal of the petition.<sup>11</sup>

### **§ 250. Proceedings subsequent to the adjudication.**

Proceedings in involuntary bankruptcy subsequent to the order of adjudication and reference are not different from the proceedings had upon a voluntary petition, or a petition for the purpose of having a partnership or the members thereof adjudged bankrupts. The examination of the bankrupt, the first creditors' meeting, the election of the trustee, the collection of the assets of the bankrupt, the distribution of the estate and other matters pertaining to the proper administration of the estate, will be considered hereafter under appropriate heads.

<sup>11</sup> *In re* Aschenbach Co. (C. C. A. 2d Cir.), 183 Fed. Rep. 305, 98 C. C. A. 290, 25 Am. B. R. 502; *In re* Lacov (C. C. A. 2d Cir.), 142 Fed. Rep. 960, 74 C. C. A. 130, 15 Am. B. R. 290; *In re* Hill Co., (C. C. A. 7th Cir.), 159 Fed. Rep. 73, 86 C. C. A. 263, 20 Am. B. R. 73. See also *Beach v. Macon Grocery Co.*, 125 Fed. Rep. 513, 11 Am. B. R. 104.



## CHAPTER XVII.

## PARTNERSHIP CASES.

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263.	Schedules in partnership cases.	278.	Discharge in partnership cases.
264.	Districts within which a partnership proceeding may be filed.		
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## § 251. Partnership bankruptcy generally.

The mode of proceeding to have a partnership adjudged to be bankrupt is the same as in the case of an individual debtor.<sup>1</sup>

Partners may present a voluntary petition, or a petition may be filed against them by creditors, or a petition may be presented by or against the partners individually as by or against any other person. Where a creditor brings the petition against a firm an act of bankruptcy and a sufficient debt must be alleged and proved, as in the case of an individual.

There are, however, some peculiarities connected with the bankruptcy of partnerships which should be noticed and which will be dealt with in this chapter. These peculiarities arise partly from the rights of partners between themselves and partly from the rule which has long prevailed in equity for the distribution of the effects of insolvent partners among their creditors, according to which the joint creditors are entitled

<sup>1</sup> B. A. 1898, Sec. 5; compare R. S. Sec. 5121.

to priority of payment out of the joint estate, and the separate creditors of each partner out of his separate estate.<sup>2</sup>

The general scheme of the bankrupt act with reference to the settlement of the estates of firms and the partners is founded upon and its provisions merely declaratory of recognized equitable principles of the administration of insolvent partnerships.<sup>3</sup>

By the provisions of section 5 of the bankrupt act, "a partnership," during the continuance of the business, or after its dissolution and before the final settlement of its business, may be adjudged a bankrupt, and jurisdiction of all the partners and the administration of the partnership and individual property is conferred upon any court of bankruptcy having jurisdiction of one of the partners.

The section provides that the creditors of the partnership shall appoint the trustee; that the trustee shall keep separate accounts of the partnership property and of the individual property; that the expenses shall be paid from the partnership property and the individual property in such proportion as the court may determine; and that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and any surplus added to the assets of the individual partners, and the net proceeds of the individual estate of each partner shall be appropriated to the payment of his individual debts, and any surplus to the payment of the partnership debts.

It authorizes the partnership estate to prove against the individual estate, and *vice versa*, and directs the assets of the partnership estate and the individual estates to be marshaled

<sup>2</sup> B. A. 1898, Sec. 5*f* and *g*; *In re* Melick, No. 9399 Fed. Cas., 4 N. B. R. 97; *In re* Collier, No. 3002 Fed. Cas., 12 N. B. R. 266; Harrison v. Sterry, 5 Cranch, 289; Collins v. Hood, No. 3015 Fed. Cas., 4 McLean, 186; Murrill v. Neil, 8 How. 414, 12 L. Ed. 1135; *Ex parte* Cook, 2 P. Wms. 500; Gray v. Chis-

well, 9 Ves. 118; Ridgeway v. Clare, 19 Beav. 111.

<sup>3</sup> *In re* Meyer (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; Amsinck v. Bean, 22 Wall. 403, 22 L. Ed. 801; Murray v. Murray, 2 Johns. Chan. 60; Colly. Part. 854.

so as to prevent preferences, and secure the equitable distribution of the property of the several estates.

It further provides that the property of a partnership shall not be administered in bankruptcy when less than all the members are adjudged bankrupt; and in that event the partner not adjudged bankrupt is to settle the partnership business expeditiously, and account for the interests of the adjudged bankrupt.

**§ 252. A partnership in fact is essential.**

It is necessary to show that a partnership in fact exists in order to sustain a proceeding against the partnership or a person as a partner.<sup>1</sup>

A partnership may be shown by written articles or express oral agreement of partnership.<sup>2</sup> The existence of a partnership may be deduced from facts and circumstances in the absence of an express agreement.<sup>3</sup> It may be implied from acts done, or the mode or manner of conducting a business.<sup>3</sup>

<sup>1</sup> *Buckingham v. First Nat. Bank* (C. C. A. 6th Cir.), 131 Fed. Rep. 192, 65 C. C. A. 498, 12 Am. B. R. 465; *Jones v. Burnham, Williams & Co.* (C. C. A. 3d Cir.), 138 Fed. Rep. 986, 71 C. C. A. 240, 15 Am. B. R. 85; *Lott v. Young* (C. C. A. 9th Cir.), 109 Fed. Rep. 798, 48 C. C. A. 654, 6 Am. B. R. 436; *In re Beckwith & Co.*, 130 Fed. Rep. 475, 12 Am. B. R. 453; *In re McLaren*, 125 Fed. Rep. 835, 11 Am. B. R. 141; *Buffalo Milling Co. v. Lewisburg Dairy Co.*, 159 Fed. Rep. 319, 20 Am. B. R. 279; *In re Pinson & Co.*, 180 Fed. Rep. 787, 24 Am. B. R. 804.

<sup>2</sup> *Buckingham v. First Nat. Bank* (C. C. A. 6th Cir.), 131 Fed. Rep. 192, 65 C. C. A. 498, 12 Am. B. R. 465; *In re Lamon*, 171 Fed. Rep. 516, 22 Am. B. R. 635.

<sup>3</sup> *Manson v. Williams*, 213 U. S. 453, 54 L. Ed. —, 22 Am. B. R.

22, affirming (C. C. A. 1st Cir.), 153 Fed. Rep. 525, 82 C. C. A. 475, 18 Am. B. R. 674, affirming *In re Hudson Clothing Co.*, 148 Fed. Rep. 305, 15 Am. B. R. 254; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837; *Rush v. Lake* (C. C. A. 9th Cir.), 122 Fed. Rep. 561, 58 C. C. A. 447, 10 Am. B. R. 455.

*In re Beckwith & Co.*, 130 Fed. Rep. 475, 12 Am. B. R. 453, this rule was applied, but the judgment was reversed in *Jones v. Burnham, Williams & Co.* (C. C. A. 3d Cir.), 138 Fed. Rep. 986, 71 C. C. A. 240, 15 Am. B. R. 85, on the ground that the facts and circumstances did not show a partnership in fact.

In *Burkhart v. German-American Bank*, 137 Fed. Rep. 958, 14 Am. B. R. 222, the defense was made that it was a joint stock association under the laws of Ohio, but it was held to be a partnership in fact and

The burden of showing that a partnership in fact exists is on the petitioners.<sup>4</sup>

### § 253. What constitutes a partnership.

If a partnership in fact exists, it is subject to be adjudged a voluntary or an involuntary bankrupt.<sup>1</sup>

The statute does not define or restrict the term "partnership." It is manifestly used in section 5 of the act with its usual meaning. It includes every partnership in any lawful trade, occupation or profession. The exemptions from involuntary bankruptcy against "natural persons" or "corporations" do not apply to partnerships.<sup>2</sup>

A partnership is defined by the English Partnership Act of 1890<sup>3</sup> to be "the relation which subsists between persons car-

was adjudged to be a bankrupt. See also *s. c. sub nom. Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 201, 15 Am. B. R. 566.

In *Davis v. Stevens*, 104 Fed. Rep. 235, 4 Am. B. R. 763, a corporation *non de jure* was adjudged bankrupt as a partnership.

<sup>4</sup> *Jones v. Burnham, Williams & Co.* (C. C. A. 3d Cir.), 138 Fed. Rep. 986, 71 C. C. A. 240, 15 Am. B. R. 85.

<sup>1</sup> *Buckingham v. First Nat. Bank* (C. C. A. 6th Cir.), 131 Fed. Rep. 192, 65 C. C. A. 498, 12 Am. B. R. 465; *Manson v. Williams*, 213 U. S. 453, 54 L. Ed. —, 22 Am. B. R. 22, affirming (C. C. A. 1st Cir.), 153 Fed. Rep. 525, 82 C. C. A. 475, 18 Am. B. R. 674, affirming *In re Hudson Clothing Co.*, 148 Fed. Rep. 305, 15 Am. B. R. 254; *Rush v. Lake* (C. C. A. 9th Cir.), 122 Fed. Rep. 561, 58 C. C. A. 447, 10 Am. B. R. 455; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837; *Burkhart v.*

*German-American Bank*, 137 Fed. Rep. 958, 14 Am. B. R. 222, *s. c. sub nom.*; *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566.

<sup>2</sup> *In re Seaboard Fire Ins. Co.*, 137 Fed. Rep. 987, 988, 13 Am. B. R. 722, Judge Holt said: "The restriction of the liability to involuntary bankruptcy proceedings to corporations of certain classes does not seem to me to apply to this provision of unincorporated companies, and I think, therefore, that any unincorporated company engaged in any kind of business may be put into bankruptcy if it is insolvent and has committed an act of bankruptcy."

*In re Lake Jackson Sugar Co.*, 129 Fed. Rep. 440, 11 Am. B. R. 458, the exemption with respect to farming was held not to apply to a corporation. For like reason it would not apply to a partnership. See also Secs. 118 to 121, *ante*.

<sup>3</sup> 53 and 54 Vict., c. 39.

rying on a business in common, with a view of profit." A very similar definition is given by Mr. Justice Gray:<sup>4</sup> "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits."

Whether in a particular case a partnership does or does not exist, depends upon the contract and intention of the parties, as appearing from the whole facts of the case.<sup>5</sup> A partnership may result from an express written or oral agreement.<sup>6</sup> A partnership may be, in the absence of an express contract, the legal consequence of an agreement implied from acts done, or the mode or manner of conducting a business, though the partners may have intended to avoid this consequence.<sup>7</sup>

The existence of a partnership in a bankruptcy proceeding is determined by the same rules that are applied in other cases. The sharing of profits is *prima facie* evidence, but is

<sup>4</sup> Meehan v. Valentine, 145 U. S. 611, 618, 36 L. Ed. 835.

<sup>5</sup> Buckingham v. First Nat. Bank (C. C. A. 6th Cir.), 131 Fed. Rep. 192, 65 C. C. A. 498, 12 Am. B. R. 465; *In re* Hudson Clothing Co., 148 Fed. Rep. 305, 15 Am. B. R. 254, affirmed *sub nom.* Manson v. Williams (C. C. A. 1st Cir.), 153 Fed. Rep. 525, 82 C. C. A. 475, 18 Am. B. R. 674, affirmed 213 U. S. 453, 54 L. Ed. —, 22 Am. B. R. 22; Rush v. Lake (C. C. A. 9th Cir.), 122 Fed. Rep. 561, 58 C. C. A. 447, 10 Am. B. R. 455; *In re* Grant, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re* Beckwith & Co., 130 Fed. Rep. 475, 12 Am. B. R. 453, reversed in Jones v. Burnham, Williams & Co. (C. C. A. 3d Cir.), 138 Fed. Rep. 986, 71 C. C. A. 240, 15 Am. B. R. 85.

<sup>6</sup> Buckingham v. First Nat. Bank (C. C. A. 6th Cir.), 131 Fed. Rep.

192, 65 C. C. A. 498, 12 Am. B. R. 465; *In re* Lamon, 171 Fed. Rep. 516, 22 Am. B. R. 635; *In re* Culver, 176 Fed. Rep. 450, 23 Am. B. R. 779.

<sup>7</sup> Manson v. Williams, 213 U. S. 453, 53 L. Ed. —, 22 Am. B. R. 22, affirming (C. C. A. 1st Cir.), 153 Fed. Rep. 525, 82 C. C. A. 475, 18 Am. B. R. 674, affirming *In re* Hudson Clothing Co., 148 Fed. Rep. 305, 15 Am. B. R. 254; Rush v. Lake (C. C. A. 9th Cir.), 122 Fed. Rep. 561, 58 C. C. A. 447, 10 Am. B. R. 455; *In re* Grant, 106 Fed. Rep. 496, 5 Am. B. R. 837; Davis v. Stevens, 104 Fed. Rep. 235, 4 Am. B. R. 763; Burkhart v. German-American Bank, 137 Fed. Rep. 958, 14 Am. B. R. 222; *In re* Culver, 176 Fed. Rep. 450, 23 Am. B. R. 779.

See also Pooley v. Driver, 5 Ch. D. 458; *Ex parte* Delhasse, 7 Ch. D. 511; Davis v. Davis, 1 Ch. D. 393.

not a conclusive test of a partnership.<sup>8</sup> Co-ownership of property is also evidence of, but it does not in itself create, a partnership as to anything so owned, whether the owners do or do not share in the profits made by the use of it.<sup>9</sup> Part owners of a ship or a house, for example, are uniformly treated as tenants in common but not as partners.<sup>10</sup> Joint owners of merchandise may consign it for sale to the same consignee and if each give separate instructions for his own share they are not treated as partners in the adventure. So where a broker or other agent purchases goods for several parties, each agreeing to take a certain portion of the entire parcel, the transaction does not amount to a partnership. In these cases there is a community of interest, but not a carrying on of business within the definitions above given.

A person may "hold himself out" as a partner in a firm so as to become liable as a partner to any one who has given credit to that firm on the faith of such representation.<sup>11</sup> In order to fix a person with liability on this ground two things must concur, *first*, the alleged representation must have been made by him, or he must have knowingly suffered it to be

<sup>8</sup> *Manson v. Williams* (C. C. A. 1st Cir.), 153 Fed. Rep. 525, 82 C. C. A. 475, 18 Am. B. R. 674, affirmed 213 U. S. 453, 53 L. Ed. —, 22 Am. B. R. 22; *Lott v. Young* (C. C. A. 9th Cir.), 109 Fed. Rep. 798, 48 C. C. A. 654, 6 Am. B. R. 436; *In re Lamon*, 171 Fed. Rep. 516, 22 Am. B. R. 635; *In re Kenney*, 97 Fed. Rep. 554, 3 Am. B. R. 353; *Meehan v. Valentine*, 145 U. S. 611, 36 L. Ed. 835; *Cox v. Hickman*, 8 H. L. C. 268, 11 E. R. 431.

<sup>9</sup> In *Berthold v. Goldsmith*, 24 How. 536, 541, 16 L. Ed. 762, Mr. Justice Clifford considers this subject at length.

<sup>10</sup> *Thompson v. Bowman*, 6 Wall. 316, 18 L. Ed. 736; *Manson v. Williams* (C. C. A. 1st Cir.), 153 Fed. Rep. 525, 82 C. C. A. 475, 18 Am. B. R. 674.

<sup>11</sup> *In re Stoddord Bros. Lumber Co.*, 169 Fed. Rep. 190, 22 Am. B. R. 435.

In *Lott v. Young* (C. C. A. 9th Cir.), 109 Fed. Rep. 798, 48 C. C. A. 654, 6 Am. B. R. 436, this doctrine was recognized, but the persons were held not to be estopped to deny partnership. See also *In re Kenney*, 97 Fed. Rep. 554, 3 Am. B. R. 353; *In re Pinson & Co.*, 180 Fed. Rep. 787, 24 Am. B. R. 804.

made; and *secondly*, it must have been known to and relied on by the person seeking to avail himself of it.<sup>12</sup>

Societies, who do not carry on business with a view to profit, such as clubs, are not partnerships; although such societies as mutual insurance, mutual loan or mutual benefit societies are not strictly partnerships,<sup>13</sup> they are at least subject to adjudication as unincorporated companies.<sup>14</sup> As observed by Judge Thompson:<sup>15</sup> "It is difficult to conceive of an unincorporated company (as distinguished from a corporation and an ordinary partnership) without any of the powers and privileges of a private corporation, for without these powers and privileges it would be an ordinary partnership."

A corporation *non de jure*<sup>16</sup> and a joint stock banking association which had failed to comply with the provisions of the state statute<sup>17</sup> have been adjudged bankrupt as partnerships.

#### § 254. Who may be partners.

It may be said generally that all persons are capable of entering into partnership.

The bankrupt law imposes no limit on the number of persons who may be associated together in partnership.

A foreigner may be a partner in a domestic partnership who may be adjudged bankrupt as a partner.<sup>1</sup> A person

<sup>12</sup> Thompson v. First Nat. Bank, 111 U. S. 529, 28 L. Ed. 507, and the cases there reviewed. Sun Ins. Co. v. Kountz Line, 122 U. S. 583, 30 L. Ed. 1137.

<sup>13</sup> Pollock's Digest of Partnership, pp. 11 and 12; Lindley on Partnership, pp. 14 and 15.

<sup>14</sup> *In re* Seaboard Fire Ins. Co., 137 Fed. Rep. 987, 13 Am. B. R. 722; *In re* Hercules, Atkin Co., 133 Fed. Rep. 813, 13 Am. B. R. 369.

<sup>15</sup> Burkhardt v. German-American Bank, 137 Fed. Rep. 958, 960, 14 Am. B. R. 222.

See also Chapman v. Barney, 129 U. S. 667, 32 L. Ed. 800; Claggett v. Kilbourne, 1 Black, 346, 17 L. Ed. 213.

<sup>16</sup> Davis v. Stevens, 104 Fed. Rep. 235, 4 Am. B. R. 763; *In re* Mendenhall, No. 9425 Fed. Cas., 9 N. B. R. 497.

<sup>17</sup> Burkhardt v. German-American Bank, 137 Fed. Rep. 958, 14 Am. B. R. 222.

<sup>1</sup> As to the rights of aliens under the bankrupt law generally, see Sec. 132, *ante*.

residing and carrying on trade in a country at war with this country can not, during the continuance of the war, be a partner with a person resident in this country, and if two partners are resident in different countries their partnership is determined by the war between those countries.<sup>2</sup>

An infant may be a partner, but while an infant he incurs no liability and is not responsible for the debts of the firm. The partnership and the adult partners may be adjudged involuntary bankrupts and the proceedings dismissed as to the infant partner.<sup>3</sup> In such case the whole of the partnership assets, including his share, is applied to the payment of the partnership debts.

A lunatic is bound by a contract entered into by him with a person who acts *bona fide* and does not know of his lunacy. Lunatics are capable of being partners. A partnership may be adjudged a bankrupt after the insanity of a partner and the appointment of a conservator of his estate.<sup>4</sup> In such case the partnership property, including the lunatic's share, may be applied to the payment of the partnership debts.

A married woman is now capable of being a partner in most states.<sup>5</sup> If she may contract and owe debts under the laws of the state of her domicile she may be a partner. She

<sup>2</sup> *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939; *The William Bagaley*, 5 Wall. 377, 18 L. Ed. 583.

In *Hanger v. Abbott*, *supra*, the supreme court said: "Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties."

<sup>3</sup> *In re Dunnigan*, 95 Fed. Rep. 428, 2 Am. B. R. 628; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794.

As to proceedings against infants, see Sec. 133, *ante*.

<sup>4</sup> *In re Stein & Co.* (C. C. A. 7th Cir.), 127 Fed. Rep. 547, 62 C. C. A. 272, 11 Am. B. R. 536; *In re Ives* (C. C. A. 6th Cir.), 113 Fed. Rep. 911, 51 C. C. A. 541, 7 Am. B. R. 692.

<sup>5</sup> As to the rights of married women generally, see Sec. 135, *ante*. *In re Kaufman* (C. C. A. 2d Cir.), 176 Fed. Rep. 93, 99 C. C. A. 107, 23 Am. B. R. 429; *In re Harris*, 108 Fed. Rep. 517, 4 Am. B. R. 132; *In re Day*, 176 Fed. Rep. 377, 23 Am. B. R. 785.

But see *In re Suckle*, 176 Fed. Rep. 828, 23 Am. B. R. 861.



may even be a partner with her husband in business, but the family relation does not constitute partnership.<sup>6</sup>

A corporation may be a *de facto* partner, although the contract of partnership was *ultra vires* and not enforceable while executory.<sup>7</sup>

A partnership may be a partner in a firm.<sup>8</sup>

A secret or silent partner may be brought into a proceeding against a firm upon the fact becoming known.<sup>9</sup> But a proceeding against an individual can not be amended to be a partnership proceeding after the discovery of a silent partner.<sup>10</sup>

### § 255. The doctrine of partnership entity.

A partnership under the present act is, for many purposes, a distinct entity separate from the individuals who compose it.<sup>1</sup>

<sup>6</sup> *In re Herbold*, 14 Am. B. R. 116, the referee said: "Early in the administration of the bankrupt act the district judge of this district stated from the bench that he would, for the purposes of the act, consider the family relation as a partnership. Under the community law a family undoubtedly partakes of the nature of a quasi-partnership, but the statutes of the state have provided that while a partnership for certain purposes, still, the law governing partnerships shall not prevail as to exemptions allowed thereunder."

<sup>7</sup> *Wallenstein v. Ervin* (C. C. A. 3d Cir.), 112 Fed. Rep. 124, 50 C. A. 129, 7 Am. B. R. 256.

<sup>8</sup> *In re Hamilton*, 1 Fed. Rep. 800; *In re Vetterlein*, 44 Fed. Rep., 57.

<sup>9</sup> *In re Stoddard Bros. Lumber Co.*, 169 Fed. Rep. 190, 22 Am. B. R. 435; *In re Harris*, 108 Fed. Rep. 517, 4 Am. B. R. 132; *In re Clark*, 111 Fed. Rep. 893, 7 Am. B. R. 96; *Rush v. Lake* (C. C. A. 9th Cir.),

122 Fed. Rep. 561, 58 C. C. A. 447, 10 Am. B. R. 455.

But see *In re Harris*, 108 Fed. Rep. 517, 4 Am. B. R. 132.

<sup>10</sup> *In re Kaufman* (C. C. A. 2d Cir.), 176 Fed. Rep. 93, 99 C. C. A. 107, 23 Am. B. R. 429; *In re Harris*, 108 Fed. Rep. 517, 4 Am. B. R. 132.

<sup>1</sup> *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237; *In re Mercur* (C. C. A. 3d Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505; *In re Bertenshaw* (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 61, 19 Am. B. R. 589; *In re Stein* (C. C. A. 7th Cir.), 127 Fed. Rep. 547, 62 C. C. A. 272, 11 Am. B. R. 536; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *Francis v. McNeal* (C. C. A. 3d Cir.), 185 Fed. Rep. 481, 109 C. C. A. —, 26 Am. B. R. 555.

The doctrine of partnership entity is of comparatively recent origin.<sup>2</sup> This artificial entity has been found convenient in the conduct of business as well as in simplifying legal remedies. The tendency in this country is to substitute simple remedies for technical common-law remedies by and against partnerships. The doctrine of partnership entity is a means to this end. It does not change substantive rights of the partnership, the individual partners or the creditors of either the firm or the individual partners.<sup>3</sup> These rights remain subject to the law of partnerships, as administered prior to the origin of the doctrine of partnership entity.

The former bankrupt acts authorized adjudication of bankruptcy of "persons who are partners in trade" instead of the

<sup>2</sup> *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 224, 106 C. C. A. 366, 25 Am. B. R. 148, Judge Warrington reviews the history of this doctrine and uses this language: "It seems that in this country, except Louisiana, the earliest statement of the doctrine of partnership entity was made in 1834 (Parsons on Part., 4th Ed. 3) by Chief Justice Hornblower in *Curtis v. Hollingshead*, 14 N. J. L. 402, when in passing upon a statutory right of attachment against property of one of several partners for a partnership debt, he said (409-10): 'In the case of partnerships, the firm is the contracting party, not the individuals composing the firm; the credit is given to the firm; the partnership, the ideal person, formed by the union of interests, is the legal debtor. A partnership is considered in law as an artificial person, or being, distinct from the individuals composing it. It is treated as such at law, and in equity. Its property is first to be appropriated to the payment of its debts.'

"The late Justice Brewer, when a member of the supreme court of Kansas and speaking for that court in *Cross v. National Bank*, 17 Kan. 336, before cited, recognized and declared the partnership entity, stating (340) in substance the same as was said by Judge Cooley in *Robertson v. Corsett*: "The firm owns the property, holds the business, and owes the debts." And in *Hubbards-town Lumber Co. v. Covert*, 35 Mich. 253, Judge Graves reached substantially the same conclusion in considering the question of residence of a partnership under a statute providing for the filing of partnership chattel mortgages. Without attempting to trace the development of this doctrine, it may be added that the supreme court, speaking through Justice Strong, recognized it, when in *Forsythe v. Woods*, 11 Wall. 484, 20 L. Ed. 207, he said (486): "The partnership is a distinct thing from the partners themselves.'"

<sup>3</sup> *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 224, 106 C. C. A. 366, 25 Am. B. R. 148.

"partnership."<sup>4</sup> The present act defines a partnership as a "person,"<sup>5</sup> and provides that a "partnership" "may be adjudged a bankrupt."<sup>6</sup> The difference in this regard between section 5 of the present act and section 14 of the act of 1841 and section 36 of the act of 1867 shows clearly that congress intended by the present act to treat a partnership as an entity distinct from its members for some purposes.<sup>7</sup> The statute just as clearly indicates that for other purposes a partnership is not an entity, but an aggregation of persons associated together to share its profits and losses, owning its property, and liable for its debts in accordance with the agreement on which it is founded.<sup>8</sup>

A partnership is an entity for the purpose of an adjudication. A partnership may be adjudged a bankrupt on the petition of creditors or partners, although the partners who compose it are not adjudged bankrupt.<sup>9</sup> It may be discharged, although the partners are not entitled to a discharge.<sup>10</sup>

A partnership may own property and owe debts as a distinct entity. The statute recognizes this in providing the manner of distribution.<sup>11</sup> At the same time it preserves the rights of firm and individual creditors, which have been enforced in

<sup>4</sup> Section 14 of the Act of August 19, 1841, 5 Stat. at L. 440, and Sec. 36 of the Act of March 2, 1867, 14 Stat. at L. 517.

<sup>5</sup> B. A. 1898, Sec. 1, clause 19.

<sup>6</sup> B. A. 1898, Sec. 5a.

<sup>7</sup> *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298; *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 224, 106 C. C. A. 366, 25 Am. B. R. 148.

<sup>8</sup> B. A. 1898, Sec. 5f; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re Carleton*, 115 Fed. Rep. 246, 8 Am. B. R. 274; *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 224, 106 C. C. A. 366, 25 Am. B. R. 184.

<sup>9</sup> *In re Bertenshaw* (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 61, 19 Am. B. R. 589; *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re Stein* (C. C. A. 7th Cir.), 127 Fed. Rep. 547, 62 C. C. A. 272, 11 Am. B. R. 536; *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 268.

<sup>10</sup> *Strause v. Hooper*, 105 Fed. Rep. 590, 5 Am. B. R. 225; *In re Laughlin*, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re Hale*, 107 Fed. Rep. 432, 6 Am. B. R. 35; *Dodge v. Kaufman*, 46 N. Y. Misc. 248, 15 Am. B. R. 542.

<sup>11</sup> B. A. 1898, Sec. 5f.

courts of equity and bankruptcy from earliest times.<sup>12</sup> The firm assets go to pay firm debts.<sup>13</sup> The individual assets go to pay individual debts.<sup>13</sup> In case of a surplus of firm assets it may be applied to the payment of individual debts and *vice versa*.<sup>13</sup>

The statute provides also that the partnership may prove claims against the individual estates and *vice versa*.<sup>14</sup> But neither the firm nor a partner, in such cases, is entitled to a dividend in competition with his own creditors.<sup>15</sup> The right of creditors in this respect survives notwithstanding the doctrine of partnership entity.

The test of insolvency of a partnership is not determined from the financial condition of the artificial entity, as in the case of a corporation. A partnership is insolvent only when the firm and all the individual partners are insolvent.<sup>16</sup>

It may be said generally that the bankrupt act recognizes the doctrine of partnership entity, but it does not contemplate that substantive rights, long recognized in the settlement of partnership estates in equity and bankruptcy, shall be disturbed. Some confusion has arisen in the cases by failing to observe this distinction.

<sup>12</sup> *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801; *In re Filmar* (C. C. A. 7th Cir.), 177 Fed. Rep. 170, 100 C. C. A. 632, 24 Am. B. R. 194; *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 224, 106 C. C. A. 366, 25 Am. B. R. 148.

<sup>13</sup> B. A. 1898, Sec. 5f.

<sup>14</sup> B. A. 1898, Sec. 5g.

<sup>15</sup> *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 224, 106 C. C. A. 366, 25 Am. B. R. 148; *In re Rice*, 164 Fed. Rep. 509; *In re Denning*, 114 Fed. Rep. 219, 8 Am. B. R. 183; *Wallerstein v. Ervin* (C. C. A. 3d Cir.), 112 Fed. Rep. 124, 50 C. C. A. 129, 7 Am. B. R. 256, affirming 109 Fed. Rep. 135, 6 Am. B. R. 356.

<sup>16</sup> See Sec. 258, *post*; *Tumlin v. Bryan* (C. C. A. 5th Cir.), 165 Fed. Rep. 166, 91 C. C. A. 200, 21 Am. B. R. 319; *Vaccaro v. Security Bank of Memphis* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474; *Davis v. Stevens*, 104 Fed. Rep. 235, 4 Am. B. R. 763; *In re Perley & Hays*, 138 Fed. Rep. 927, 15 Am. B. R. 54.

But see *In re Bertenshaw* (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 61, 19 Am. B. R. 589; *In re Everybody's Market*, 173 Fed. Rep. 492, 21 Am. B. R. 925; *In re Solomon & Carvel*, 163 Fed. Rep. 140, 20 Am. B. R. 488.

**§ 256. Partnership exists after dissolution until final settlement.**

A partnership may be adjudged bankrupt at any time during the continuation of the partnership business, or after its dissolution and before the final settlement thereof.<sup>1</sup>

The language of this provision is simply declaratory of a well-recognized rule that where there are assets or debts of a partnership remaining, the partnership, even after dissolution, may properly be considered as subsisting as to its creditors and for the purpose of applying its joint stock and property to the payment of its creditors.<sup>2</sup>

This provision makes the partnership entity subject of adjudication notwithstanding dissolution.<sup>3</sup> The statute contains no restriction in respect to the manner in which the partnership is dissolved. It is immaterial whether it is dissolved by the expiration of the partnership agreement, or by consent of the parties or by the death or bankruptcy of a partner, or otherwise.<sup>4</sup>

When a partnership is dissolved by the death of one of the partners, the partnership entity and the surviving partners may be adjudged bankrupt under the present act.<sup>5</sup> The prac-

<sup>1</sup> B. A. 1898, Sec. 5a; *Holmes v. Baker & Hamilton* (C. C. A. 9th Cir.), 160 Fed. Rep. 922, 88 C. C. A. 104, 20 Am. B. R. 252; *In re Pinson & Co.*, 180 Fed. Rep. 787, 24 Am. B. R. 804; *In re Levy*, 95 Fed. Rep. 812, 2 Am. B. R. 21; *In re Rudnick*, 102 Fed. Rep. 750, 4 Am. B. R. 531; *In re Hirsch*, 97 Fed. Rep. 571, 3 Am. B. R. 348; *In re Coe*, 157 Fed. Rep. 308, 19 Am. B. R. 618; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576.

<sup>2</sup> *Holmes v. Baker & Hamilton* (C. C. A. 9th Cir.), 160 Fed. Rep. 922, 88 C. C. A. 104, 20 Am. B. R. 252; *In re Crockett*, No. 3402 Fed. Cas., 2 Ben. 514; *In re Noonan*, No.

10292 Fed. Cas., 3 Biss. 491; *In re Stowers*, No. 13516 Fed. Cas., 1 Low. 528; *In re Foster*, No. 4962 Fed. Cas., 3 Ben. 386; *In re McFarland*, No. 8788 Fed. Cas., 10 N. B. R. 381.

<sup>3</sup> As to the doctrine of partnership entity, see Sec. 255, *ante*.

<sup>4</sup> *In re Coe*, 157 Fed. Rep. 308, 19 Am. B. R. 618.

But see *In re Evans*, 161 Fed. Rep. 590, 20 Am. B. R. 406.

<sup>5</sup> *In re Coe*, 157 Fed. Rep. 308, 19 Am. B. R. 618; *In re McLaren*, 125 Fed. Rep. 835, 11 Am. B. R. 141.

As to partnership entity generally, see Sec. 255, *ante*.

tice was different under the former bankrupt acts, which authorized adjudication of bankruptcy of "persons who are partners in trade" instead of the "partnership."<sup>6</sup> The court of bankruptcy has no jurisdiction to adjudge a deceased person or his estate to be bankrupt.<sup>7</sup> It was held under those acts that a surviving partner might be adjudged a bankrupt, both individually and as a surviving partner of the firm.<sup>8</sup> By this method the property of the partnership, dissolved by the death of a partner, was drawn into the court of bankruptcy for administration, although the firm could not be adjudged a bankrupt.

This result is accomplished under the present act by adjudicating the firm bankrupt. The general rule is that upon an adjudication the estates of the partners, as well as the partnership assets, are drawn to the administration in bankruptcy.<sup>9</sup> The court of bankruptcy has complete jurisdiction over the partnership estate, including the decedent's interest provided possession of the assets of his individual estate can be obtained without forcibly interfering with property in the legal custody of the probate court.<sup>10</sup> If the administrator or executor will voluntarily surrender possession of the estate the trustee may take it. But the trustee can not take possession of any property

<sup>6</sup> Section 14 of the Act of August 19, 1841, 5 Stat. at L. 440 and Sec. 36 of the Act of March 2, 1867, 14 Stat. at L. 517.

As to the effect of the change in phraseology in the Act of 1898, see Sec. 255, *ante*.

<sup>7</sup> *Adams v. Terrell*, 4 Fed. Rep. 796, 802; *In re Temple*, No. 13825 Fed. Cas., 4 Saw. 92; *Vaccaro v. Security Bank of Memphis* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474.

<sup>8</sup> *Briswalter v. Long*, 14 Fed. Rep. 153; *In re Stevens*, No. 13393 Fed. Cas., 1 Saw. 397.

<sup>9</sup> *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C.

A. 261, 15 Am. B. R. 569; *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 975, 39 C. C. A. 368, 3 Am. B. R. 561; *In re Farley*, 115 Fed. Rep. 359, 8 Am. B. R. 268; *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 208; *In re Ceballos*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Latimer*, 141 Fed. Rep. 665, 23 Am. B. R. 388.

But see *In re Bertenshaw* (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 61, 19 Am. B. R. 589, from which Judge Hook files a vigorous dissenting opinion.

<sup>10</sup> *In re Pierce*, 102 Fed. Rep. 977, 4 Am. B. R. 489.

of which the administrator or executor has custody without his consent.<sup>11</sup> In any case the decedent's estate is liable for partnership debts to the same extent as the estate of a living partner.<sup>12</sup> The rights of creditors may be enforced in the probate court if the court of bankruptcy does not obtain possession of the decedent's estate.

The adjudication of a partnership after the death of a partner can not be attacked collaterally.<sup>13</sup>

The death of a partner after a petition is filed does not affect the proceedings.<sup>14</sup>

### § 257. Acts of bankruptcy by a partnership.

The commission of an act of bankruptcy within four months prior to filing a petition is necessary to support an adjudication of a firm or a partner, as in the case of individuals.<sup>1</sup>

A firm may be adjudged bankrupt only when the firm has committed an act of bankruptcy.<sup>2</sup> A partner may be adjudged a bankrupt only when he has committed an act of bankruptcy.<sup>3</sup>

If a partnership has committed any one or more of the enumerated acts of bankruptcy it is sufficient to support an adjudication of the firm entity. To sustain an adjudication against a firm the act of bankruptcy need not be actually com-

<sup>11</sup> *In re Pierce*, 102 Fed. Rep. 977, 4 Am. B. R. 489.

<sup>12</sup> *Vaccaro v. Security Bank of Memphis* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474.

<sup>13</sup> *Wilson v. Parr*, 115 Ga. 629, 8 Am. B. R. 230.

See also Sec. 244, *ante*.

<sup>14</sup> B. A. 1898, Sec. 8.

<sup>1</sup> As to what constitutes acts of bankruptcy, see Sec. 137, *et seq.*, *ante*.

<sup>2</sup> *Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87

C. C. A. 77, 20 Am. B. R. 237; *Hartman v. Peters*, 146 Fed. Rep. 82, 17 Am. B. R. 61; *In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20 Am. B. R. 537; *Royston v. Weis* (C. C. A. 5th Cir.), 112 Fed. Rep. 962, 50 C. C. A. 638, 7 Am. B. R. 584.

<sup>3</sup> *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576. *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787.



mitted by all the partners.<sup>4</sup> Even their privity is not essential. An act by one partner, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, or admitting inability to pay debts and willingness to be adjudged bankrupts, may be imputed to all the partners.<sup>4</sup>

The commission of an act of bankruptcy by a partner without the scope of his authority does not bind the firm. It is not an act of bankruptcy on the part of a firm for a partner to prefer a firm creditor or one of his own creditors out of his individual estate.<sup>5</sup> If a partner commits an act of bankruptcy he may be individually adjudged bankrupt, although the firm has not committed an act of bankruptcy.<sup>6</sup>

A single act of bankruptcy may support an adjudication against the firm and the individual partners.<sup>7</sup> An act of bankruptcy may be committed by the firm and the partners by making a general assignment for the benefit of creditors,<sup>8</sup> or

<sup>4</sup>*In re Kersten*, 110 Fed. Rep. 929, 6 Am. B. R. 516; *In re Shapiro*, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re Solomon & Carvel*, 163 Fed. Rep. 140, 20 Am. B. R. 488; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559, affirming *Chemical Nat. Bank v. Meyer*, 92 Fed. Rep. 896, 1 Am. B. R. 565.

<sup>5</sup>*Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237; *Hartman v. Peters*, 146 Fed. Rep. 82, 17 Am. B. R. 61; *In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20 Am. B. R. 537; *In re Redmond*, No. 11632 Fed. Cas., 9 N. B. R. 408.

<sup>6</sup>*Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237.

<sup>7</sup>*In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *Green River Deposit Bank & Craig Bros.*, 110 Fed. Rep. 137, 6 Am. B. R. 381; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576; *In re Kersten*, 110 Fed. Rep. 929, 6 Am. B. R. 516; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re Shapiro*, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787.

<sup>8</sup>*In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559, affirming *Chemical Nat. Bank v. Meyer*, 92 Fed. Rep. 896, 1 Am. B. R. 565; *Green River Deposit Bank v. Craig Bros.*, 110 Fed. Rep. 137, 6 Am. B. R. 381; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837; *In re Solomon & Carvel*, 163 Fed. Rep. 140, 20 Am. B. R. 488.



by failing to discharge a levy of execution against the firm,<sup>9</sup> or by making a fraudulent transfer of property of the firm,<sup>10</sup> or by an admission in writing by one partner on behalf of himself and copartners that they are unable to pay their debts and are willing to be adjudged bankrupts.<sup>11</sup>

A petition by one partner to bring his firm and copartner, into bankruptcy will support an adjudication of the firm and the petitioning partner, but not the nonassenting partner, unless an act of bankruptcy is alleged to have been committed by him.<sup>12</sup> The filing of a voluntary petition is an act of bankruptcy on the part of the petitioner and the firm entity.<sup>12</sup>

### § 258. Insolvency of a partnership.

Whether insolvency is a necessary element of an act of bankruptcy or essential to sustain an adjudication is governed by the same rules in partnership cases as in cases of individuals.<sup>1</sup>

Where a petition is filed by all of the partners, it is voluntary proceeding and the solvency or insolvency of a firm is immaterial.

Where a petition is filed by less than all the partners, the nonassenting partner may defend on the ground that he is solvent and therefore the firm is solvent.<sup>2</sup>

Where a petition is filed by creditors, they must allege and prove the partnership to be insolvent if such an allegation is necessary in the case of an individual.<sup>3</sup> Such allegation and

<sup>9</sup> *Holmes v. Baker & Hamilton* (C. C. A. 9th Cir.), 160 Fed. Rep. 922, 88 C. C. A. 104, 20 Am. B. R. 252.

<sup>10</sup> *In re Shapiro*, 106 Fed. Rep. 495, 5 Am. B. R. 839.

<sup>11</sup> *In re Kersten*, 110 Fed. Rep. 929, 6 Am. B. R. 516.

<sup>12</sup> *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re Carleton*, 115 Fed. Rep. 246, 8 Am. B. R. 270; *In re*

*Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

<sup>1</sup> As to insolvency as an element of an act of bankruptcy, see Secs. 139 to 142; and as to the defense of insolvency, see Sec. 234 *ante*.

<sup>2</sup> *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787.

<sup>3</sup> *Vaccaro v. Security Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474; *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588; *Davis v. Stevens*, 104 Fed. Rep. 235, 4 Am. B. R. 763.

proof is unnecessary in a partnership case, if not required in the case of an individual.<sup>4</sup>

The test of solvency or insolvency of a partnership is whether the firm debts may be paid in full with property which is liable for such payment. Each partner is liable *in solido* for the debts of the firm so that they are debts of each individual partner.<sup>5</sup> A partnership is, therefore, insolvent only when the firm debts exceed the value of the property of the firm, together with that of the partners applicable to the payment of firm debts.<sup>6</sup>

There are cases which hold that a partnership is insolvent when the firm property is insufficient to pay firm debts.<sup>7</sup> These cases go upon the theory that the firm entity alone is to be considered. But the doctrine of partnership entity does not disturb substantive rights long recognized by courts of equity and bankruptcy.<sup>8</sup> The better rule is that a firm is solvent while any of the partners are able to pay the firm debts.

<sup>4</sup> West Co. v. Lea, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

<sup>5</sup> In Mills v. Fisher & Co. (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 901, 87 C. C. A. 77, 20 Am. B. R. 237, Judge Lurton said: "The right of a partnership creditor to share in the separate estate of the members of the copartnership, gives him such an interest in the separate property of its members as to entitle him to prove his claim against the separate estate and to make such a claim the basis for an adjudication of bankruptcy against a member of a firm who has given a preference out of his estate. This was well settled under former acts and in this respect the present law has not changed the rule."

<sup>6</sup> Vaccaro v. Security Bank of Memphis (C. C. A. 6th Cir.), 103

Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474; Tumlin v. Bryan (C. C. A. 5th Cir.), 165 Fed. Rep. 166, 91 C. C. A. 200, 21 Am. B. R. 319; *In re* Perlhefter, 177 Fed. Rep. 305, 25 Am. B. R. 576; *In re* Perley & Hays, 138 Fed. Rep. 927, 15 Am. B. R. 54; Davis v. Stevens, 104 Fed. Rep. 235, 3 Am. B. R. 131; *In re* Blair, 99 Fed. Rep. 76, 3 Am. B. R. 588; Francis v. McNeal (C. C. A. 3d Cir.), 186 Fed. Rep. 481, 109 C. C. A. —, 26 Am. B. R. 555.

<sup>7</sup> *In re* Bertenshaw (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 61, 19 Am. B. R. 589; *In re* Everybody's Market, 173 Fed. Rep. 492, 21 Am. B. R. 925; *In re* McMurtrey & Smith, 142 Fed. Rep. 853, 15 Am. B. R. 427.

<sup>8</sup> See Sec. 255, *ante*.

**§ 259. Individual petition by or against a partner.**

There is nothing in the bankrupt statute to prevent a petition by or against a partner individually and separately without joining the other members of the firm. The statute contains no restrictions upon partners because they are partners with respect to the right to adjudge them bankrupts individually as other persons.

The statute recognizes the right of such a proceeding.<sup>1</sup> It expressly provides that in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.<sup>2</sup>

This provision applies to a proceeding by or against one partner or any number less than all, and means that the bankruptcy of one partner shall not preclude the other members from settling the partnership business, unless by the consent of the solvent partners.<sup>3</sup> This consent may be inferred from the acts of the partners.<sup>4</sup>

Such proceedings are simply voluntary or involuntary by or against the individual. The partnership debts and assets are not drawn into bankruptcy to be administered.<sup>4\*</sup> Only

<sup>1</sup> B. A. 1898, Secs. 5*c*, 5*h* and 16; *In re Hirsch*, 97 Fed. Rep. 571, 3 Am. B. R. 344; *In re Mercur* (C. C. A. 3d Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505.

<sup>2</sup> B. A. 1898, Sec. 5*h*; *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801; *Moses v. Pond*, 4 Am. B. R. 655.

As to the power of a solvent partner to compromise, see *In re Saul*, 5 Fed. Rep. 715; *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459.

<sup>3</sup> *In re Meyer* (C. C. A. 2d Cir.),

98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re Hirsch*, 97 Fed. Rep. 571; 3 Am. B. R. 344.

<sup>4</sup> *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re Duguid*, 100 Fed. Rep. 274; 3 Am. B. R. 794; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837.

<sup>4\*</sup> *In re Mercur* (C. C. A. 3d Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505; *Ludvigh v. Umstadter*, 148 Fed. Rep. 319, 17 Am. B. R. 774.

the individual debts and assets, including the interest of the bankrupt partner or partners in the partnership as accounted for by the solvent partners, is administered in bankruptcy. All debts of the partnership having been settled by the solvent partners, a discharge granted the bankrupt partner will release him from all liability for partnership as well as his individual debts.<sup>5</sup>

It has been held that if the petition does not pray that the firm be adjudged bankrupt, the copartners can not come in voluntarily and make themselves parties to the proceedings for the purpose of adjudicating the firm bankrupt.<sup>6</sup> A partnership creditor may join in a petition against one of the partners individually.<sup>7</sup>

Petitions by an insolvent partner of a partnership, which has ceased to do business and has no assets, have attracted considerable attention. How can such a partner proceed to be relieved of his liability for partnership debts as well as individual debts? Two methods of procedure have been adopted under the present act.

An insolvent partner of such a firm has filed his individual petition, scheduled the partnership and his individual debts, averred that the firm has no assets, set forth his property if he had any, and prayed to be adjudged a bankrupt without asking an adjudication against the firm. In such cases he must at least give notice to his former partners of the proceeding and his desire to be discharged from partnership debts.<sup>8</sup> It has

<sup>5</sup> *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. Rep. 249, 5 Am. B. R. 751.

<sup>6</sup> *In re Kaufman*, 176 Fed. Rep. 93, 23 Am. B. R. 429; *Mahoney v. Ward*, 100 Fed. Rep. 278, 3 Am. B. R. 770; *In re Boylan*, No. 1757 Fed. Cas., 1 Ben. 266; *In re Mercur* (C. C. A. 3d Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505.

<sup>7</sup> *Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237; *In re Mercur*, 95 Fed. Rep. 634, 2 Am. B. R. 626, s. c. (C. C. A. 3d Cir.), 122

Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505.

<sup>8</sup> *In re Meyers*, 96 Fed. Rep. 408, 2 Am. B. R. 707 and 97 Fed. Rep. 757, 3 Am. B. R. 260; *In re Russell*, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re McFaun*, 96 Fed. Rep. 592, 3 Am. B. R. 66; *In re Elliott* (Ref. Op.), 2 N. B. N. 350; *In re Laughlin*, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re Hartman*, 96 Fed. Rep. 593, 3 Am. B. R. 65; *In re Morrison*, 127 Fed. Rep. 186, 11 Am. B. R. 498.

been held that a discharge upon an individual petition releases the debtor from his liability for individual and partnership obligations.<sup>9</sup>

The other and safer course to pursue is to have the partnership and himself adjudicated bankrupts upon a petition by less than all of the partners.<sup>10</sup> In this way the partnership affairs are surely brought into the bankruptcy proceedings and there can be no question, but what a discharge will operate as a release of both firm and individual obligations.

### § 260. Petition by all the partners.

The petition of all the partners to bring the firm and the partners into bankruptcy is purely a voluntary proceeding under section 4a of the act.<sup>1</sup>

Where all the partners unite in the petition, the jurisdiction must appear as that they have had their principal place of business, or resided, or have had their domicile within the territorial jurisdiction of the court for the greater portion of the preceding six months. If the court has jurisdiction of the firm or one of the partners it is sufficient.<sup>2</sup>

It is not necessary to allege an act of bankruptcy to have been committed. The filing of such petition is an act of bankruptcy.<sup>3</sup> The solvency or insolvency of the partnership is immaterial.

<sup>9</sup> *Jarecki v. McElwaine*, 107 Fed. Rep. 249, 5 Am. B. R. 751. See also *In re Meyers*, 97 Fed. Rep. 757, 3 Am. B. R. 260.

<sup>10</sup> *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Russell*, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601. For proceedings on such a petition, see Sec. 262. *post*.

<sup>1</sup> See Official Form No. 2, Form No. 4, *post*.

<sup>2</sup> B. A. 1898, Sec. 5c.

<sup>3</sup> B. A. 1898, Sec. 3a, clause 5; *In re Junck & Balthazard*, 169 Fed. Rep. 481, 483, 22 Am. B. R. 298, the court said: "For the purposes of this controversy the petition must be considered as voluntary, and Section 4 clearly extends the benefits of the act to every person owing debts, and this includes a partnership. To hold that every voluntary petition must set up a technical act of bankruptcy would emasculate the act."

If it is desired to have the partners adjudged bankrupts as well as the firm, the petition should "pray that the said firm and the several partners constituting said firm may be adjudged," etc.

There must be filed with the petition a schedule of the assets and debts of the firm and a separate schedule of the assets and debts of each partner.

### § 261. Creditors' petition against a partnership.

Creditors may institute involuntary proceedings to bring the partnership entity and the individual partners into bankruptcy.<sup>1</sup>

The form of petition against a partnership is substantially the same as against an individual.<sup>2</sup> It is not necessary to file a petition against the firm and also separate petitions against the partners.<sup>3</sup> The petition against a firm and the partners constitutes one proceeding.

There must be three petitioning creditors if there are more than twelve creditors. The petition should show that the claims of the petitioners amount to \$500, that the indebtedness of the firm is at least \$1000,<sup>4</sup> and that the firm or one of the partners has had a residence, domicile, or principal place of business within the district for the greater part of six months before the petition was filed.<sup>5</sup> In other words, the same things must concur in respect to the partnership as in case of proceedings against an individual.

All of the partners should be named in the petition and brought before the court.<sup>6</sup> One who holds himself out as a

<sup>1</sup> B. A. 1898, Sec. 4b and Sec. 5a.

<sup>2</sup> See Official Form No. 3, Form No. 5, *post*.

<sup>3</sup> *In re Gay*, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re Langslow*, 98 Fed. Rep. 869, 3 Am. B. R. 529n; but see *In re Barden*, 101 Fed. Rep. 553, 4 Am. B. R. 31; *In re Farley*, 115 Fed. Rep. 359, 8 Am. B. R. 266.

<sup>4</sup> *In re Pinson & Co.*, 180 Fed. Rep. 787, 24 Am. B. R. 804.

<sup>5</sup> B. A. 1898, Sec. 2, clause 1, and Sec. 5c.

<sup>6</sup> *In re Moore*, No. 9750 Fed. Cas., 5 Biss. 79; *In re Lewis*, No. 8311 Fed. Cas., 2 Ben. 96; *In re Prankard*, No. 11366 Fed. Cas., 1 N. B. R. 297; Gen. Ord. 8; *In re Meyers*, 97 Fed. Rep. 757, 3 Am.

partner, although he has actually retired from the firm, may be alleged a bankrupt as a member of the firm upon a creditor's petition.<sup>7</sup> It is not necessary, however, to name or serve a secret or dormant partner in order to have a valid adjudication in bankruptcy.<sup>8</sup> If the name of such partner is known, he should be made a party to the proceedings.<sup>9</sup>

The petitioners must also allege and prove that an act of bankruptcy has been committed within four months prior to filing the petition by the firm to support an adjudication against it,<sup>10</sup> and by each partner sought to be adjudged a bankrupt.<sup>11</sup>

The petitioners should also allege and prove the partnership to be insolvent if such an allegation is necessary in the case of an individual.<sup>12</sup> Such an allegation is unnecessary in a partnership case if not required in proceedings against an individual.<sup>13</sup> A partnership is deemed to be insolvent only

B. R. 260; *In re Laughlin*, 96 Fed. Rep. 589, 3 Am. B. R. 1; *Dickas v. Barnes, Trustee* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566.

<sup>7</sup> *In re Krueger*, No. 7941 Fed. Cas., 2 Low. 66.

<sup>8</sup> *Metcalf v. Officer*, No. 9496 Fed. Cas., 5 Dill. 565; *In re Harris*, 108 Fed. Rep. 517, 4 Am. B. R. 132.

<sup>9</sup> *In re Stoddard Bros. Lumber Co.*, 169 Fed. Rep. 190, 22 Am. B. R. 435; *In re Harris*, 108 Fed. Rep. 517; 4 Am. B. R. 132; *Rush v. Lake* (C. C. A. 9th Cir.), 122 Fed. Rep. 561, 58 C. C. A. 447, 10 Am. B. R. 455.

<sup>10</sup> See Sec. 257, *ante*; *Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237; *In re Stovall Grocery Co.*, 161 Fed. Rep. 882, 20 Am. B. R. 537; *Hartman v. Peters*, 146 Fed. Rep. 82, 17 Am. B. R. 61.

<sup>11</sup> *In re Meyer* (C. C. A. 2d

Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *Holmes v. Baker & Hamilton* (C. C. A. 9th Cir.), 160 Fed. Rep. 922, 88 C. C. A. 104, 20 Am. B. R. 252; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576; *In re Shapiro*, 106 Fed. Rep. 495, 5 Am. B. R. 839.

<sup>12</sup> See Sec. 258, *ante*; *Vaccaro v. Security Bank* (C. C. A. 6th Cir.), 103 Fed. Rep. 436, 43 C. C. A. 279, 4 Am. B. R. 474; *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588; *Davis v. Stevens*, 104 Fed. Rep. 235, 4 Am. B. R. 763.

As to insolvency as an element of an act of bankruptcy, see Secs. 139 to 142, *ante*. As to the defense of insolvency, see Sec. 234, *ante*.

<sup>13</sup> *West Co. v. Lea*, 174 U. S. 590, 43 L. Ed. 1098, 2 Am. B. R. 463.

As to insolvency as an element of an act of bankruptcy, see Secs. 139 to 142, *ante*. As to the defense of insolvency, see Sec. 234, *ante*.

when the firm debts exceed the value of the property of the firm, together with that of the partners applicable to the payment of firm debts.<sup>14</sup>

The petition may pray for an adjudication against the firm entity, or the partners, or both. A creditors' petition may lead to an adjudication of the firm entity alone,<sup>15</sup> or the firm entity and the partners who have committed an act of bankruptcy,<sup>16</sup> or the partners individually without an adjudication against the firm.<sup>17</sup> A partner, who is exempt because a wage earner or farmer, can not be adjudged bankrupt.<sup>18</sup>

The firm may defend on the same grounds as an individual debtor,<sup>19</sup> or on the ground that no partnership in fact exists.<sup>20</sup> Creditors of the partnership or of the individual partners may intervene to oppose an adjudication.<sup>21</sup>

## § 262. Petition by less than all the partners.

Proceedings to bring the firm and partners into bankruptcy may be instituted by less than all the partners filing a petition.<sup>1</sup>

<sup>14</sup> See Sec. 258, *ante*.

<sup>15</sup> *In re Bertenshaw* (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 81, 19 Am. B. R. 589; *Strause v. Hooper*, 105 Fed. Rep. 590, 5 Am. B. R. 325; *In re Hale*, 107 Fed. Rep. 432, 6 Am. B. R. 35.

<sup>16</sup> *Holmes v. Baker & Hamilton*, (C. C. A. 9th Cir.), 160 Fed. Rep. 922, 88 C. C. A. 104, 20 Am. B. R. 252; *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re Stein & Co.* (C. C. A. 7th Cir.), 127 Fed. Rep. 547, 62 C. C. A. 272, 11 Am. B. R. 536; *In re Solomon & Carvel*, 163 Fed. Rep. 140, 20 Am. B. R. 488; *In re Coe*, 157 Fed. Rep. 308, 19 Am. B. R. 618; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576.

<sup>17</sup> *In re Mercur* (C. C. A. 3d Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505.

<sup>18</sup> *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566.

<sup>19</sup> See Sec. 228, *et seq.*, *ante*.

<sup>20</sup> See Sec. 252, *ante*.

<sup>21</sup> *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576.

<sup>1</sup> *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298; *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Carleton*, 115 Fed. Rep. 246, 8 Am. B. R. 270; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787.



Such proceedings are voluntary as to the petitioning partners and involuntary as to partners refusing to join as petitioners.<sup>2</sup> If the partners not joining in the original petition shall do so after notice, the proceeding is wholly voluntary.<sup>3</sup> When the petition is filed in the clerk's office, it can not then be classed as an involuntary proceeding, because it may never become such, and, in the absence of the judge from the district or division, it is the duty of the clerk to refer the case to the proper referee.<sup>4</sup>

The petition may be substantially in the form used when all the partners join in the petition.<sup>5</sup> It should state the names of all the partners<sup>6</sup> and pray for a notice to be served upon the partners not petitioning, giving the names and places of residence of such partners, if known.

The petition need not allege an act of bankruptcy to have been committed by the firm or the petitioning partners, other than their inability to pay debts and willingness to be adjudged bankrupts on that ground. The filing of the petition is an act of bankruptcy on the part of the petitioning partners and the firm.<sup>7</sup>

If it is desired to bring into bankruptcy the partners not joining in the petition, an act of bankruptcy must be alleged to have been committed by each of them. A partner, refusing

<sup>2</sup> *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298; *In re Carleton*, 115 Fed. Rep. 246, 8 Am. B. R. 270.

*In Medsker v. Bonebrake*, 108 U. S. 66, 71, 27 L. Ed. 654, Mr. Justice Miller said: "It is not a voluntary bankruptcy if the man is forced into it against his will by his partner, any more than by any one else; and it is compulsory and involuntary if he refuses to join in such case and is forced into it, as much as in any other enforced bankruptcy."

<sup>3</sup> *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601.

<sup>4</sup> *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601.

<sup>5</sup> See Official Form No. 2, Form No. 4, *post*.

<sup>6</sup> *In re Altman*, 95 Fed. Rep. 263, 2 Am. B. R. 407.

<sup>7</sup> B. A. 1898, Sec. 3, clause 5; *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298; *In re Carleton*, 115 Fed. Rep. 246, 8 Am. B. R. 270; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459.

to join in the petition, can not be adjudged a bankrupt, unless he has committed an act of bankruptcy.<sup>8</sup>

The petition may pray for an adjudication of the firm and all the partners individually, or such of them as are sought to be brought into bankruptcy.

A schedule of the assets and debts of the firm and a separate schedule of the assets and debts of each petitioning partner must be annexed to and filed with the petition.

The case, whether coming before the judge or a referee, can not be properly proceeded with until notice of the pendency of the proceeding has been given to the member or members of the firm who have not joined in the petition as filed.<sup>9</sup> Under the provisions of general order No. 8, a time must be fixed for a hearing upon the petition, of which due notice must be given.

If the nonjoining member or members of the firm can be found, in the district or out of it, personal service of the notice must be made.<sup>10</sup> If personal service can not be had, then, upon filing before the judge (or the referee, if the case has been referred by the clerk) an affidavit showing that personal service of notice can not be made, an order of publication of notice will be made, as provided for in section 18 of the act.<sup>11</sup>

The adjudication of the petitioning partners follows regularly as matter of course. A partner not joining the petition

<sup>8</sup> *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298; *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459.

<sup>9</sup> Gen. Ord. 8. *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601; *In re Russell*, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re Elliott* (Ref. Op.), 2 N. B. N. 350; *In re Altman*, 95 Fed. Rep. 263, 2 Am. B. R. 407; *In re Moore*, No. 9750 Fed. Cas., 5 Biss. 79; *In re Prankard*, No. 1136 Fed. Cas., 1 N. B. R. 297; *In re Lewis*, No. 8311 Fed. Cas., 2 Ben. 96.

<sup>10</sup> See Sec. 206, *ante*; *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601.

<sup>11</sup> See Sec. 209, as to manner of serving by publication.

*In re Murray & Winters*, 3 Am. B. R. 90, Judge Shiras said: "If personal service can not be had, it must be given by publication as provided for in Sec. 18 of Bankruptcy Act."

For form of notice when service is made by publication, see *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601.

may resist the adjudication of the firm and himself.<sup>12</sup> A creditor will not be permitted to oppose an adjudication of a firm upon the petition of a partner.<sup>13</sup>

After a partner not joining in the petition has been served with notice of the filing of a petition several courses are open to him.

*First.* He may appear at the time fixed by the court for the hearing of the petition and join with his copartners in the prayer of the petition, or, by failing to enter an appearance, show that he does not propose to contest the adjudication. In such cases the proceedings are voluntary upon the petition of all the partners.<sup>14</sup>

*Second.* He may appear at the time fixed by the court for the hearing of the petition to oppose an adjudication of the firm.<sup>15</sup> General order 8 provides that he may "make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy." As the act of bankruptcy is the filing of the petition his defense in this respect is limited to challenging the power of his copartner to file such a petition. He may, however, show that the partnership is solvent,<sup>16</sup> and on this question he is entitled to a trial by jury.<sup>17</sup>

*Third.* He may appear at the time fixed by the court for the hearing of the petition and oppose his own adjudication by setting up any defense available to a debtor in involuntary proceedings.<sup>18</sup>

<sup>12</sup> Gen. Ord. 8. *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298; *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787; *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601.

<sup>13</sup> *In re Carleton*, 115 Fed. Rep. 246, 8 Am. B. R. 270; *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

<sup>14</sup> Sec. 260, *ante*; *In re Murray*, 96 Fed. Rep. 600, 3 Am. B. R. 601.

<sup>15</sup> Gen. Ord. 8.

<sup>16</sup> *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787, Judge Lowell held "that a non-assenting partner can not set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency."

<sup>17</sup> *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787.

<sup>18</sup> See Sec. 228, *et seq.*, *ante*; *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *Royston v. Weis*

If he shows that he is solvent he is entitled to settle the affairs of the firm and account for the interest of the partner or partners adjudged bankrupt.<sup>19</sup> He is entitled to a jury trial on the question of his solvency.<sup>20</sup>

*Fourth.* He may not appear in response to the notice. In such case the partnership is regularly adjudged bankrupt and he will be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom an adjudication is made.<sup>21</sup> In such cases his property will be administered by the court of bankruptcy. If he has a surplus of assets after the discharge of his individual liabilities, such surplus will be devoted to the payment of the firm debts if the firm assets are insufficient for that purpose.<sup>22</sup>

### § 263. Schedules in partnership cases.

A petition by partners, whether all or a part of them join in it, must be accompanied by a separate schedule of the liabilities and assets of the partnership and by separate schedules of the individual liabilities and assets of each petitioning partner.<sup>1</sup> These schedules are prepared in the manner required in a case of voluntary bankruptcy.<sup>2</sup>

If any partner refuse to join in the petition to have the partnership declared bankrupt and an adjudication is made, such partner must file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.<sup>3</sup>

(C. C. A. 5th Cir.), 112 Fed. Rep. 962, 50 C. C. A. 638, 7 Am. B. R. 584.

<sup>19</sup> B. A. 1898, Sec. 5h.

<sup>20</sup> *In re Forbes*, 128 Fed. Rep. 137, 11 Am. B. R. 787.

<sup>21</sup> Gen. Ord. 8. *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

<sup>22</sup> *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

<sup>1</sup> *In re Laughlin*, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re Ceballos*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Morrison*, 127 Fed. Rep. 186, 11 Am. B. R. 498; *In re Brick*, 4 Fed. Rep. 804; *Wilkins v. Davis*, No. 17664 Fed. Cas., 2 Low. 511.

<sup>2</sup> Official Form No. 1, Schedules A and B; see Form No. 3, *post*; see Secs. 173 to 180, *ante*.

<sup>3</sup> Gen. Ord. 8.

In the case of a petition filed by creditors the schedules are prepared as in involuntary proceedings.<sup>4</sup>

**§ 264. Districts within which a partnership proceeding may be filed.**

The petition to have a partnership adjudged to be bankrupt may be filed in the district where the firm has had its principal place of business for the greater portion of the six months preceding the filing of the petition.<sup>1</sup>

It may be filed in any district in which a court of bankruptcy has jurisdiction of one of the partners.<sup>2</sup>

If the court has jurisdiction of one of the partners of a firm it may have jurisdiction of all the partners and of the administration of the partnership and of the individual property.<sup>2</sup>

In case two or more petitions are filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed having jurisdiction takes and retains jurisdiction over all proceedings in such bankruptcy until the same are closed.<sup>3</sup> If such petitions are filed in the same district, action is first had upon the one first filed. But the court so retaining jurisdiction may, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.<sup>4</sup>

**§ 265. The adjudication.**

The proceedings leading to an adjudication and reference in partnership cases are the same as in other voluntary or in-

<sup>4</sup> See Secs. 173 to 180, *ante*.

<sup>1</sup> B. A. 1898, Sec. 2, clause 1; Sec. 192, *ante*.

<sup>2</sup> B. A. 1898, Sec. 5c; *In re Blair*, 99 Fed. Rep. 76, 3 Am. B. R. 588; *In re Murray*, 96 Fed. Rep. 600, 3 Am. N. B. R. 601.

*In re Strauss & Stern*, a partnership, southern district of Ohio (not reported), it was ruled under this

clause that the court had jurisdiction of the partnership by virtue of Stern's residing within the district. Strauss was a nonresident of the district and the firm had no place of business.

<sup>3</sup> Gen. Ord. 6.

<sup>4</sup> B. A. 1898, Sec. 32; Gen. Ord. 6. See Sec. 196, *ante*.

voluntary proceedings according as the petition seeking an adjudication is voluntary or involuntary.

Where a proper case is made by the petition and proofs, the firm and the individual partners are regularly adjudicated bankrupt in one proceeding.<sup>1</sup> If some of the partners have not committed or participated in an act of bankruptcy they can not be adjudged bankrupts in such a proceeding.<sup>2</sup> In such cases the firm and the partners who have committed an act of bankruptcy are adjudicated bankrupt.

A partnership may be adjudged a bankrupt without an adjudication against any of the partners individually.<sup>3</sup> The partners may be adjudicated bankrupts without an adjudication against the firm.<sup>4</sup>

The jurisdiction of the court to make an adjudication exists although there are no assets, firm or individual, for distribution.<sup>5</sup>

### **§ 266. When firm and individual estates are brought in for administration.**

It may be said generally that when a partnership entity is adjudged bankrupt it draws into the court of bankruptcy the assets and debts of the firm and the individual assets and debts of the several partners to be administered.<sup>1</sup>

<sup>1</sup> *Holmes v. Baker & Hamilton* (C. C. A. 9th Cir.), 160 Fed. Rep. 922, 88 C. C. A. 104, 20 Am. B. R. 252; *In re Gay*, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re Shapiro*, 106 Fed. Rep. 495, 5 Am. B. R. 839; *In re Grant*, 106 Fed. Rep. 496, 5 Am. B. R. 837.

<sup>2</sup> *In re Meyer* (C. C. A. 2d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R. 559; *In re Ceballos & Co.*, 161 Fed. Rep. 445, 20 Am. B. R. 459; *In re Solomon & Carvel*, 163 Fed. Rep. 140, 20 Am. B. R. 488; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576.

<sup>3</sup> *In re Bertenshaw* (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 61, 19 Am. B. R. 577; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *Strause v. Hooper*, 105 Fed. Rep. 590, 5 Am. B. R. 225.

<sup>4</sup> *In re Mercur* (C. C. A. 3d Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505.

<sup>5</sup> *In re Pinson & Co.*, 180 Fed. Rep. 787, 24 Am. B. R. 804.

<sup>1</sup> *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566; *In re Meyer* (C. C. A. 3d Cir.), 98 Fed. Rep. 976, 39 C. C. A. 368, 3 Am. B. R.

The individual estate of a partner may be drawn into bankruptcy, although no adjudication goes against the partner.<sup>2</sup> The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners to be bankrupts.

An exception to this rule exists. Section 5*h* of the act provides that "in the event of one or more, but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

This merely preserves to a solvent partner the right to administer the affairs of the partnership. If he wants to do so, he may take upon himself the settlement of the partnership business, reporting to the court according to the equitable rule, the residuum of assets remaining to be distributed by the court among the partnership creditors.<sup>3</sup> If he does not wish

559; *In re Stein* (C. C. A. 7th Cir.), 127 Fed. Rep. 547, 62 C. C. A. 272, 11 Am. B. R. 536; *In re Lattimer*, 174 Fed. Rep. 824, 23 Am. B. R. 388; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, 502, 53 L. Ed. 300, 21 Am. B. R. 416; *In re Dobert & Son*, 165 Fed. Rep. 749, 21 Am. B. R. 634.

But see *In re Bertenshaw* (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 35 C. C. A. 6, 19 Am. B. R. 577.

<sup>2</sup> *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re Junck & Balthaz-*

*ard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

*In re Dickas v. Barnes*, *supra*, some of the partners were wage earners and farmers and not subject to be adjudicated bankrupts in an involuntary proceeding, but their estates were administered in the bankruptcy proceedings against the partnership.

This rule is severely criticised by Professor Brannan in an article entitled: "The separate estate of nonbankrupt partners in the bankruptcy of a partnership under the bankrupt act of 1898," in Vol. 20, *Harvard Law Review*, 589.

<sup>3</sup> *In re Mercur*, 116 Fed. Rep. 655, 8 Am. B. R. 275; *In re Junck & Balthazard*, 169 Fed. Rep. 481, 22 Am. B. R. 298.

to do so, the firm property is administered by the court of bankruptcy.<sup>4</sup>

Where a partnership is not adjudged a bankrupt, the partnership property is not drawn into bankruptcy for administration, but only the individual assets of the partners adjudicated bankrupt.<sup>5</sup> Where the court obtains jurisdiction of one of the partners,\* it has power to adjudicate the firm and all of the partners bankrupt and to administer the partnership and individual property.<sup>6</sup> If, however, the court does not adjudicate the firm bankrupt the firm property is not drawn into bankruptcy.

### § 267. The trustee in partnership cases.

The manner of election, the qualification, powers and duties of a trustee in partnership cases is the same as in other estates.<sup>1</sup>

Whether firm or individual creditors, or both, are entitled to elect the trustee in partnership cases depends upon the nature of the proceedings.<sup>2</sup>

The statute provides that "the creditors of the partnership shall appoint the trustee."<sup>3</sup> This provision applies only to cases in which the firm is adjudged bankrupt.<sup>4</sup> In such cases the creditors of the individual partners are not entitled to vote for the trustee.<sup>5</sup> No separate trustees for the partners are elected where the firm is brought into bankruptcy.<sup>6</sup>

<sup>4</sup> See observation of Judge Lowell *In re Beck*, 110 Fed. Rep. 140, 6 Am. B. R. 554.

<sup>5</sup> *In re Mercur* (C. C. A. 3d Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505; *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801; *In re Shepard*, No. 12754 Fed. Cas., 3 Ben. 347; *Ludvigh v. Ninstadter*, 148 Fed. Rep. 319, 17 Am. B. R. 774.

<sup>6</sup> B. A. 1898, Sec. 5f.

<sup>1</sup> As to the election of trustees generally, see Sec. —, *post*.

<sup>2</sup> *In re Beck*, 110 Fed. Rep. 140, 6 Am. B. R. 554.

<sup>3</sup> B. A. 1898, Sec. 5b.

<sup>4</sup> *In re Beck*, 110 Fed. Rep. 140, 6 Am. B. R. 554.

<sup>5</sup> B. A. 1898, Sec. 5b; *In re Coe*, 154 Fed. Rep. 162, 18 Am. B. R. 715; *In re Eagles & Crisp*, 99 Fed. Rep. 696, 3 Am. B. R. 733; *In re Phelps*, No. 11071 Fed. Cas., 1 N. B. R. 525.

<sup>6</sup> *In re Coe*, 154 Fed. Rep. 162, 18 Am. B. R. 715.



Where the adjudication goes against a partner and not against the firm, the trustee may be elected by the firm creditors and the individual creditors of that partner.<sup>7</sup>

The reason for these rules with respect to voting for a trustee is that every creditor of a firm is also a creditor of each partner, but a creditor of one partner is not a creditor of the firm, nor has he any interest in the property of an insolvent partnership. If a separate creditor of a partner were permitted to participate in choosing a trustee for the partnership property, he would have a voice in the management of property in which he had no interest. The election of the trustee for both the firm and separate property of each member is limited to firm creditors. No one, therefore, has a voice who has not an interest in the whole property which passes, though some may be excluded who have an interest in part of it.

The statute contemplates that the trustee elected by the firm creditors shall administer both the partnership property and the property belonging to the individual partners.<sup>8</sup> He administers the property of the individual partners even when such partners are and can not be adjudged bankrupts.<sup>9</sup> He is required to keep separate accounts of such property.<sup>10</sup> The expenses are paid from the partnership property and the individual property in such portions as the court may determine.<sup>11</sup>

<sup>7</sup> *In re Beck*, 110 Fed. Rep. 140, 6 Am. B. R. 554; *In re Webb*, No. 17317 Fed. Cas., 4 Saw. 326.

In *Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237, Judge Lurton said: "The right of a partnership creditor to share in the separate estate of the members of the copartnership gives him such an interest in the separate property of its members as to entitle him to prove his claim against the separate estate." He, therefore, has a right to vote for a trustee.

<sup>8</sup> *In re Coe*, 154 Fed. Rep. 162, 18 Am. B. R. 718.

<sup>9</sup> *Dickas v. Barnes* (C. C. A. 6th Cir.), 140 Fed. Rep. 849, 72 C. C. A. 261, 15 Am. B. R. 566; *Francis v. McNeal* (C. C. A. 3d Cir.), 186 Fed. Rep. 481, 109 C. C. A. —, 26 Am. B. R. 555.

<sup>10</sup> B. A. 1898, Sec. 5d.

<sup>11</sup> B. A. 1898, Sec. 5e; *In re Blumer*, 12 Fed. Rep. 489; *In re Smith*, No. 12987 Fed. Cas., 13 N. B. R. 500.

The trustee of a member of the firm, elected by both firm and individual creditors, has nothing to do with the firm property, because it is not in bankruptcy.<sup>12</sup> He administers the individual estate of the partner, including his interest in the partnership as accounted for upon the settlement of the firm affairs.

**§ 268. Rule as to administering estates of firms and partners.**

When a person not in partnership with another is adjudged a bankrupt, the whole of his property becomes divisible among all his creditors. A different mode of distribution prevails in partnership cases, owing to the rule that firm creditors are to be paid in the first instance out of the firm property, and the separate creditors of each partner out of his separate estate.

This rule was stated at an early date by Lord Chancellor King in *Ex parte Cooke*,<sup>1</sup> and subsequently confirmed by Lord Eldon,<sup>2</sup> and others. It has been the subject of enactment in the English Bankruptcy Act of 1883,<sup>3</sup> and in the bankruptcy laws of the United States.<sup>4</sup>

The present statute<sup>5</sup> commands that "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership

<sup>12</sup> *Ludvigh v. Umstadter*, 148 Fed. Rep. 319, 17 Am. B. R. 774.

<sup>1</sup> 2 P. Wms. 500. In *Murrill v. Neil*, 8 How. 413, 426, 12 L. Ed. 1135, it is said that "this rule may be traced back in England, with certainty, to the cases of *ex parte Crowder* in 2 Vernon, 706 (in 1715), and of *ex parte Cooke*, 2 P. Wms. 500 (in 1728)."

<sup>2</sup> *Ex parte Clay*, 6 Ves. 813a; *ex parte Taitt*, 16 Ves. 193.

<sup>3</sup> Sec. 40, subsection 3 of the Act of 1883; Eng. Bankruptcy Rule No. 293.

<sup>4</sup> Act of 1867, R. S. Sec. 5121; Sec. 14 of the Act of 1841, 5 Stat. at L. 448; and Sec. 5 of the Act of 1898.

<sup>5</sup> B. A. 1898, Sec. 5f.

property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

When a firm is adjudged bankrupt this section provides for the administration of the firm and individual property at the time the petition is filed.<sup>6</sup> It includes all the property the title to which is in the firm or a partner at that time and which has been transferred in fraud of creditors, either a preferential or a fraudulent transfer.<sup>7</sup> This provision does not deal with firm property applied to the payment of individual debts or individual property to the payment of firm debts.<sup>8</sup> Section 5g regulates the distribution with respect to such property, as explained in another place.<sup>9</sup>

The property of the firm and the partners is administered by the same trustee,<sup>10</sup> who is required to keep separate accounts of each property.<sup>11</sup>

Where several persons are members of different firms and a joint adjudication is obtained against all of them, distinct accounts will be had of the estates of the respective firms as well as of the separate estate of each bankrupt, and each estate will be made to bear its own debts and its fair proportion of the expenses.<sup>12</sup> Where the same partners conduct business in two different places under different names, the two firms will be treated as one firm in the distribution of the assets, and no notice will be taken of the indebtedness of one firm to the

<sup>6</sup> *Sargent v. Blake* (C. C. A. 8th Cir.), 160 Fed. Rep. 57, 87 C. C. A. 213, 20 Am. B. R. 115.

<sup>7</sup> *Sargent v. Blake* (C. C. A. 8th Cir.), 160 Fed. Rep. 57, 87 C. C. A. 213, 20 Am. B. R. 115; *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416.

<sup>8</sup> *Sargent v. Blake* (C. C. A. 8th Cir.), 160 Fed. Rep. 57, 87 C. C. A. 213, 20 Am. B. R. 115.

<sup>9</sup> Sec. 276, *post*.

<sup>10</sup> *In re Coe*, 154 Fed. Rep. 162, 18 Am. B. R. 718.

<sup>11</sup> B. A. 1898, Sec. 5d.

<sup>12</sup> *In re Hinds*, No. 6516 Fed. Cas., 3 N. B. R. 351; *In re Dunkerson*, No. 4156 Fed. Cas., 4 Biss. 227; *In re Ellis*, No. 4399 Fed. Cas., 5 Ben. 421; *Ex parte Marlin*, 2 Bro. C. C. 15; *In re Stanton*, No. 13295 Fed. Cas., 28 Miss. 447.

other.<sup>13</sup> If a person is a partner in several firms, all of which are bankrupt, the surplus of his separate estate will be applied in discharge of the partnership debts of the respective firms, in proportion to the amount of the debts proved against such firms respectively.<sup>13\*</sup> Where one partner has sold out to his copartner before bankruptcy, the property belonging to the firm at the time of the dissolution should be applied first to the payment of the firm creditors, the separate estate of the purchasing partner should be applied first to the payment of his separate debts, and any surplus in either fund should then be applied on the other.<sup>13\*\*</sup>

Where proceedings were prosecuted against a person as the sole owner of a business—the assets and debts being those of the business—it was held that the distribution should be on that basis, although a secret partner in the business may be shown.<sup>14</sup>

### § 269. What is firm and individual property respectively.

It may be stated generally that the partnership property consists of all the property which forms the stock of the firm, and all debts owing to the partnership, and all of the real or personal property purchased with the firm money.<sup>1</sup>

<sup>13</sup> *In re Vetterlein*, No. 16927 Fed. Cas., 5 Ben. 311; *Buckner v. Calcote*, 28 Miss. 432, and note on page 447; *In re Lloyd*, 22 Fed. Rep. 90; *Ballin v. Ferst*, 55 Ga. 546; *In re Williams*, No. 17707 Fed. Cas., 3 Woods, 493; *In re Savage*, No. 12381 Fed. Cas., 16 N. B. R. 368; *In re Vetterlein*, 44 Fed. Rep. 57.

<sup>13\*</sup> *Ex parte Franklyn Buck*, 332.

<sup>13\*\*</sup> *In re Denning*, 114 Fed. Rep. 219, 8 Am. B. R. 133; *In re Filmer* (C. C. A. 7th Cir.), 177 Fed. Rep. 170, 100 C. C. A. 632, 24 Am. B. R. 194; *In re Terrens*, 175 Fed. Rep. 495, 23 Am. B. R. 680.

<sup>14</sup> *In re Harris*, 108 Fed. Rep. 517, 4 Am. B. R. 132.

<sup>1</sup> *Hiscocks v. Jaycox*, No. 6531 Fed. Cas., 12 N. B. R. 507; *Marratt v. Murphy*, No. 9103 Fed. Cas., 11 N. B. R. 131; *Thrall v. Crampton*, No. 14008 Fed. Cas., 9 Ben. 218; *Buchan v. Sumner*, 2 Barb. Ch. 165, and approved in *Collumb v. Read*, 24 N. Y. 505; *Fereday v. Wightwick*, 1 R. & M. 49.

But not so when the deed to real estate is taken to themselves jointly as tenants in common. *Jones' Appeal*, 70 Penn. 169.

The presumption that it belongs to the firm will arise when real estate is purchased with firm money, although the conveyance is made to one partner alone, who in such case is considered a trustee for the firm;<sup>2</sup> so also when stock in a corporation is purchased with firm money and transferred in the name of one of the partners he will be deemed the trustee for the firm.<sup>3</sup> But where property is bought with firm money and taken in the name of one partner under an agreement that it shall be his separate property, it will be regarded as a loan to him from the partnership of the partnership money.<sup>4</sup> Property acquired by a surviving partner by means of his position as partner is deemed firm property.<sup>5</sup>

Premises used by persons for the purpose of carrying on their trade are *prima facie* a part of the partnership property, but this presumption may be rebutted.<sup>6</sup>

A sale by one partner to his copartner, when the firm is insolvent, which if held would operate to apply the property of the retiring partner to the payment of the individual debts of the partner purchasing, is considered fraudulent and the property distributed as firm property.<sup>7</sup> But it is competent for solvent partners to make any arrangements which they think proper with respect to their joint property in the partnership, or the separate property of the partners, and to alter the character of the property so as to convert joint into separate

<sup>2</sup> *In re* Swift, 114 Fed. Rep. 947, 9 Am. B. R. 237; *In re* Groetzinger (C. C. A. 3d Cir.), 127 Fed. Rep. 814, 62 C. C. A. 494, 11 Am. B. R. 723; *Smith v. Smith*, 5 Ves. 193; *Ex parte* Hinds, 3 De G. & S. 613.

<sup>3</sup> *Ex parte* Connell, Deac. 201, and 3 M. & A. 581.

<sup>4</sup> *Smith v. Smith*, 5 Ves. 193; *Taylor v. Rasch*, No. 13801 Fed. Cas., 5 N. B. R. 399.

<sup>5</sup> *In re* Day, 176 Fed. Rep. 377, 23 Am. B. R. 785; *Featherstonhaugh v. Fenwick*, 17 Ves. 308;

*Clements v. Hall*, 2 De G. & J. 172.

<sup>6</sup> *Osborn v. McBride*, No. 10593 Fed. Cas., 3 Saw. 590; *Featherstonhaugh v. Fenwick*, 17 Ves. 308.

<sup>7</sup> *In re* Terrens, 175 Fed. Rep. 495, 23 Am. B. R. 680; *In re* Filmar (C. C. A. 7th Cir.), 177 Fed. Rep. 170, 100 C. C. A. 632, 24 Am. B. R. 194; *In re* Worth, 130 Fed. Rep. 927, 930, 12 Am. B. R. 566; *In re* Head, 114 Fed. Rep. 489, 7 Am. B. R. 556; *In re* Cooke, No. 3150 Fed. Cas., 3 Biss. 122; *Collins v. Hood*, No. 3015 Fed. Cas., 4 McLean, 186.

property and *vice versa*. Such agreement, if made *bona fide*, will bind their creditors, and in the event of bankruptcy the property will be administered as firm or separate property, according to the character which the partners have placed upon it.<sup>8</sup>

Where one partner sold his interest to another, with an agreement that the continuing partner should collect the firm assets and pay the firm debts, and he carried on the business and from time to time replenished the stock of goods, mingling the old and new together and sold from either indifferently so that it was impossible to tell which were the goods of the old firm and which were the goods of the continuing partner alone, it was held upon the bankruptcy of both partners of the old firm that the assets in the hands of the continuing partner were to be regarded as individual assets, to be applied to the payment of his individual debts before any portion could be used to pay the debts of the old firm.<sup>9</sup>

The assets of an individual partner consist of that property in which such partner is separately interested at the time of the bankruptcy.<sup>10</sup> A policy of insurance on the life of a partner is not partnership property because it may have been pledged at times for a firm debt.<sup>10\*</sup>

Where all the property of the firm belongs to one partner and the others having no interest in the gains and profits, such

<sup>8</sup> *In re Long*, No. 8476 Fed. Cas., 7 Ben. 141; *In re Montgomery*, No. 9727 Fed. Cas., 3 Ben. 565; *In re Willey*, No. 17656 Fed. Cas., 4 Biss. 214; *In re Lane*, No. 8044 Fed. Cas., 2 Low. 333; *In re McEwen*, No. 8783 Fed. Cas., 6 Biss. 294; *In re Kahley*, No. 7593 Fed. Cas., 2 Biss. 383.

<sup>9</sup> *In re Montgomery*, No. 9727 Fed. Cas., 3 Ben. 565.

<sup>10</sup> *In re Lowe*, No. 8564 Fed. Cas., 11 N. B. R. 221; *In re Clark*, No. 2798 Fed. Cas., 4 Ben. 88.

*In re Rudnick*, 102 Fed. Rep. 750, 4 Am. B. R. 531, it was held that

where one partner had, prior to bankruptcy, transferred all of his property and interests to the other partner, and it became in the hands of the other partner, who was also a bankrupt debtor, exempt under the laws of the state, he may lawfully sell or dispose of it, and the trustee takes no title therein. But see *In re Rosenbaum*, 1 N. B. N. 541.

<sup>10\*</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *In re Day*, 176 Fed. Rep. 377, 23 Am. B. R. 285.

property is the individual property of the partner. Where the interest of each partner extends to the entire stock in trade, the excess of the interest of one partner over that of the other partners is not the former's separate estate.<sup>11</sup>

### § 270. What are firm debts.

A debt is considered a firm debt and may be proved against the joint or partnership fund when it is contracted or incurred by the partnership in the ordinary course of business. It is clearly a firm debt when all the partners act jointly. One partner, acting within the scope of the business, may bind the firm, as will be pointed out presently.

It has been held to be joint debt where a joint and several note was given for money borrowed by a firm and signed in the firm name, with other names following,<sup>1</sup> or where a note was endorsed in the name of the firm.<sup>2</sup> Trust funds which have been invested by an executor in his partnership business with the knowledge and consent of his copartner may be proved against the partnership fund.<sup>3</sup>

A judgment against partners and others jointly is a several claim as against the partners, and can not receive a dividend from the joint estate,<sup>4</sup> but a judgment on a firm note for a firm debt is provable against the firm.<sup>5</sup>

<sup>11</sup> *In re* Lowe, No. 8564 Fed. Cas., 11 N. B. R. 221.

<sup>1</sup> *Union Bank v. Neill* (C. C. A. 5th Cir.), 149 Fed. Rep. 711, 79 C. C. A. 417, 17 Am. B. R. 841; *In re* Shattuck & Bugh (Ref.), 6 Am. B. R. 56; *In re* Holbrook, No. 6588 Fed. Cas., 2 Low. 259; *Bush v. Crawford*, No. 2224 Fed. Cas., 7 N. B. R. 299. See *McDaniel v. Stroud* (C. C. A. 4th Cir.), 106 Fed. Rep. 486, 45 C. C. A. 446, 5 Am. B. R. 685.

<sup>2</sup> *Union Bank v. Neill* (C. C. A. 5th Cir.), 149 Fed. Rep. 711, 79 C. C. A. 417, 17 Am. B. R. 841;

*Gauss v. Schrader*, 48 Fed. Rep. 816; *In re* Norris, No. 10302 Fed. Cas., 2 Hask. 19; *In re* Morse, No. 9853 Fed. Cas., 11 N. B. R. 482; *Ex parte* Russell, No. 12148 Fed. Cas., 16 N. B. R. 476. But see *In re* Jones, 100 Fed. Rep. 781, 4 Am. B. R. 141.

<sup>3</sup> *In re* Tesson, No. 13844 Fed. Cas., 9 N. B. R. 378.

<sup>4</sup> *In re* Herrick, No. 6420 Fed. Cas., 13 N. B. R. 312; *In re* Lewis, No. 8313 Fed. Cas., 8 N. B. R. 546.

<sup>5</sup> *In re* Berriam, No. 1351 Fed. Cas., 6 Ben. 297; *In re* Kitzinger, No. 7861 Fed. Cas., 19 N. B. R. 152.

A claim on a bond or notes signed by individual partners, but not for a firm obligation, is not partnership debt.<sup>6</sup> When a note or bond is given for a firm debt the rule is otherwise.<sup>7</sup> A note given by a firm and endorsed by one partner is a firm debt.<sup>8</sup> A note given by a firm to a surety on a bond of a partner may be a firm debt.<sup>8\*</sup> Oral testimony may be received for the purpose of showing the real transaction whether a note is a firm or an individual obligation.<sup>8\*\*</sup>

Where property of an individual partner of the firm is taken over and the firm assumes his individual debts and sufficient consideration is shown therefor, such debts become firm debts.<sup>8†</sup>

A debt is not always so manifestly a firm debt when it is contracted by one of the partners for the firm. In determining whether such a debt is a firm debt or an individual debt resort must be had to the general law of partnership.<sup>9</sup> The general rule is that every partner is the general agent of the

<sup>6</sup> *In re Stoddard Bros. Lumber Co.*, 169 Fed. Rep. 190, 22 Am. B. R. 435; *Strause v. Hooper*, 105 Fed. Rep. 590, 5 Am. B. R. 225; *In re Jones*, 116 Fed. Rep. 431, 8 Am. B. R. 826; *In re Webb*, No. 17313 Fed. Cas., 2 N. B. R. 614; *In re Roddin*, No. 11989 Fed. Cas., 6 Biss. 377; *In re Miller*, No. 9556 Fed. Cas., 1 N. Y. Leg. Obs. 180; *In re Bucyrus Machine Co.*, No. 2100 Fed. Cas., 5 N. B. R. 303.

<sup>7</sup> *Davis v. Turner* (C. C. A. 4th Cir.), 120 Fed. Rep. 605, 56 C. C. A. 619, 9 Am. B. R. 704; *In re Culver*, 176 Fed. Rep. 450, 23 Am. B. R. 779; *In re Warren*, No. 17191, Fed. Cas., 2 Ware, 322.

<sup>8</sup> *Lamoille County Nat. Bank v. Stevens*, 107 Fed. Rep. 245, 6 Am. B. R. 164.

<sup>8\*</sup> *In re Speer Bros.*, 144 Fed. Rep. 910, 16 Am. B. R. 524.

<sup>8\*\*</sup> *In re Stoddard Bros. Lumber Co.*, 169 Fed. Rep. 190, 22 Am. B.

R. 435; *In re Weisenberg & Co.*, 131 Fed. Rep. 517, 12 Am. B. R. 41.

<sup>8†</sup> *Merchants Nat. Bank v. Thomas* (C. C. A. 5th Cir.), 121 Fed. Rep. 305, 51 C. C. A. 374, 10 Am. B. R. 299; *In re Sickman & Glenn*, 155 Fed. Rep. 508, 19 Am. B. R. 232; *In re Dresser* (C. C. A. 2d Cir.), 135 Fed. Rep. 495, 68 C. C. A. 207, 13 Am. B. R. 747; *Dacovich v. Schley* (C. C. A. 5th Cir.), 134 Fed. Rep. 72, 67 C. C. A. 198, 13 Am. B. R. 752.

See also *Hibberd v. McGill* (C. C. A. 3d Cir.), 129 Fed. Rep. 590, 64 C. C. A. 158, 12 Am. B. R. 101.

<sup>9</sup> See Bates on Partnership, Sec. 315, *et seq.*; Lindley on Partnership, p. 124; *Taylor v. Rasch*, No. 13800 Fed. Cas., 1 Flip. 385; *In re Blanchard*, 161 Fed. Rep. 793, 20 Am. B. R. 417, it was held that a partner could not bind the firm by giving a mortgage on firm property.



firm to carry out its objects and transact its business in the usual and ordinary way; that he is not the agent of each partner individually and can not bind them severally or any number of them less than all. Unless his power is limited by the articles and the restriction is known, he represents all the powers of the firm within the scope of its ordinary business, but is confined to such acts as are necessary for carrying on the partnership business in the ordinary way, according to the usages of the particular business. The several instances in which a partner may contract a debt for the firm will be found in the works on partnership and need not be considered here.<sup>9</sup> Capital contributed by a partner is not a firm debt.<sup>10</sup> Money loaned a firm under the will of a deceased partner is a firm debt.<sup>11</sup> A note given by a remaining to a retiring partner for his interest is not a firm obligation.<sup>12</sup>

### § 271. What are individual debts.

Individual debts are such as are contracted by the individual partners for their own benefit or such liabilities as by law they are required to liquidate. Debts for individual clothing, furniture and the like are individual and not partnership debts.<sup>1</sup>

Creditors holding individual obligations of the members of the firm, although given for a consideration moving to the firm, are entitled to a dividend out of the individual estates.<sup>2</sup> A solvent partner who has paid firm debts out of his separate estate is entitled to prove contribution against the separate

<sup>10</sup> *In re* Floyd & Co., 156 Fed. Rep. 206, 19 Am. B. R. 438.

<sup>11</sup> *In re* Lough (C. C. A. 2d Cir.), 182, 961, 105 C. C. A. 423, 25 Am. B. R. 597.

<sup>12</sup> *In re* Stoddard Bros. Lumber Co., 169 Fed. Rep. 190, 22 Am. B. R. 435.

<sup>1</sup> Taylor v. Rasch, No. 13800 Fed. Cas., 1 Flip. 385.

<sup>2</sup> *In re* Weisenberg & Co., 131 Fed. Rep. 517, 12 Am. B. R. 417;

*In re* Stoddard Bros. Lumber Co., 169 Fed. Rep. 190, 22 Am. B. R. 435; *In re* Lehigh Lumber Co., 101 Fed. Rep. 216, 4 Am. B. R. 221. *In re* Stevens, 104 Fed. Rep. 323, 5 Am. B. R. 9; *In re* Jones, 116 Fed. Rep. 341, 8 Am. B. R. 626; *In re* Bucyrus Machine Co., No. 2100 Fed. Cas., 5 N. B. R. 303; *In re* Miller, No. 9556 Fed. Cas., 1 N. Y. Leg. Obs. 180.

estate of his bankrupt partners.<sup>3</sup> An administrator of a deceased partner, whose property has been converted by the surviving partner, has a provable claim against the separate estate of the surviving partner.<sup>4</sup>

## § 272. What are joint and separate debts.

There are some debts of such a character that they may be proved both against the firm and the individual.

In such cases where a dividend has been paid on one estate, the amount should be deducted and a dividend only on the balance allowed from the other. But when the dividends on both estates are simultaneous, the creditor is entitled to prove against both estates for the whole debt. In no case is he entitled to collect more than the amount of his debt from both estates.

A note made by a firm and endorsed by one of the partners individually may be proven, both against the estate of the firm and the individual estate of the endorser.<sup>1</sup> So also the beneficiaries of a trust fund, invested by the executor in his partnership business with the knowledge and consent of his copartner, may prove their claim against the partnership, although they have proved it against the estate of the executor.<sup>2</sup>

<sup>3</sup> *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815; *In re* Swift, 106 Fed. Rep. 65, 5 Am. B. R. 415; *In re* Dell, No. 3774 Fed. Cas., 5 Saw. 344.

*In re* Hamilton, 1 Fed. Rep. 800, where two firms were partners, and one firm tried to prove against the individual estate of a member of the other firm.

<sup>4</sup> *In re* Mills, No. 9611 Fed. Cas., 11 N. B. R. 74.

<sup>1</sup> *In re* McCoy (C. C. A. 7th Cir.), 150 Fed. Rep. 106, 80 C. C. A. 60, 17 Am. B. R. 760; *Buckingham v. First Nat. Bank* (C. C. A. 6th

Cir.), 131 Fed. Rep. 192, 65 C. C. A. 498, 12 Am. B. R. 465; *In re* Farnum, No. 4674 Fed. Cas., 6 Law Rep. 21; *Emery v. Canal Nat. Bank*, No. 446 Fed. Cas., 3 Cliff. 507; *Stephenson v. Jackson*, No. 13374 Fed. Cas., 2 Hughes, 204; *In re* Bradley, No. 1772, Fed. Cas., 2 Biss. 515; *Mead v. National Bank*, No. 9366, Fed. Cas., 6 Blatch. 180; *In re* Knight, No. 7880 Fed. Cas., 2 Biss. 518; *In re* Long, No. 8476 Fed. Cas., 7 Ben. 141; *In re* Adams, 29 Fed. Rep. 843.

<sup>2</sup> *In re* Tesson, No. 13844 Fed. Cas., 9 N. B. R. 378.

Where a member of a firm which is general agent of a corporation misappropriated funds to the uses of the firm, which was known by the firm, it was held that proof might be made both against the firm and the individual estate.<sup>3</sup> Where a creditor holds different notes for partnership debts, some made by the individual partners and others in the name of the firm, he may prove the individual notes against the individual estates and the firm notes against the firm estates.<sup>4</sup>

Where a creditor of a partnership has a lien on both the partnership and individual assets of the members, he may resort to either fund for payment at his option, unless there are creditors having liens only on the individual fund. Then the equitable rule as to two funds will apply and the partnership creditor must first exhaust the partnership fund.<sup>5</sup> A partnership creditor who is secured by a pledge or mortgage upon the individual property of a partner may ordinarily prove for his whole claim against the partnership without first exhausting his security.<sup>6</sup>

Another class of joint and separate debts arises upon the conversion of joint into separate debts and *vice versa*. Thus, when one of the partners takes the firm assets and agrees to pay the joint debt he becomes individually liable,<sup>7</sup> and the retiring partner will also continue liable as before the dissolution of the partnership.<sup>8</sup> The retiring partner may be released from such liability if the creditors agree to accept the continuing partner as their sole debtor. Precisely what amounts to such an acceptance it is impossible to state. It

<sup>3</sup> *In re* Coe, 169 Fed. Rep. 1002, 22 Am. B. R. 384; *In re* Baxter, No. 119 Fed. Cas., 18 N. B. R. 62.

<sup>4</sup> *Mead v. National Bank*, No. 9366 Fed. Cas., 6 Blatch. 180.

<sup>5</sup> *In re* Lewis, No. 8313 Fed. Cas., 2 Hughes, 320.

<sup>6</sup> *In re* May, No. 9327 Fed. Cas., 17 N. B. R. 192. See also *In re* Norris, No. 10302 Fed. Cas., 2 Hask. 19.

<sup>7</sup> *In re* Lloyd, 22 Fed. Rep. 88; *In re* Collier, No. 3002 Fed. Cas., 12 N. B. R. 266; *In re* Downing, No. 4044 Fed. Cas., 1 Dill. 33; *In re* Rice, No. 11750 Fed. Cas., 9 N. B. R. 373; *In re* Long, No. 8476 Fed. Cas., 7 Ben. 141.

<sup>8</sup> *In re* Pease, No. 10881 Fed. Cas., 13 N. B. R. 168; *Dickenson v. Lockyer*, 4 Ves. 36; *Smith v. Jamieson*, 5 T. R. 601; *Graham v. Whichelo*, 1 Cr. & M. 186.

seems that mere dealing by the creditor with the continuing partner as his debtor, or the taking of a separate security from him not involving a merger of the original debt, is not conclusive evidence of an intention to abandon all claims against the retiring partner.<sup>9</sup> In order that the transaction should have this effect it must be shown that the security was intended to be taken in satisfaction of the original debt, or that a new was substituted for the old liability.<sup>10</sup> In case there is no such acceptance the firm creditors may prove against the estate of the continuing partner and share *pari passu* with the separate creditors.<sup>11</sup> They may then pursue the individual partner for the balance.<sup>12</sup>

It may happen upon the formation of a partnership between two persons that it is agreed that the debts of one of them shall become the joint debts of the firm.<sup>12\*</sup> Such an agreement will not make his separate creditors joint creditors of both partners unless the creditors assent to the arrangement. If the partnership is adjudged bankrupt before such assent is given, such creditors will not be entitled to prove their claims as joint creditors of the firm against the partnership estate.<sup>13</sup>

<sup>9</sup> Harris v. Farwell, 15 Beav. 31; David v. Elice, 5 B. & C. 196; *Ex parte* Smith, 1 M. D. & D. 165; Heath v. Percival, 1 P. W. 682; Lodge v. Dicas, 3 B. & A. 611.

<sup>10</sup> See cases cited in last note above, and Bilborough v. Holmes, 5 Chan. Div. 255; *Ex parte* Butcher, 13 Chan. Div. 465.

<sup>11</sup> *In re* Lloyd, 22 Fed. Rep. 88; *In re* Collier, No. 3002 Fed. Cas., 12 N. B. R. 266; *In re* Downing, No. 4044 Fed. Cas., 1 Dill. 33; *In re* Rice, No. 11750 Fed. Cas., 9 N. B. R. 373; *In re* Long, No. 8476 Fed. Cas., 7 Ben. 141.

<sup>12</sup> *In re* Pease, No. 10881 Fed. Cas., 13 N. B. R. 168.

<sup>12\*</sup> Merchants Bank v. Thomas (C. C. A. 5th Cir.), 121 Fed. Rep.

305, 51 C. C. A. 374, 10 Am. B. R. 299; *In re* Sickman & Glenn, 155 Fed. Rep. 508, 19 Am. B. R. 232;

<sup>13</sup> *In re* Isaacs, No. 7093 Fed. Cas., 3 Saw. 35; Hibberd v. McGill (C. C. A. 3d Cir.), 129 Fed. Rep. 590, 64 C. C. A. 158, 12 Am. B. R. 101.

In First Nat. Bank v. State Nat. Bank (C. C. A. 9th Cir.), 131 Fed. Rep. 422, 65 C. C. A. 414, 12 Am. B. R. 429 and 440, affirming *In re* McIntire, 132 Fed. Rep. 295, 12 Am. B. R. 787, it was held that where there is no sufficient evidence to sustain a finding that a partnership assumed the indebtedness of an old firm at the formation of the new partnership, the notes of the new firm signed by the partner of the

The character of a debt may be changed from joint to separate or *vice versa* by taking security of a higher nature or by obtaining a judgment. The theory upon which this rule rests is that the original debt is extinguished or merged, and the right to prove depends upon the nature of the substituted security whether it is joint or separate. Thus, a simple contract debt will merge in a bond and a bond in a judgment,<sup>14</sup> but a simple contract debt will not merge in a bill of exchange or a promissory note, for the quality is not changed.<sup>15</sup>

### § 273. Proof by firm creditors in partnership cases.

The general rule is that firm creditors must go first against the joint estate, and are not entitled to receive any dividend out of the separate estate until all the separate creditors have been paid in full, and that the separate creditors have demand first on the separate estate, and are not entitled to receive any dividend from the partnership estate until all the firm creditors are paid in full.<sup>1</sup>

Where a firm is adjudged bankrupt the firm creditors are entitled to be paid in full out of the partnership estate before any part of that estate is applied in augmentation of the separate estates of the partners.<sup>2</sup>

If there is no firm estate the creditors of the firm are entitled to rank as separate creditors of the several estates of

old firm as renewal notes of such indebtedness to bank which had knowledge of the fact, are not provable against the new firm's estate in bankruptcy.

<sup>14</sup> Higgins' Case, 6 Coke 344; *Ex parte* Christy, 2 Dea. & Chit. 155; Price v. Moulton, 10 C. B. 561; *Ex parte* Davy, Ridg, 289.

<sup>15</sup> *Ex parte* Lobb, 7 Ves. 592; *Ex parte* Seddon, 2 Cox, 49.

<sup>1</sup> B. A. 1898, Sec. 5f; Euclid Nat. Bank v. Union Trust Co. (C. C. A. 4th Cir.), 149 Fed. Rep. 975, 79 C. C. A. 485, 17 Am. B. R. 834;

*In re* Telfer (C. C. A. 6th Cir.), 184 Fed. Rep. 244, 106 C. C. A. 366, 25 Am. B. R. 148; Buckingham v. First Nat. Bank (C. C. A. 6th Cir.), 131 Fed. Rep. 192, 65 C. C. A. 498, 12 Am. B. R. 465; *In re* Filmar (C. C. A. 7th Cir.), 177 Fed. Rep. 170, 100 C. C. A. 632, 24 Am. B. R. 194; Sargent v. Blake (C. C. A. 8th Cir.), 160 Fed. Rep. 57, 87 C. C. A. 213, 20 Am. B. R. 114; *In re* Terrens, 175 Fed. Rep. 495, 23 Am. B. R. 680; *In re* Blanchard, 161 Fed. Rep. 793, 20 Am. B. R. 417.

<sup>2</sup> B. A. 1898, Sec. 5f.

the respective partners. In such case the firm and individual creditors may share *pari passu* in the individual estate.<sup>3</sup>

It has been held that this exception to the general rule, long recognized by the courts of equity and bankruptcy, does not apply under the present bankrupt act, because it is not mentioned in the statute.<sup>4</sup> But when Congress adopts a rule of administering partnership property which has received a uniform construction from very early times, it is presumed that it intends the same construction placed on its language, unless it expressly declares otherwise.

Any partnership assets, however small, which are available for distribution will defeat the right of firm creditors to receive dividends from the separate estate until after the individual debts are paid.<sup>5</sup> Where the firm assets are only sufficient to

<sup>3</sup> *Conrader v. Cohen* (C. C. A. 3d Cir.), 121 Fed. Rep. 801, 58 C. C. A. 249, 9 Am. B. R. 619, affirming *In re Conrader*, 118 Fed. Rep. 676, 9 Am. B. R. 85; *In re Green*, 116 Fed. Rep. 118, 8 Am. B. R. 553; *In re West*, 39 Fed. Rep. 203; *In re Downing*, No. 4044 Fed. Cas., 1 Dill. 33; *In re Jewett*, No. 7304 Fed. Cas., 1 N. B. R. 491; *In re Rice*, No. 11750 Fed. Cas., 9 N. B. R. 373; *In re McEwen*, No. 8783 Fed. Cas., 6 Biss. 294; *In re Collier*, No. 3002 Fed. Cas., 12 N. B. R. 266; *In re Mills*, No. 9611 Fed. Cas., 11 N. B. R. 74; *In re Knight*, No. 7880 Fed. Cas., 2 Biss. 518.

<sup>4</sup> *In re Janes* (C. C. A. 2d Cir.), 133 Fed. Rep. 912, 67 C. C. A. 216, 13 Am. B. R. 341; *In re Henderson*, 142 Fed. Rep. 588, 16 Am. B. R. 91; affirmed, *sub nom.*, *Euclid Nat. Bank v. Union Trust and Deposit Co.* (C. C. A. 4th Cir.), 149 Fed. Rep. 975, 79 C. C. A. 485, 17 Am. B. R. 834.

*In re Wilcox*, 94 Fed. Rep. 84, 2 Am. B. R. 117, Judge Lowell has

reviewed the history of the practice in this country and in England in an elaborate opinion and held that this exception to the general rule did not apply under the present bankrupt act. The large number of cases reviewed by him shows, however, that this exception has generally been recognized both in equity and bankruptcy from very early times.

*In re Mills*, 95 Fed. Rep. 269, 2 Am. B. R. 667, Judge Baker refused to permit partnership creditors, who had received fifty-five per centum of their claims in a state proceeding, closing up a partnership, to prove the residue of their claims equally with the individual creditors in the distribution of the individual estate. There were no firm assets.

<sup>5</sup> *In re Marwick*, No. 9181 Fed. Cas., 2 Ware, 233; *In re Smith*, No. 12987 Fed. Cas., 13 N. B. R. 500; *In re Morse*, No. 9854 Fed. Cas., 13 N. B. R. 376; *In re Blumer*, 12 Fed. Rep. 489; *In re Litchfield*, 5 Fed. Rep. 47.

pay the expenses of the proceedings, the firm creditors may share in the individual estate, for the words "net proceeds" refer to the estate to be distributed among the creditors.<sup>6</sup>

The weight of authority is to the effect that in order to exclude the firm creditors, an available joint fund must be affirmatively shown to exist. The burden of proving that there is such a fund rests upon the individual creditors.<sup>7</sup> Where there are no individual assets the separate creditors of the partners can not prove against the partnership fund,<sup>8</sup> except in the surplus after paying the firm debts.

It seems that the general rule may be waived by the partnership, as by giving a mortgage upon partnership property to secure an individual debt.<sup>9</sup>

Where there are no separate creditors of a bankrupt partner the firm creditors are entitled to prove at once for the purpose of receiving dividends from his separate estate,<sup>10</sup> and this right may be acquired by the firm creditors paying all the separate creditors.<sup>11</sup>

Where one member of a firm becomes bankrupt, the firm creditors are entitled to prove for the purpose of voting at any meeting of creditors and are entitled to vote.<sup>12</sup> But they are not entitled to receive any dividend out of the separate property

<sup>6</sup> *In re* McEwen, No. 8783 Fed. Cas., 6 Biss. 294; *In re* Litchfield, 5 Fed. Rep. 47.

<sup>7</sup> *In re* Jewett, No. 7304 Fed. Cas., 1 N. B. R. 491; *In re* West, 39 Fed. Rep. 203; *contra*, *In re* Byrne, No. 2270 Fed. Cas., 1 N. B. R. 464.

<sup>8</sup> *In re* Kinkead, No. 7825 Fed. Cas., 3 Biss. 405.

<sup>9</sup> *In re* Kahley, No. 7593 Fed. Cas., 2 Biss. 383; *Thompson v. Spittle*, 102 Mass. 207.

See also *Fisher v. Syfers*, 109 Ind. 514; *Nat. Bank v. Sprague*, 20 N. J. Eq. 13; *Kennedy v. Nat.*

*Union Bank*, 23 Hun (N. Y.), 494; *Purple v. Farrington*, 119 Ind. 164, *Winslow v. Wallace*, 116 Ind. 317, *Jones Chat. Mort.*, Sec. 44.

<sup>10</sup> *Ex parte* Chandler, 9 Ves. 35; *In re* Day, 176 Fed. Rep. 377, 23 Am. B. R. 785.

<sup>11</sup> *Ex parte* Taitt, 16 Ves. 193.

<sup>12</sup> *In re* Beck, 110 Fed. Rep. 140, 6 Am. B. R. 554; *In re* Webb, No. 17317 Fed. Cas., 4 Saw. 326.

See also *Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237, as to the right of firm creditors against partners' estates.

of the bankrupt until the separate creditors have been paid in full.<sup>13</sup>

If a creditor proves against the partnership estate under a misapprehension as to the facts, he may be allowed to transfer his proof to the separate estate of the partner whose debt it is.<sup>14</sup>

#### § 274. Proof by individual creditors.

The general rule is that individual creditors must look to the individual estate and are not entitled to receive any dividend from the partnership estate until all the firm creditors are paid in full. The separate creditors of each partner may only prove against the individual estate of that partner.<sup>1</sup>

They are not entitled to prove against the partnership estate. If any surplus of the firm assets remain after paying the firm debts, they are applied in augmentation of the separate estates of the partners, in proportion to their several interests in the firm.<sup>2</sup>

Individual creditors are not entitled to vote in the choice of a trustee, where the firm is adjudged bankrupt.<sup>3</sup> Where the adjudication goes against a partner and not against the firm, the individual creditors of that partner and the firm creditors together elect the trustee.<sup>4</sup>

#### § 275. Proof by firm and individual creditors.

A firm and individual creditor, that is, a creditor for whose debt the firm is jointly and one or more of the partners is

<sup>13</sup> *In re Diamond* (C. C. A. 2d Cir.), 149 Fed. Rep. 407, 79 C. C. A. 227, 17 Am. B. R. 563.

<sup>14</sup> *Ex parte Vining*, 1 Dea. 555.

<sup>1</sup> B. A. 1898, Sec. 5f.

<sup>2</sup> B. A. 1898, Sec. 5f.

<sup>3</sup> *In re Coe*, 154 Fed. Rep. 162, 18

Am. B. R. 718; *In re Eagles & Crisp*, 99 Fed. Rep. 696, 3 Am. B. R. 733; *In re Phelps*, No. 11071 Fed. Cas., 1 N. B. R. 525.

<sup>4</sup> *In re Beck*, 110 Fed. Rep. 140, 6 Am. B. R. 554; *In re Webb*, No. 17317 Fed. Cas., 4 Saw. 326.



also liable, may prove and receive dividends from both the firm estate and the individual estate or either of them.<sup>1</sup>

The principle upon which double proof is allowed is that the firm estate and the individual estate are considered in the administration of property in bankruptcy, distinct estates.

For the same reason if partners are jointly and separately liable for a debt and one only is bankrupt, the creditor may prove against his estate without prejudice to his rights against the solvent partner, or the creditor may sue the solvent partner without prejudice to his right to prove against the bankrupt partner for what he may not recover from the solvent partner.

An individual creditor of one partner having a security on the firm estate may prove for the full amount of his debt against the individual estate without giving up his security, and on the other hand a creditor of a partnership, whose debt is secured by mortgage or lien on the individual estate of one of the partners, may prove for the full amount of his debt against the firm estate without giving up his security.

### **§ 276. Proof by firm against the individual estates and vice versa.**

Section 5g provides that "The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates, so as to prevent preferences, and secure the equitable distribution of the property of the several estates."

It will be observed that proof by a firm against an individual estate and *vice versa* may be had only by leave of

<sup>1</sup> *Buckingham v. First Nat. Bank* (C. C. A. 6th Cir.), 131 Fed. Rep. 192, 65 C. C. A. 498, 12 Am. B. R. 465; *In re McCoy* (C. C. A. 7th Cir.), 150 Fed. Rep. 106, 80 C. C. A. 60, 17 Am. B. R. 760 and cases

cited in the opinion. *In re Terrens*, 175 Fed. Rep. 495, 500, 23 Am. B. R. 680; *In re Bates*, 100 Fed. Rep. 263, 4 Am. B. R. 56; *In re Coe*, 169 Fed. Rep. 1002, 22 Am. B. R. 384.

court.<sup>1</sup> Although proof may be permitted, it does not follow that dividends may be received at once. Prior to the present act a rule prevailed in this country, as also for a long period in England, permitting proof to be made but that no dividend was paid until the creditors having prior claims on the estate had been paid.<sup>2</sup>

It has been uniformly held that the rule of distribution prescribed by section 5*f* is not varied by anything permissible under this provision, where the partnership and the individual members are all adjudged bankrupts and the estates of all of them are before the court and are unaffected by preference or fraud.<sup>3</sup> In other words, it does not change the general rule that the separate estate of one partner shall not claim against the joint estate of the partnership in competition with the joint creditors, nor shall the joint estate claim against the separate estate in competition with the separate creditors.<sup>4</sup> It has accordingly been held that a partner is not entitled to a dividend from firm assets for advances made or goods sold to the partnership,<sup>5</sup> nor a firm from the individual estate for money loaned to a partner.<sup>6</sup>

<sup>1</sup> *In re Telfer*, 184 Fed. Rep. 244, 106 C. C. A. 366, 25 Am. B. R. 148.

<sup>2</sup> *Murrill v. Neil*, 8 How. 414, 12 L. Ed. 1135; *In re McLean*, No. 8879 Fed. Cas., 15 N. B. R. 333; *Ex parte Elton*, 3 Ves., Jr., 238.

In *Murray v. Murray*, 5 Johnston's Chan. Rep. 72, *et seq.*, and in *McCulloch v. Dashiell*, 1 Har. & Gill, 99, *et seq.*, the doctrine on this question of distribution as illustrated in both the English and American decisions is ably treated.

<sup>3</sup> *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 244, 106 C. C. A. 366, 25, 148; *Wallerstein v. Ervin* (C. C. A. 3d Cir.), 112 Fed. Rep. 124, 50 C. C. A. 129, 7 Am. B. R. 256; *In re Filmar* (C. C. A. 7th Cir.), 177 Fed. Rep. 170, 100 C. C. A. 632, 24 Am. B. R. 194; *In re Terrens*, 175

Fed. Rep. 495, 23 Am. B. R. 680; *In re Denning*, 114 Fed. Rep. 219, 8 Am. B. R. 183; *In re Rice*, 164 Fed. Rep. 509, 21 Am. B. R. 205; *In re Effinger*, 184 Fed. Rep. 728, 24 Am. B. R. 930.

<sup>4</sup> *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801; *Murrill v. Neil*, 8 How. 414, 12 L. Ed. 1135.

<sup>5</sup> *Wallerstein v. Ervin* (C. C. A. 3d Cir.), 112 Fed. Rep. 124, 50 C. C. A. 129, 7 Am. B. R. 256; *In re Rice*, 164 Fed. Rep. 509, 21 Am. B. R. 205; *In re Denning*, 114 Fed. Rep. 219, 8 Am. B. R. 183; *In re Effinger*, 184 Fed. Rep. 728, 24 Am. B. R. 930.

<sup>6</sup> *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 244, 106 C. C. A. 366, 25 Am. B. R. 148.

Two exceptions are admitted to the general rule.<sup>7</sup> *First*, where property of a partner has been fraudulently applied for purposes of the partnership, or firm property fraudulently used in augmentation of a partner's estate. *Second*, where a distinct trade is prosecuted by one or more of the members of the firm.

Section 5g clearly authorizes the court to deal with the fraudulent application of firm property to the augmentation of individual estates and *vice versa* for the purpose of securing an equitable distribution of the property of the several estates.<sup>8</sup> Congress clearly intended that the courts of bankruptcy should have full equity powers to deal with the several estates to the end that justice might be done, and to prevent any fraudulent scheme as between the firm and the individual partners.<sup>9</sup>

### **§ 277. Proof by partners against the individual estate of a copartner.**

A solvent partner, who has a claim against his copartner, can not prove his own separate debt against the individual estate of the bankrupt partner, while any of the firm creditors are unpaid.<sup>1</sup>

The reason is that he is himself liable to all of the firm creditors, which is sufficient to show that in equity he can not be permitted to claim any part of the funds of the bankrupt before all the creditors to whom he is liable are paid.<sup>1</sup>

<sup>7</sup> *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

<sup>8</sup> *In re Filmar* (C. C. A. 7th Cir.), 177 Fed. Rep. 170, 100 C. C. A. 632, 24 Am. B. R. 194; *In re Denning*, 114 Fed. Rep. 219, 8 Am. B. R. 183; *In re Jones and Cook*, 100 Fed. Rep. 781, 4 Am. B. R. 141.

*In re Denning*, 114 Fed. Rep. 219, 221, 8 Am. B. R. 183, speaking of the conversion of a joint estate into separate estates, Judge Lowell said: "Moreover, Section 5g of the Bankrupt Act was intended, I believe, to clear up the whole matter, and to permit the court to deal with conversions of this kind so as not

only to prevent preferences in the technical meaning of that word, but also so as to secure the equitable distribution of property of the several estates."

<sup>9</sup> *In re Filmar* (C. C. A. 7th Cir.), 177 Fed. Rep. 170, 100 C. C. A. 632, 24 Am. B. R. 194; *In re Telfer* (C. C. A. 6th Cir.), 184 Fed. Rep. 244, 106 C. C. A. 366, 25 Am. B. R. 148; *In re Terrens*, 175 Fed. Rep. 495, 23 Am. B. R. 680.

<sup>1</sup> *Emery v. Canal Nat. Bank*, No. 4446 Fed. Cas., 7 N. B. R. 217; approved, *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

A solvent partner can not prove against the individual estate of a bankrupt copartner in competition with the individual creditors of the bankrupt until all the firm creditors are paid.<sup>2</sup> The reason is that if a dividend were reserved to such a partner on such proof the firm creditors might be injured by such solvent partner stopping the surplus of the individual estate, which otherwise would be carried over to the firm estate, or the separate creditors might be injured by such stopping and the transmission of the same be delayed.

If a testator authorizes his executor to carry on the business with his assets and the executor does so and the firm becomes bankrupt, the persons beneficially entitled under the will can not prove in competition with the firm creditors. If, however, the assets of the testator did not remain as capital of the new firm but as a loan, the legatees are entitled to prove the debt against the estates of the firm and the partners.<sup>3</sup>

Debts due by the bankrupt partner to the partnership are entitled to priority in preference to the debts due by him to his separate creditors, and if the partnership funds prove insufficient to discharge his debt to the partnership, the solvent partner has a right to prove the deficiency against the separate estate of the bankrupt *pari passu* with the individual creditors.<sup>4</sup>

Where one partner pays the firm creditors he will be allowed to prove against the separate estate of his copartner for the share which the latter ought to have paid.<sup>5</sup> If one partner pays the firm creditors he is entitled to contribution from his copartners who may prove against the individual estate of a copartner.<sup>6</sup>

<sup>2</sup> *Ex parte* Lodge & Fendal, 1 Ves., Jr. 166; *Ex parte* Maude, L. R. 2 Ch. App. 555; *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801.

<sup>3</sup> *In re* Lough (C. C. A. 2d Cir.), 182 Fed. Rep. 961, 105 C. C. A. 423, 25 Am. B. R. 597.

<sup>4</sup> *Ex parte* Taylor, 2 Rose, 175; *Ex parte* King, 17 Ves. 115.

<sup>5</sup> *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63; *Ex parte* Watson, 4 Mad. 477; *Ex parte* Young, 2 Rose, 40.

<sup>6</sup> *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63; *Ex parte* Plowden, 3 M. & A. 402; *Ex parte* Smith, Buck, 492.

The trustee of an estate of a bankrupt partner can not prove a separate debt of that estate against the individual estate of a bankrupt copartner, for by so doing he would come into competition with firm creditors and the individual creditors of the bankrupt's estate. This is clearly in conflict with the general rule.

### § 278. Discharge in partnership cases.

Proceedings to obtain a discharge and in opposition thereto in partnership cases are the same as in other cases.<sup>1</sup> It may be said generally that whoever is adjudicated bankrupt may be granted a discharge, if otherwise entitled to it under the act.

Where the adjudication goes against the firm, a discharge may be granted the partnership entity, although the partners are not adjudicated bankrupts, or are not entitled to discharge.<sup>2</sup>

The effect of a discharge to a partnership entity alone is to release the firm from firm debts. A discharge does not extinguish the obligation. It may be pleaded in bar of any action against the partnership on the debt so released. It does not effect the liability of a partner for firm debts, if he has not been discharged.<sup>3</sup> In that case the firm creditor may assert his claim against the partner.<sup>4</sup>

If an adjudication goes against any of the partners, without regard to whether the firm is or is not adjudicated bankrupt, he or they may receive a discharge individually, if they are otherwise entitled to it under the act.<sup>5</sup> A partner is not

<sup>1</sup> See Discharges, Chap. XXXVI, *post*.

<sup>2</sup> *In re Bertenshaw* (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 61, 19 Am. B. R. 577; *In re Hale*, 107 Fed. Rep. 432, 6 Am. B. R. 35; *In re Pincus*, 147 Fed. Rep. 621, 17 Am. B. R. 331; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *Strause v. Hooper*, 105 Fed. Rep. 590, 5 Am. B. R. 225.

<sup>3</sup> B. A. 1898, Sec. 16; *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57.

<sup>4</sup> *Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57.

<sup>5</sup> *In re Gay*, 98 Fed. Rep. 870, 3 Am. B. R. 529; *In re Meyers*, 97 Fed. Rep. 757, 3 Am. B. R. 260; *In re Morrison*, 127 Fed. Rep. 186, 11 Am. B. R. 498; *In re Laughlin*, 96

entitled to a discharge individually, if he has not been adjudged bankrupt in the proceeding.<sup>6</sup>

There is conflict of decisions upon the question of the effect of a discharge of a partner with respect to releasing firm and individual obligations. A distinction has been attempted to be made between cases where the firm was or was not adjudicated a bankrupt, and between cases where firm assets and where no firm assets were administered. These distinctions appear immaterial in view of the principle underlying partnership relations.

The true rule is when a partner is granted a discharge it releases the unpaid balance of all debts provable in bankruptcy scheduled by him, except such as are expressly exempted by section 17 of the act. Partnership debts are provable against the individual estate of a partner,<sup>7</sup> although postponed

Fed. Rep. 589, 3 Am. B. R. 1; *In re* McFaun, 96 Fed. Rep. 592, 3 Am. B. R. 66; *In re* Hartman, 96 Fed. Rep. 593, 3 Am. B. R. 65; *In re* Bertenshaw (C. C. A. 8th Cir.), 157 Fed. Rep. 363, 85 C. C. A. 61, 19 Am. B. R. 577.

*In re* Gay, 98 Fed. Rep. 870, 872, 3 Am. B. R. 529, Judge Aldrich, speaking of a case where the firm and partners were both in bankruptcy said: "As to the form of discharge, in Massachusetts the practice is, in such a case, to discharge each individual partner from all debts and claims, making no distinct reference to their partnership of individual character,—the theory being that the discharge of the partner from all debts and claims covers both; while in Maine, as I understand it, the practice is to expressly discharge each individual partner from firm indebtedness, and individual indebtedness as well.

The petition for dis-

charge is granted, and a discharge should be issued to each individual partner, and should cover his liability on the debts and claims against Gay Bros., and his individual indebtedness as well."

<sup>6</sup> *Strause v. Hooper*, 105 Fed. Rep. 590, 5 Am. B. R. 225; *In re* Hale, 107 Fed. Rep. 432, 6 Am. B. R. 35; *In re* Pincus, 147 Fed. Rep. 621, 17 Am. B. R. 331.

<sup>7</sup> *In re* Diamond (C. C. A. 2d Cir.), 149 Fed. Rep. 407, 79 C. C. A. 227, 17 Am. B. R. 563; *Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237; *In re* Beck, 110 Fed. Rep. 140, 6 Am. B. R. 554; *In re* Webb, No. 17317 Fed. Cas., 4 Saw. 326; *Loomis v. Wallblom*, 94 Minn. 394, 13 Am. B. R. 687, *Berry Bros. v. Sheehan*, 115 N. Y. App. Div. 488, 17 Am. B. R. 322; *West Philadelphia Bank v. Gerry*, 106 N. Y. 467; *Curtis v. Woodward*, 58 Wis. 499.

in payment until after the individual debts are paid in full.<sup>8</sup> If, therefore, a partner schedules the firm debts as well as individual debts and prays for a release from them, a discharge to him individually releases both classes of obligations.<sup>9</sup> This is the rule in England.<sup>10</sup>

On the other hand it has been held that a discharge of a partner upon an individual petition without an adjudication against the firm will not release him from partnership obligations.<sup>11</sup> As observed by Judge Baker,<sup>12</sup> "The cases holding that a discharge granted to one member of a firm does not release him from partnership indebtedness, where he alone is adjudged a bankrupt, proceed on the principle that the trustee could not acquire possession of and administer the assets of the firm. In so holding it seems to have been overlooked that the bankruptcy of one member is *ipso facto* a dissolution of the firm, and that, while the solvent partner would be allowed to administer the partnership assets, yet the trustee in bankruptcy is entitled to the bankrupt's share of the partnership assets after the payment of the partnership debts. The separate estate of the bankrupt partner, and his beneficial

<sup>8</sup> See Sec. 273, *ante*; *In re Diamond* (C. C. A. 2d Cir.), 149 Fed. Rep. 407, 79 C. C. A. 227, 17 Am. B. R. 563.

<sup>9</sup> *Jarecki Mfg. Co. v. McElwaine*, 107 Fed. Rep. 249, 5 Am. B. R. 755; *In re Kaufman*, 136 Fed. Rep. 262, 14 Am. B. R. 393; *Loomis v. Wallblom*, 94 Minn. 394, 13 Am. B. R. 687; *Berry Bros. v. Sheehan*, 115 N. Y. App. Div. 488, 17 Am. B. R. 322; *Deaf & Dumb Institute v. Crockett*, 117 N. Y. App. Div. 269, 17 Am. B. R. 233; *West Philadelphia Bank v. Gerry*, 106 N. Y. 467; *Curtis v. Woodward*, 58 Wis. 499; *Wilkins v. Davis*, No. 17664 Fed. Cas., 2 Low. 511; *In re Downing*, No. 4044 Fed. Cas., 1 Dill. 33; *In re Stevens*, No. 13393 Fed. Cas., 1 Saw. 397; *In re Abbe*, No. 4 Fed. Cas., 2 N. B. R. 75; *In re Leland*, No.

8228 Fed. Cas., 5 Ben. 168; *In re Brick*, 4 Fed. Rep. 805-6; *In re Webb*, No. 17317 Fed. Cas., 4 Saw. 326.

<sup>10</sup> *Ex parte Yale*, 3 P. W. 25, note a; *Ex parte Hammond*, 21 Wkly. Rep. 865; *Thomson v. Harding*, 3 C. B. (N. S.) 254.

<sup>11</sup> *Dodge v. Kaufman*, 46 N. Y. Misc. 248, 15 Am. B. R. 542; *Hudgins v. Lane*, No. 6827 Fed. Cas., 2 Hughes, 361; *In re Noonan*, No. 10292 Fed. Cas., 10 N. B. R. 330; *In re Little*, No. 8390 Fed. Cas., 2 Ben. 186; *In re Grady*, No. 5654 Fed. Cas., 3 N. B. R. 227; *In re Bidwell*, No. 1392 Fed. Cas., 2 N. B. R. 229.

<sup>12</sup> *In Jarecki Mfg. Co. v. McElwaine*, 107 Fed. Rep. 249, 5 Am. B. R. 751.

interest in the firm after the payment of firm debts, is to be administered by the trustee for the payment of the bankrupt's individual debts. The adjudication of one partner as a bankrupt brings within the jurisdiction of the court his entire estate for administration, and if, after the payment of his individual debts out of his individual estate, any surplus remains, it will be applicable to the payment of firm indebtedness. For the purpose of reaching any such surplus, firm creditors may prove against the estate of the bankrupt partner."

In order that a discharge granted a partner upon his individual petition in bankruptcy may operate to release his partnership as well as his individual debts, the firm debts should be scheduled as partnership obligations, notice should be sent the firm creditors as such, the petition in bankruptcy and the application for discharge should show that the petitioner sought a discharge from firm as well as individual obligations, and notice of the proceedings should be given the remaining partners.<sup>13</sup> The courts have permitted proceedings defective in these respects to be cured by amendment.<sup>14</sup> But no amendment will be permitted to an individual petition to bring in the copartners for the purpose of adjudicating the firm bankrupt.<sup>15</sup>

When objections are filed to the discharge of partners who are bankrupts the trial may be joint, but the verdicts and judgments must be separate.<sup>16</sup>

<sup>13</sup> *In re* Meyers, 96 Fed. Rep. 408, 2 Am. B. R. 707, 97 Fed. Rep. 737, 3 Am. B. R. 260; *In re* Russell, 97 Fed. Rep. 32, 3 Am. B. R. 91; *In re* McFaun, 96 Fed. Rep. 592, 3 Am. B. R. 66; *In re* Elliott (Ref. Op.), 2 N. B. N. 350; *In re* Laughlin, 96 Fed. Rep. 589, 3 Am. B. R. 1; *In re* Hartman, 96 Fed. Rep. 593, 3 Am. B. R. 65; *In re* Morrison, 127 Fed. Rep. 186, 11 Am. B. R. 498.

<sup>14</sup> *In re* Morrison, 127 Fed. Rep. 186, 11 Am. B. R. 498; *In re* McFaun, 96 Fed. Rep. 592, 3 Am. B. R. 66; *In re* Hartman, 96 Fed. Rep.

<sup>15</sup> *In re* Mercur (C. C.A. 3d 136 Fed. Rep. 262, 14 Am. B. R. 393; *In re* Meyers, 97 Fed. Rep. 757, 3 Am. B. R. 260.

<sup>16</sup> *In re* Mercur (C. C. A. 3rd Cir.), 122 Fed. Rep. 384, 58 C. C. A. 472, 10 Am. B. R. 505; *In re* Kaufman, 176 Fed. Rep. 93, 23 Am. B. R. 429; Mahoney v. Ward, 100 Fed. Rep. 278, 3 Am. B. R. 770; *In re* Boylan, No. 1757 Fed. Cas., 1 Ben. 266.

<sup>16</sup> *In re* George, No. 5325 Fed. Cas., 1 Low. 409.



## CHAPTER XVIII.

## MEETINGS OF CREDITORS.

SEC.		SEC.	
279.	Proceedings after a reference generally.	283.	Proving claims to vote.
280.	The time and manner of calling the first meeting of creditors.	284.	Counting votes.
281.	The first meeting of creditors.	285.	The election of a trustee.
282.	Who are entitled to vote at creditors' meetings.	286.	Notice to trustee.
		287.	Other meetings of creditors.

**§ 279. Proceedings after a reference generally.**

A copy of the order referring a case to a referee is immediately sent by mail to the referee, or delivered to him personally by the clerk or other officer of the court.<sup>1</sup>

All the proceedings thereafter, except such as are required by the act or by the general orders to be had before the judge, are regularly had before the referee.<sup>1</sup> Proofs of claims and other papers filed subsequent to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.<sup>2</sup>

The first step usually taken by a referee after having notice of the reference is to call the first meeting of the creditors of the person adjudged to be bankrupt. The purpose of this meeting is to afford the creditors of the bankrupt an opportunity to prove their claims, to appoint a trustee, to examine the bankrupt and to transact such other business as properly may be transacted, relating to the administration of the estate of the bankrupt.

**§ 280. The time and manner of calling the first meeting of creditors.**

The first meeting of the creditors of a bankrupt should be held not less than ten nor more than thirty days after the

<sup>1</sup> Gen. Ord. 12.

kirk, 103 Fed. Rep. 779, 4 Am. B. R.

<sup>2</sup> Gen. Ord. 2, 20; *In re Oder-* 617.

adjudication.<sup>1</sup> It can not be held before an adjudication,<sup>2</sup> unless a composition with creditors is offered.<sup>2\*</sup> The meeting is regularly held at the county seat of the county in which the bankrupt has had his principal place of business, resided or had his domicile. If that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside or have his domicile within the United States, the court fixes a place for the meeting which is the most convenient for parties in interest.<sup>3</sup>

If such meeting should by any mischance not be held within such time, the court or referee fixes the date as soon as may be thereafter when it shall be held.<sup>4</sup> The court has directed a meeting of creditors to be called on notice, where the first meeting was not legal.<sup>4\*</sup> The meeting must be held in strict accordance with the time and place specified.<sup>5</sup>

The creditors should have at least ten days' notice of the first meeting by mail to their respective addresses, as they appear in the list of creditors of the bankrupt.<sup>6</sup> Notice should be given to all persons, known to claim to be creditors, although omitted from the schedules.<sup>6\*</sup> An involuntary bankrupt will not be heard to question the regularity of a meeting held upon notice given by the referee before the bankrupt's list of creditors was filed, although some of his creditors were not notified.<sup>6†</sup>

The notice to creditors of the first meeting should also be published at least once and may be published such number of

<sup>1</sup> B. A. 1898, Sec. 55a; *In re* Back Bay Automobile Co., 158 Fed. Rep. 679, 19 Am. B. R. 835.

<sup>2</sup> *In re* Back Bay Automobile Co., 158 Fed. Rep. 679, 19 Am. B. R. 835.

<sup>2\*</sup> B. A. 1898, Sec. 12a, as amended June 25, 1910, 36 Stat. at L. 838.

<sup>3</sup> B. A. 1898, Sec. 55a. Compare R. S. Secs. 5034 and 5035.

<sup>4</sup> B. A. 1898, Sec. 55a, and Sec. 1, clause 7; Gen. Ord. 12, par. 2.

<sup>4\*</sup> *In re* Kaufman, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re* Day & Co., 174 Fed. Rep. 164, 23 Am. B. R.

56; *In re* Evening Standard Publishing Co., 164 Fed. Rep. 517, 21 Am. B. R. 156.

<sup>5</sup> *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Back Bay Automobile Co., 158 Fed. Rep. 679, 19 Am. B. R. 845.

<sup>6</sup> B. A. 1898, Sec. 58a.

<sup>6\*</sup> *In re* Evening Standard Publishing Co., 164 Fed. Rep. 517, 21 Am. B. R. 156.

<sup>6†</sup> *In re* Schiller, 96 Fed. Rep. 400, 2 Am. B. R. 704.

additional times as the court may direct.<sup>7</sup> The last publication must be at least once and may be published such number of additional times as the court may direct.<sup>8</sup> The last publication must be at least one week prior to the date fixed for the meeting.<sup>7</sup> The paper in which the notice is published is designated by order of court.<sup>8</sup>

The form of notice is prescribed by the supreme court,<sup>9</sup> and is regularly given by the referee.<sup>10</sup> In mailing these notices the referee is entitled to use a government penalty envelope and need not pay postage.<sup>11</sup>

### § 281. The first meeting of creditors.

The first meeting of creditors of a bankrupt should be held at the time and place specified in the notice for holding it.<sup>1</sup> It is not proper to hold a meeting before that time.

If any creditor desires to have a voice in the business for which the meeting is called he should attend personally or by a duly authorized agent or attorney.<sup>2</sup> Where no creditor is present or represented the meeting is considered as held as fully and effectually as if creditors had appeared or been represented and the referee is not authorized to wait for or require a "quorum."<sup>3</sup>

The judge or referee is required by statute to be present.<sup>4</sup> The referee regularly attends. The bankrupt is also required to be present, provided the meeting is had at a place not more than one hundred and fifty miles from his home or principal place of business. If creditors attend, the meeting should be organized at the hour designated in the notice or as soon thereafter as practicable. The judge or referee presides.<sup>5</sup>

<sup>7</sup> B. A. 1898, Sec. 58*b*.

<sup>8</sup> B. A. 1898, Sec. 28.

<sup>9</sup> Form No. 18.

<sup>10</sup> B. A. 1898, Sec. 58*c*.

<sup>11</sup> This question has been ruled upon by the Post-office Department at Washington, Sec. 82, note.

<sup>1</sup> *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733.

<sup>2</sup> Gen. Ord. 4. See Official Forms

Nos. 20 and 21, see Forms Nos. 39 and 40, *post*.

<sup>3</sup> *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re Cogswell*, No. 2959 Fed. Cas., 1 Ben. 388.

<sup>4</sup> B. A. 1898, Sec. 55*b*.

<sup>5</sup> B. A. 1898, Sec. 7; Official Forms Nos. 14 and 18, see Forms Nos. 31 and 35, *post*; *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733.

The duties of the referee as presiding officer are of a judicial character.<sup>6</sup> His actions, therefore, under all circumstances should be free from reproach and above all suspicion of interest or partisanship. It is especially incumbent upon him in no manner to interfere with or influence the choice of a trustee by the creditors.<sup>7</sup> The policy of the bankrupt law is to give the creditors of a bankrupt a free, deliberate, unbiased choice in the first instance of the person who is to take the assets and manage them.<sup>8</sup> The referee presides at this meeting exactly in the same manner and in the same sense that a judge presides over his court.

Before proceeding with the other business the judge or referee regularly allows or disallows claims.<sup>9</sup> This is done for the purpose of determining the right of creditors to vote at that meeting. The regular business of the first meeting in addition to proving claims, includes the election of a trustee<sup>10</sup> and fixing the amount of his bond,<sup>11</sup> the examination of the bankrupt if requested by any creditor,<sup>12</sup> and such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of the act.<sup>13</sup>

The meeting may be adjourned from day to day so as to furnish opportunity for all creditors to prove their debts and to come to an agreement in regard to the selection of a trustee if possible.<sup>14</sup> The several adjournments will constitute but

<sup>6</sup> B. A. 1898, Sec. 55b.

<sup>7</sup> *In re McGill* (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 158.

<sup>8</sup> *In re Jacobs & Roth*, 154 Fed. Rep. 988, 990, 18 Am. B. R. 728; *In re Smith*, No. 12971 Fed. Cas., 2 Ben. 113.

<sup>9</sup> B. A. 1898, Sec. 55b. See also Sec. 283, *post*.

<sup>10</sup> B. A. 1898, Sec. 44. As to electing a trustee, see Sec. 285, *post*.

<sup>11</sup> B. A. 1898, Sec. 50c.

<sup>12</sup> B. A. 1898, Sec. 55b, Secs. 608 and 624, *post*; *In re Kuffler*, 153 Fed. Rep. 667, 18 Am. B. R. 587;

*In re Walker*, 96 Fed. Rep. 550; 3 Am. B. R. 35; *In re Jehu*, 94 Fed. Rep. 638; 2 Am. B. R. 498.

<sup>13</sup> B. A. 1898, Sec. 55c; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

<sup>14</sup> *In re Nice & Schreiber*, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re Kaufman*, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re Syracuse Paper & Pulp Co.*, 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re Morris*, 154 Fed. Rep. 211, 18 Am. B. R. 828; *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733.

one meeting. It will be the first meeting of the creditors within the contemplation of the statute, whether held on the day designated in the notice or on the day to which the meeting assembled on that day has been adjourned.<sup>15</sup>

**§ 282. Who are entitled to vote at creditors' meetings.**

Only creditors of the bankrupt are entitled to vote at the first or any subsequent meeting of the creditors. Not all of his creditors, however, are entitled to vote.

In order to vote, a creditor must own an unsecured claim provable in bankruptcy and have actually proved it and had it allowed.<sup>1</sup>

An attorney for the bankrupt has been permitted to vote a creditor's claim, but the courts do not approve such practice.<sup>1\*</sup> An attorney in any case can not vote without producing a letter of attorney, duly appointing him an attorney in fact.<sup>2</sup> The same rule applies to an agent or a proxy. The form of a letter of attorney prescribed by the supreme court should be

<sup>15</sup> *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re Phelps*, No. 11071 Fed. Cas., 1 N. B. R. 525; *In re Norton*, No. 10348 Fed. Cas., 6 N. B. R. 297.

<sup>1</sup> B. A. 1898, Sec. 56a and b; *In re Malino*, 118 Fed. Rep. 368, 8 Am. B. R. 205; *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733.

<sup>1\*</sup> *In re Cooper*, 135 Fed. Rep. 196, 14 Am. B. R. 320; *In re Kimball*, 100 Fed. Rep. 777, 4 Am. B. R. 144; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 552, 24 Am. B. R. 117, Judge Evans 211, 18 Am. B. R. 828.

*In re Kaufman*, 179 Fed. Rep. 552, 24 Am. B. R. 117, Judge Evans said: "There is no statutory provision either in the bankruptcy act or elsewhere which forbids a creditor to have as his attorney or agent the person who had acted as attorney

for the bankrupt in the preparation of his consent to an adjudication, but judicial policy greatly discourages a practice of attorneys at law acting as attorneys at the same time both for the bankrupt and for his creditors, because such a practice might lead to conduct and results which should be strongly condemned."

*In re Henschel*, 109 Fed. Rep. 861, 865, 6 Am. B. R. 305, proxies in the interest of the bankrupt were not permitted to vote.

<sup>2</sup> *In re Blankfein*, 97 Fed. Rep. 191, 3 Am. B. R. 165; *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re Richards*, 103 Fed. Rep. 849, 4 Am. B. R. 631; *In re Lazoris*, 120 Fed. Rep. 716, 10 Am. B. R. 31; *In re Scully*, 108 Fed. Rep. 372, 5 Am. B. R. 716.

followed.<sup>2\*</sup> Such letters of attorney should be filed by the referee as a part of his record.<sup>3</sup> Where a power of attorney is mislaid and not produced until the meeting is over, the attorney is properly refused the right to participate.<sup>4</sup>

Where a claim has been assigned after proof the real owner alone can vote, and if he holds several claims he can only cast one vote.<sup>5</sup> The managing officers of a bankrupt corporation, when *bona fide* creditors, have the same right to vote as any other creditor.<sup>6</sup> An individual creditor of one partner can not vote for a trustee for the partnership estate.<sup>7</sup> The creditors of the partnership appoint such trustee.<sup>7</sup> A joint or firm creditor, on the separate bankruptcy of one member of a firm, may vote at the creditors' meeting.<sup>8</sup> The reason for this distinction is that each individual partner is liable for the firm debts and will be released from such liability by a discharge. A separate creditor can vote for the trustee in the separate bankruptcy of one of the partners although all the assets

<sup>2\*</sup>Official Form Nos. 20 and 21, Forms Nos. 39 and 40, *post*; *In re Henschel* (C. C. A. 2d Cir.), 113 Fed. Rep. 442, 51 C. C. A. 277, 7 Am. B. R. 662; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526; *In re Lloyd*, 148 Fed. Rep. 92, 17 Am. B. R. 96.

As to what constitutes a sufficient form of power of attorney, see *In re Blue Ridge Packing Co.*, 125 Fed. Rep. 619, 11 Am. B. R. 36.

<sup>3</sup>*In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733.

<sup>4</sup>*In re Blue Ridge Packing Co.*, 125 Fed. Rep. 619, 11 Am. B. R. 36.

<sup>5</sup>*In re Kenney Co.*, 136 Fed. Rep. 451, 14 Am. B. R. 611; *Lowenstein v. McShane Mfg. Co.*, 130 Fed. Rep. 1007, 12 Am. B. R. 601; *In re Messengill*, 113 Fed. Rep. 366, 7 Am. B. R. 669; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526; *In re Frank*, No. 5050 Fed. Cas., 5 Ben. 164.

<sup>6</sup>*In re Syracuse Paper & Pulp Co.*, 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re Northern Iron Co.*, No. 10322 Fed. Cas., 14 N. B. R. 356.

<sup>7</sup>B. A. 1898, Sec. 5b; *In re Coe*, 154 Fed. Rep. 162, 18 Am. B. R. 715; *In re Eagles & Crisp*, 99 Fed. Rep. 696, 3 Am. B. R. 733; *In re Phelps*, No. 11071 Fed. Cas., 1 N. B. R. 525.

<sup>8</sup>*In re Beck*, 110 Fed. Rep. 140, 6 Am. B. R. 554; *In re Diamond* (C. C. A. 2d Cir.), 149 Fed. Rep. 407, 79 C. C. A. 227, 17 Am. B. R. 563; *In re Webb*, No. 17317 Fed. Cas., 4 Saw. 326; *Wilkins v. Davis*, No. 17664 Fed. Cas., 2 Low. 511.

See also *Mills v. Fisher & Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 897, 87 C. C. A. 77, 20 Am. B. R. 237, as to the right of firm creditors against the estate of a partner.

are joint.<sup>9</sup> It has been held that one of several joint creditors, who are not partners, can not vote without the consent of the others.<sup>10</sup>

Where a stockholder in a bankrupt corporation is a debtor for a part of his stock subscription he is not entitled to vote until he has made his indebtedness good.<sup>10\*</sup>

Creditors holding claims which are secured or have priority are not in respect to such claims entitled to vote.<sup>11</sup> Such a creditor may surrender his security or preference at the first meeting, when it is of such a nature as to be effectually destroyed by such surrender, and thereupon he is entitled to vote like any other creditor.<sup>12</sup> The holder of a lien which is made void by the act no longer has any security and therefore may vote.<sup>13</sup>

Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the court seem to be owing over and above the value of their securities or priorities.<sup>14</sup>

Where the debt consists of several parts, one of which is secured, he may vote on the unsecured portion.<sup>15</sup> If the

<sup>9</sup> *In re Beck*, 110 Fed. Rep. 140, 6 Am. B. R. 554.

<sup>10</sup> *In re Purvis*, No. 11476 Fed. Cas., 1 N. B. R. 163.

<sup>10\*</sup> *In re Duryea Power Co.*, 159 Fed. Rep. 783, 20 Am. B. R. 219; *In re Wiener & Goodman Shoe Co.*, 96 Fed. Rep. 949, 3 Am. B. R. 200; *In re Alleman Hardware Co.*, 172 Fed. Rep. 611, 22 Am. B. R. 871.

<sup>11</sup> B. A. 1898, Sec. 56b; *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re Malino*, 118 Fed. Rep. 368, 8 Am. B. R. 205.

<sup>12</sup> *In re Saunders*, No. 12371 Fed. Cas., 2 Low. 444; B. A. 1898, Sec. 57g; *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re Malino*,

118 Fed. Rep. 368, 8 Am. B. R. 205.

<sup>13</sup> *In re Scully*, 108 Fed. Rep. 372, 5 Am. B. R. 716.

<sup>14</sup> B. A. 1898, Sec. 57e; *In re Milne, Turnbull & Co.*, 159 Fed. Rep. 280, 20 Am. B. R. 248.

But see *In re Day & Co.* (C. C. A. 2d Cir.), 178 Fed. Rep. 545, 101 C. C. A. 461, 24 Am. B. R. 252, affirming 174 Fed. Rep. 164, 23 Am. B. R. 56.

<sup>15</sup> B. A. 1898, Sec. 56b; *In re Eagles*, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re Parkes*, No. 10754 Fed. Cas., 10 N. B. R. 82; *In re Hanna*, No. 6027 Fed. Cas., 5 Ben. 5.

security is upon property of a third person,<sup>16</sup> the creditor may prove the whole claim and vote. Where the security was on the individual property of a partner, a firm creditor was permitted to vote.<sup>16\*</sup> Where the security is upon property exempted by law to the bankrupt, the creditor can vote on unsecured balance only.<sup>17</sup>

It was held that where a mortgage creditor had sold the mortgaged premises after the adjudication and had become himself the purchaser he could not vote on the deficiency as an unsecured creditor.<sup>18</sup>

A creditor, charged with having received a preference, is not entitled to vote until the question of his preference is determined.<sup>19</sup> If he has received a preference, he is not entitled to vote until he surrenders such preference, because the claim can not be allowed until after the preference is surrendered and he is not entitled to vote until after the claim is allowed.<sup>20</sup> Where, under a general assignment made by a debtor more than a year before the commencement of proceedings in bankruptcy, a creditor therein preferred, had received a partial payment of his claim, he is not required, before being admitted to prove his debt in the bankruptcy proceedings and vote in the election of a trustee, to refund to the estate of the

<sup>16</sup> *In re Cram*, No. 3343 Fed. Cas., 1 Hask. 89.

<sup>16\*</sup> *In re Coe*, Powers & Co. (Ref.), 1 Am. B. R. 275, affirmed by district judge.

<sup>17</sup> *In re Lautzenheimer*, 124 Fed. Rep. 716, 10 Am. B. R. 720. As to the effect of liens on exempt property see Sec. 427, *post*.

But see *In re Stillwell*, No. 13448 Fed. Cas., 7 N. B. R. 226; *In re Tertelling*, No. 13842 Fed. Cas., 2 Dill. 339.

<sup>18</sup> *In re Hunt*, No. 6884 Fed. Cas., 17 N. B. R. 205. See also *In re Winter* (C. C. A. 3d Cir.), 174 Fed. Rep. 556, 98 C. C. A. 338, 23

Am. B. R. 156; *In re Dix*, 176 Fed. Rep. 582, 23 Am. B. R. 889.

<sup>19</sup> *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

*In re Ashland Steel Co.* (C. C. A. 6th Cir.), 168 Fed. Rep. 679, 94 C. C. A. 165, 21 Am. B. R. 834, a preferred creditor voted without any objection being made by the other creditors.

<sup>20</sup> B. A. 1898, Sec. 57g; *Stevens v. Nave-McCord Mercantile Co.* (C. C. A. 8th Cir.), 150 Fed. Rep. 71, 80 C. C. A. 25, 17 Am. B. R. 609; *In re Malino*, 118 Fed. Rep. 368, 8 Am. B. R. 205.



bankrupt the amount so received.<sup>21</sup> The claim is provable for the balance remaining unpaid.

The referee and the bankrupt are required by law to attend the first meeting of the creditors, but neither of them are entitled to vote, because the business is transacted by the creditors alone.<sup>22</sup>

### § 283. Proving claims to vote.

In order to entitle a creditor to vote at a creditors' meeting it is not only necessary for him to prove his claim, but it must be allowed.<sup>1</sup>

Where a claim is regularly and properly proved, and no objection is made by a party in interest, the referee should allow it forthwith.<sup>2</sup> In such cases the creditor is entitled to vote at the first meeting of creditors. A creditor may prove his claim for the purpose of voting, although omitted from the schedule.<sup>3</sup>

Any party in interest, either the bankrupt or a creditor, may object to the allowance of a claim presented in the prescribed manner. As long as objections are pending against his claim a creditor is not entitled to vote.<sup>4</sup> The referee should, however, consider the matter at once and determine, as soon as may be, whether the creditor or his proxies are entitled to vote.<sup>5</sup>

<sup>21</sup> *In re Folb*, 91 Fed. Rep. 107, 1 Am. B. R. 22.

<sup>22</sup> B. A. 1898, Sec. 56, Sec. 7, clause 1, and Sec. 55b.

<sup>1</sup> *In re Milne, Turnbull & Co.*, 159 Fed. Rep. 280, 20 Am. B. R. 248; *In re Malino*, 118 Fed. Rep. 368, 8 Am. B. R. 205; *In re Evening Standard Pub. Co.*, 164 Fed. Rep. 517, 21 Am. B. R. 156.

*In re Hornstein*, 122 Fed. Rep. 266, 10 Am. B. R. 308, Judge Ray clearly points out the distinction between proving and allowing a claim.

As to the form and manner of proving claims see Chap. XX, *post*.

<sup>2</sup> B. A. 1898, Sec. 57d; *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584, 15 Am. B. R. 326; *In re Sumner*, 101 Fed. Rep. 224, 4 Am. B. R. 123.

<sup>3</sup> *In re Evening Standard Publishing Co.*, 164 Fed. Rep. 517, 21 Am. B. R. 156.

<sup>4</sup> *In re Evening Standard Publishing Co.*, 164 Fed. Rep. 517, 21 Am. B. R. 156.

<sup>5</sup> *In re McGill* (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re Malino*, 118 Fed. Rep. 368, 8 Am.

The referee may proceed to take proof and if the objecting party can not produce sufficient evidence to overcome the sworn proof of claim, he should allow the claim.<sup>6</sup> The bankrupt is regularly present at the first meeting of the creditors. Under section 7 it is his duty to examine the correctness of proofs of claims filed against his estate, and to disclose the fact when any person tries to prove a false claim against his estate. With the assistance of the bankrupt and such evidence as may be introduced, the referee can ordinarily dispose of objections at the first meeting before a vote is taken.

Where the objecting party shows legal cause for delay for the purpose of producing evidence not at hand, the referee may postpone the hearing for that purpose.<sup>7</sup> It is impossible to state just how far a referee is bound to go in the liquidation and allowance of claims before proceeding with the election of a trustee and the other business of the meeting. This is largely a matter of discretion.<sup>8</sup> Where the referee is in doubt about claims, it has been held that, "in proper cases provisional

B. R. 205; *In re* Milne, Turnbull & Co., 159 Fed. Rep. 280, 20 Am. B. R. 248.

<sup>6</sup> B. A. 1898, Sec. 57d; *In re* Syracuse Paper & Pulp Co., 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re* Shaw, 109 Fed. Rep. 780, 6 Am. B. R. 499; *In re* Carter, 138 Fed. Rep. 846, 15 Am. B. R. 126; *In re* Castle Braid Co., 145 Fed. Rep. 224.

In *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584, 15 Am. B. R. 536, the supreme court said: "We believe that the understanding of the profession, the words of the act and convenient and just administration all are on the side of treating a sworn proof of claim as some evidence even when it is denied."

<sup>7</sup> *In re* Morris, 154 Fed. Rep. 211, 18 Am. B. R. 828; *In re* Kaufman,

179 Fed. Rep. 552, 24 Am. B. R. 117; *In re* Evening Standard Publishing Co., 146 Fed. Rep. 517, 21 Am. B. R. 156; *In re* Syracuse Paper & Pulp Co., 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re* Nice & Schreiber, 123 Fed. Rep. 987, 10 Am. B. R. 639.

<sup>8</sup> In *Evening Standard Publishing Co.*, 164 Fed. Rep. 517, 21 Am. B. R. 156, Judge Ray said: "Whether the referee will or will not postpone the election of a trustee, where claims are objected to, is a matter of sound discretion. If such a number of claims are duly objected to that an election by a majority in number and amount can not be had, then, if circumstances demand, he may and should himself appoint."

allowances and disallowances might be made in order that a trustee might be expeditiously selected."<sup>9</sup>

The fact of allowing a claim or postponing the allowance of it affects no right of the creditor, except the right to vote. A claim which has been allowed may be reconsidered and re-allowed, or rejected in whole or in part, at any time before the estate is closed.<sup>10</sup> If it is made to appear that the result would be changed by such vote or votes, the referee or the judge may set aside the result of the vote and direct a new vote to be taken.<sup>11</sup> Where it appears that the exercise of the right to vote would have been barren of result, the court will not delay proceedings in order to afford such creditors the opportunity to exercise such right.<sup>12</sup>

The referee should include in his record a list of creditors who have proved their debts at the first meeting together with their residence and the amount of each creditor's debt.<sup>13</sup>

#### § 284. Counting votes.

The number of votes for an election or to carry any matter of business is prescribed by the statute. Creditors pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed, and are present.<sup>1</sup>

<sup>9</sup> *In re* Milne, Turnbull & Co., 159 Fed. Rep. 280, 20 Am. B. R. 248; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205.

But see *In re* Columbia Iron Works, 142 Fed. Rep. 234, 242, 14 Am. B. R. 526.

<sup>10</sup> B. A. 1898, Sec. 57k. See Sec. 349, *post*; *In re* Syracuse Paper & Pulp Co., 164 Fed. Rep. 275, 278, 21 Am. B. R. 174.

<sup>11</sup> *In re* Kaufman, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re* Evening Standard Publishing Co., 164 Fed. Rep. 517, 21 Am. B. R. 156; *In re* Eagles, 99 Fed. Rep. 695, 3

Am. B. R. 733; *In re* Day & Co., 174 Fed. Rep. 164, 23 Am. B. R. 56, affirmed (C. C. A. 2d Cir.), 178 Fed. Rep. 545, 101 C. C. A. 61, 24 Am. B. R. 252.

<sup>12</sup> *In re* Kelly Dry Goods Co., 102 Fed. Rep. 747, 749, 4 Am. B. R. 528; *In re* Northern Iron Co., No. 10322 Fed. Cas., 14 N. B. R. 356; *In re* Lake Superior Ship Canal R. & Iron Co., No. 7997 Fed. Cas., 7 N. B. R. 376; *In re* Jackson, No. 7123 Fed. Cas., 7 Biss. 280.

<sup>13</sup> Official Form, No. 19, Form No. 38, *post*.

<sup>1</sup> B. A. 1898, Sec. 56a.

The reason for this provision is clearly to prevent a large creditor from controlling the meeting to the detriment of other creditors, and at the same time to prevent several creditors having small claims from uniting to the injury of the large creditor, who may be the only one who has a real interest in the proceedings.

Each creditor, owning a claim which has been allowed, is entitled to one vote. This may be cast by him personally or by a duly appointed proxy.<sup>2</sup> If the proxy is not entitled to vote he should not be counted.<sup>3</sup> Where a proxy is taken by the attorney for the bankrupt he has been permitted to vote the creditor's claim, but such practice should be discouraged.<sup>4</sup> Where proxies are given in the interest of the bankrupt for the purpose of controlling the election of a trustee, they should be rejected and not counted.<sup>5</sup>

An assignee of several valid claims of creditors is entitled to a single vote, and not to a vote for each claim so assigned.<sup>6</sup>

Relatives, stockholders, directors and employes of bankrupts having claims allowed are entitled to vote and be counted.<sup>7</sup> That fact is a circumstance which justified a more

<sup>2</sup> *In re Henschel* (C. C. A. 2d Cir.), 113 Fed. Rep. 443, 51 C. C. A. 277, 7 Am. B. R. 662.

<sup>3</sup> *In re Day & Co.* (C. C. A. 2d Cir.), 174 Fed. Rep. 164, 23 Am. B. R. 56, affirmed (C. C. A. 2d Cir.), 178 Fed. Rep. 545, 101 C. C. A. 461, 24 Am. B. R. 252.

<sup>4</sup> *In re Cooper*, 135 Fed. Rep. 196, 14 Am. B. R. 320; *In re Morris*, 154 Fed. Rep. 211, 18 Am. B. R. 828; *In re Kaufman*, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re Kimball*, 100 Fed. Rep. 777, 4 Am. B. R. 144; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

<sup>5</sup> *In re Day & Co.* (C. C. A. 2d Cir.), 178 Fed. Rep. 545, 101 C. C.

A. 461, 24 Am. B. R. 252, affirming 174 Fed. Rep. 164, 23 Am. B. R. 56; *In re McGill* (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re Lloyd*, 148 Fed. Rep. 92, 17 Am. B. R. 96.

<sup>6</sup> *In re Kenney*, 136 Fed. Rep. 451, 14 Am. B. R. 526; *In re Messengill, Iron Works*, 142 Fed. Rep. 234, 242, 14 Am. B. R. 526; *In re Messengill*, 113 Fed. Rep. 366, 7 Am. B. R. 669; *In re Frank*, No. 5050 Fed. Cas., 5 N. B. R. 194.

<sup>7</sup> *In re Day & Co.* (C. C. A. 2d Cir.), 178 Fed. Rep. 545, 101 C. C. A. 461, 24 Am. B. R. 252; *In re Syracuse Paper & Pulp Co.*, 164 Fed. Rep. 275, 21 Am. B. R. 174.

rigid scrutiny than would be the case if no such relation existed, especially if the election turns on them.

It will be observed that in counting the votes to determine the majority in number and amount that all creditors, whose claims are allowed and are present, are counted and not merely the number of votes cast.<sup>8</sup> A creditor is not considered present whose proxy is not permitted to vote—a claim is not present to be counted, unless it may be voted.<sup>9</sup> Creditors, who are not present at the meeting in person or by proxy, are not counted, although their claims may have been allowed.<sup>10</sup> Where only one creditor appears at the first meeting of creditors and proves his debts he may appoint the trustee.<sup>11</sup>

By this mode of counting every debt upon which a vote has not been cast in favor of a question or person must be counted as a vote in the negative, if the creditor owing claim is present. A question is not carried which receives the majority in number of claims, unless the majority in number also constitutes a majority in the amount of claims. So, also it is not carried where a majority in amount of debts is cast in favor of the question, unless that majority in amount also constitutes a majority in number. The majority must be a joint majority of both the number and the value, of claims present at the meeting.<sup>12</sup>

<sup>8</sup> B. A. 1898, Sec. 56; *In re Henschel* (C. C. A. 2d Cir.), 113 Fed. Rep. 443, 51 C. C. A. 277, 7 Am. B. R. 662, reversing 109 Fed. Rep. 861, 6 Am. B. R. 305; *In re Purvis*, No. 11476 Fed. Cas., 1 N. B. R. 163; *In re Scheiffer*, No. 12445 Fed. Cas., 2 N. B. R. 591.

<sup>9</sup> *In re McGill* (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re Henschel* (C. C. A. 2d Cir.), 113 Fed. Rep. 443, 51 C. C. A. 277, 7 Am. B. R. 662; *In re Kaufman*, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re Mackellar*, 116 Fed. Rep. 547, 8 Am. B. R. 669.

<sup>10</sup> *In re Mackellar*, 116 Fed. Rep. 547, 8 Am. B. R. 669.

<sup>11</sup> *In re John E. Wright* (Ref.), 2 Am. B. R. 497; *In re Haynes*, No. 6269 Fed. Cas., 2 N. B. R. 227; *Anon.*, No. 458 Fed. Cas., 1 N. B. R. 216.

<sup>12</sup> *In re Henschel* (C. C. A. 2d Cir.), 113 Fed. Rep. 443, 51 C. C. A. 277, 7 Am. B. R. 662; *In re Kaufman*, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re Machin*, 128 Fed. Rep. 315, 11 Am. B. R. 449.

*In re Nice & Schreiber*, 123 Fed. Rep. 987, 10 Am. B. R. 639. At the first meeting before the referee, of the 27 creditors present, a majority in number voted in favor of one person for trustee and four creditors, a majority in amount,

### § 285. The election of a trustee.

The statute provides that the creditors of a bankrupt shall at their first meeting after the adjudication appoint one trustee or three trustees of such estate.<sup>1</sup>

The manner of conducting the election of the trustee or trustees is not prescribed by the statute. The creditors regularly vote in the same manner as at any other election. The preliminary ballots may be taken *viva voce* or upon written slips.

Votes may be solicited for any particular trustee. The creditors should canvass and discuss the different candidates so that the choice of a trustee may be made with full knowledge of all the facts and their bearings. The solicitation of votes must be properly exercised. Improper means and undue influence will not be permitted.<sup>2</sup>

A creditor may change his vote at any time during the progress of the election.<sup>3</sup> But he can not change his vote after he has signed the certificate of election.<sup>4</sup>

If there is no choice on the first vote, a second, third, or any number of ballots may be had until the required concurrence is obtained, or it appears that the creditors can not elect

voted for another person. In consequence of this diversity of choice there was no election.

<sup>1</sup> B. A. 1898, Sec. 44; *In re Wm. F. Fisher Co.*, 135 Fed. Rep. 223, 14 Am. B. R. 366, only two trustees were elected at the first meeting and the third trustee was elected at a subsequent meeting.

<sup>2</sup> *In re McGill* (C. C. A. 6th Cir.), 156 Fed. Rep. 67, 45 C. C. A. 218, 5 Am. B. R. 155; *In re Dayville Woolen Co.*, 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re Morton*, 118 Fed. Rep. 908, 9 Am. B. R. 508.

*In re Van De Mark*, 175 Fed. Rep. 287-289, 23 Am. B. R. 760,

Judge Hazel said: "The practice of counsel for the bankrupt of soliciting proxies from creditors and voting them to control the election of a trustee is not viewed with favor by the bankruptcy law, and the referee would have been justified in excluding such votes or proxies as being manifestly in the interest of the bankrupt; but no such order was made, and the objection to certain creditors voting for trustee was overruled."

<sup>3</sup> *In re Pfromm*, No. 11061 Fed. Cas., 8 N. B. R. 357.

<sup>4</sup> *In re Scheiffer*, No. 12445 Fed. Cas., 2 N. B. R. 591.

a trustee.<sup>5</sup> When a final result is reached, it must be made a matter of record in the form prescribed.<sup>6</sup> The creditors who have appointed a trustee must sign the certificate, with their residences and amount of debts claimed and allowed. The reason for this requirement is, that if any dispute should arise in regard to the actual result of election there would be satisfactory evidence before the court to settle the controversy.

Where the creditors are unable to agree at their first meeting and a majority in number and amount request an adjournment for a reasonable time in order that they may come to some agreement, the referee should grant such adjournment and should not himself appoint a trustee.<sup>7</sup> Where no request is made for a second meeting the referee may appoint the trustee after failure to elect one by the creditors.<sup>8</sup>

Where two days have been used in unsuccessful attempts by creditors to choose a trustee and one is needed at once the referee should appoint him.<sup>9</sup> Where the majority in number vote for one person for trustee and the majority in amount for another the referee may appoint.<sup>10</sup> It has been held that the referee may appoint a trustee where it is impracticable to pass on a large number of contested claims at the first meeting,<sup>11</sup>

<sup>5</sup> *In re* Nice & Schreiber, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re* Mackellar, 116 Fed. Rep. 547, 8 Am. B. R. 669; *In re* Kaufman, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re* Van De Mark, 175 Fed. Rep. 287, 23 Am. B. R. 760.

<sup>6</sup> Official Form No. 22, see Form No. 41, *post*.

<sup>7</sup> *In re* Nice & Schreiber, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re* Van De Mark, 175 Fed. Rep. 287, 23 Am. B. R. 760.

<sup>8</sup> *In re* Machin, 128 Fed. Rep. 315, 11 Am. B. R. 449.

*In* Clark v. Pidcock (C. C. A. 3d Cir.), 129 Fed. Rep. 745, 64

C. C. A. 273, 12 Am. B. R. 309, a trustee was appointed more than a year after the creditors' meeting.

<sup>9</sup> *In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162.

<sup>10</sup> *In re* Richards, 103 Fed. Rep. 849, 4 Am. B. R. 631; *In re* Kenney & Co., 136 Fed. Rep. 451, 11 Am. B. R. 611; *In re* Morris, 154 Fed. Rep. 211, 18 Am. B. R. 828.

<sup>11</sup> *In re* Cohen, 131 Fed. Rep. 391, 11 Am. B. R. 439; *In re* Kaufman, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re* Milne, Turnbull & Co., 159 Fed. Rep. 280, 20 Am. B. R. 248.

but the better practice is to adjourn the election until such claims may be adjudicated.

The election of the trustee is subject to be approved or disapproved by the referee or judge.<sup>12</sup> The statute gives to the creditors the right to elect a trustee.<sup>13</sup> The selection of a trustee by the creditors ought not to be lightly set aside. He should be confirmed unless there is good reason to believe that the election was controlled in the interest of the bankrupt or by some influence opposed to the interests of the creditors, so as to imperil the fair and efficient administration of the estate.<sup>14</sup>

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed if the court shall deem it desirable.<sup>15</sup>

The creditors not only appoint the trustee or trustees, but they should fix the amount of the bond required. They may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee the court must do so.<sup>16</sup>

<sup>12</sup> Gen. Ord. 13. *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re* Van De Mark, 175 Fed. Rep. 287, 23 Am. B. R. 760; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re* Rekerdres, 108 Fed. Rep. 206, 5 Am. B. R. 811.

<sup>13</sup> B. A. 1898, Sec. 44.

<sup>14</sup> See Sec. 531, *post*; *In re* Syracuse Paper & Pulp Co., 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 620, 11 Am. B. R. 36; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re* Mangan, 133 Fed. Rep. 1000, 13 Am. B. R. 303; *In re*

Mackellar, 116 Fed. Rep. 547, 8 Am. B. R. 669.

*In re* Eastlack, 145 Fed. Rep. 68, 16 Am. B. R. 529, after reviewing the cases, Judge Lanning said: "These cases establish the rule that the election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed, or controlled by the bankrupt, or his attorney, or by some influence opposed to the creditors' interests."

<sup>15</sup> Gen. Ord. 15. See also Sec. 252, *post*.

<sup>16</sup> B. A. 1898, Sec. 50c.



**§ 286. Notice to trustee.**

The appointment of a trustee by the creditors is subject to be approved or disapproved by the referee or the judge.<sup>1</sup> Ordinarily the referee makes the order approving the appointment.

He thereupon immediately notifies the trustee in person or by mail of his appointment.<sup>2</sup> The notice should contain a statement of the penal sum of the trustee's bond.<sup>2</sup>

The trustee is required forthwith to notify the referee of his acceptance or rejection of the trusteeship.<sup>3</sup> Where the trustee accepts the trust he should immediately qualify.<sup>4</sup> If he declines to accept the trust, a vacancy occurs in the office of trustee. The creditors are then entitled to have another meeting to elect a trustee.<sup>5</sup> The creditors may, of course, waive this privilege, in which case the judge or referee (usually the referee) appoints one or three trustees.<sup>5</sup>

**§ 287. Other meetings of creditors.**

Creditors may hold meetings other than the first one whenever it may be necessary to consider matters pertinent to the administration of the estate or other matters relating to the proceedings in bankruptcy.

Where the schedule of a voluntary bankrupt discloses no assets, and no creditor appears at the first meeting, the court may direct that no trustee be appointed, and no meeting of the creditors other than the first meeting be called.<sup>1</sup>

A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent

<sup>1</sup> Gen. Ord. 13.

<sup>2</sup> Gen. Ord. 16. Official Form No. 24, see Form No. 43, *post*.

<sup>3</sup> Gen. Ord. 16.

<sup>4</sup> Trustees, Chap. XV.

<sup>5</sup> B. A. 1898, 44; *In re John E. Wright* (Ref.), 2 Am. B. R. 497,

the person elected died before accepting the trust and before the adjourned meeting was held. At the adjourned meeting a new trustee was elected.

<sup>1</sup> Gen. Ord. 15.

to hold a meeting at such time and place.<sup>2</sup> Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.<sup>3</sup> The judge or referee is required to call a meeting of creditors whenever one-fourth or more in number of those who have proved their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.<sup>4</sup>

Creditors who have proved their claims at the first meeting or have proved them subsequently are entitled to vote at these meetings subject to the restrictions contained in section 56. Creditors, whether they have proved their claims or not, are entitled to have at least ten days' notice by mail to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of all such meetings of creditors.<sup>5</sup> The referee regularly gives this notice.<sup>6</sup>

The referee is not required to be present or preside at these meetings, but in practice he usually does so. The bankrupt is not required to attend such meetings unless specially ordered to do so. There is no form prescribed for conducting the business or taking the votes except that the creditors can only pass upon matters submitted to them at such meetings by a majority vote in number and amount of claims of all creditors

<sup>2</sup> B. A. 1898, Sec. 55*d*.

<sup>3</sup> Gen. Ord. 25.

<sup>4</sup> B. A. 1898, Sec. 55*e*, and Sec. 1, clause 7.

<sup>5</sup> B. A. 1898, Sec. 58*a*. See *In re*

Mills, No. 9610, Fed. Cas., 7 Ben. 452; *Anon.*, No. 457 Fed. Cas., 1 N. B. R. 122.

<sup>6</sup> B. A. 1898, Sec. 39, clause 4, and Sec. 58*c*.

whose claims have been allowed and are present.<sup>7</sup> Such meetings are properly guided by the rules and usages of parliamentary bodies.<sup>8</sup>

Whenever the affairs of the estate are ready to be closed a final meeting of creditors must be ordered.<sup>9</sup> If there are several dividends a final meeting must be held, but the final dividend can not be declared within three months of the first dividend.<sup>10</sup> At the final meeting the final report and account of the trustee may be examined and passed upon by the creditors.<sup>11</sup> The creditors are entitled to ten days' notice of this meeting.<sup>12</sup>

<sup>7</sup> B. A. 1898, Sec. 56a.

<sup>8</sup> *In re Merchants' Ins. Co.*, No. 9442 Fed. Cas., 6 Biss. 252.

<sup>9</sup> B. A. 1898, Sec. 55f; *In re Sarah Michel*, 95 Fed. Rep. 803, 1 Am. B. R. 665.

<sup>10</sup> B. A. 1898, Sec. 65b.

<sup>11</sup> B. A. 1898, Sec. 47a, cl. 8.

<sup>12</sup> B. A. 1898, Sec. 58a, cl. 6.

## CHAPTER XIX.

## PROVABLE DEBTS.

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305.	Interest.	325.	Torts.
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307.	Debts founded upon contract.	327.	Debts barred by the statute of limitations.

## § 288. Provable debts defined.

Debts of the bankrupt may be proved and allowed against his estate.<sup>1</sup>

*First*, which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.

<sup>1</sup> B. A. 1898, Sec. 63. Compare R. S. Secs. 5067 to 5072.

*Second*, debts due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice.

*Third*, debts founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt.

*Fourth*, debts founded upon an open account, or upon a contract express or implied.

*Fifth*, debts founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

The five classes of debts quoted above are contained in section 63a and include every class of debt provable in bankruptcy. If a claim does not fall within one of these classes it is not provable.<sup>2</sup>

This section relates to debts, demands and claims only, which are not preferred or secured, and which have no priority over any other debts. They are the debts, demands and claims of the general creditors against the general assets of the bankrupt at the time the petition was filed. Debts secured by a mortgage lien or other kind of security are not provable under this section until the secured creditor surrenders such preferences, except for the amount each claim exceeds the value of its security.<sup>3</sup>

### § 289. What is a "debt."

It is to be observed that debts only are provable under the first paragraph of section 63. To ascertain, therefore, what

<sup>2</sup> *Dunbar v. Dunbar*, 190 U. S. 340, 350, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 556, 20 Am. B. R. 25; *Brown & Adams v. United*

*Button Co.* (C. C. A. 3d Cir.), 149 Fed. Rep. 48, 79 C. C. A. 70, 17 Am. B. R. 565.

<sup>3</sup> B. A. 1898, Sec. 57e, f and g. See proof by second creditors, Sec. 339, *post*.

is provable under these provisions it is necessary to inquire at the outset what is included in the word "debts."

A debt, as defined by the act itself, includes "any debt, demand or claim provable in bankruptcy."<sup>1</sup> This definition does not throw much light on its meaning in this connection, although it fully defines it wherever it is used in any other part of the act.

A debt, in the bankrupt act, is not limited to its common-law meaning, which Mr. Justice Blackstone defines to be "a sum of money due by certain and express agreement, as by a bond for a determinate sum; a bill or note; a special bargain; or rent reserved on a lease; where the quantity is fixed and specific and does not depend upon any subsequent valuation to settle it."<sup>2</sup>

It is not used in its generic sense "to include every claim and demand upon which a judgment for a sum of money, or directing payment of money, could be recovered in an action," as defined by the New York Civil Code,<sup>3</sup> as will be pointed out presently.

It may be said generally that a debt under the bankrupt act includes any liability of the bankrupt growing out of an express or implied agreement or contract, which is fixed at the time the petition is filed, such as a bill for goods sold and delivered, a note or bill of exchange, damages for breach of a contract, and the like.<sup>4</sup>

The early bankrupt acts dealt only with the affairs of traders. Debts in bankruptcy at present are regularly those growing out of business transactions. A debt in bankruptcy

<sup>1</sup> B. A. 1898, Sec. 1, clause 11.

<sup>2</sup> Blackstone's Commentaries, Sec. 154.

<sup>3</sup> New York Code of Civil Proc., Sec. 2514.

<sup>4</sup> McDonald v. Tefft-Weller Co. (C. C. A. 5th Cir.), 128 Fed. Rep. 381, 63 C. C. A. 123, 11 Am. B. R. 800; Moch v. Market St. Nat. Bank (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11,

affirming 105 Fed. Rep. 891, 5 Am. B. R. 89.

*In re Harper*, 175 Fed. Rep. 412, 423, 23 Am. B. R. 918, Judge Ray suggests a broader meaning to the word debt in bankruptcy than that given in the text.

In *Ames v. Moir*, 138 U. S. 306, 311, 34 L. Ed. 951, the supreme court said: "The writing referred to did not, in itself, create a debt

may be due at law or in equity.<sup>5</sup> It may be a definite sum of money or an unliquidated amount founded upon a contract, express or implied, the liability for which is fixed at the time the petition is filed and which may be liquidated by litigation.<sup>6</sup>

A claim, which is not founded upon an agreement or contract however just and lawful in itself, is not to be regarded as a debt within the meaning of the bankrupt act.

Claims of this character may be enforced at law or in equity, although not provable in bankruptcy.<sup>7</sup>

A claim for damages for an injury to the person or property of another is not strictly a debt in bankruptcy and is not provable under section 63a.<sup>8</sup> Such claims do not grow out of an agreement or contract or any business transaction of the bankrupt. A judgment for a fine or penalty is not a debt.<sup>9</sup> It is a punishment and can not be said in any respect to be based on agreement.

within the meaning of the Bankruptcy act. \* \* \* When the plaintiffs delivered, or offered to deliver, the high wines at the defendant's place of business on the 18th of July, in fulfillment of the agreement of June 9th, and defendant failed to pay for them, then, and not before, was a debt created within the meaning of the bankruptcy act."

<sup>5</sup> See Equitable Debts, Sec. 292, *post*; James v. Gray (C. C. A. 1st Cir.), 131 Fed. Rep. 401, 65 C. C. A. 385, 12 Am. B. R. 573.

<sup>6</sup> See Unliquidated Debts, Sec. 291, *post*, and Debts Founded Upon Contracts, Sec. 307, *post*.

*In re Brown* (C. C. A. 9th Cir.), 164 Fed. Rep. 673, 90 C. C. A. 489, 21 Am. B. R. 123, it was held that the liability of officers and directors of a corporation to creditors for losses growing out of the negligent, wrongful or fraudulent conduct of such officers and directors is re-

garded in California as one of suretyship, and therefore a contract and hence a debt in bankruptcy.

<sup>7</sup> *Stockwell v. United States*, 13 Wall. 531, 20 L. Ed. 491.

<sup>8</sup> *Brown & Adams v. United Button Co.* (C. C. A. 3d Cir.), 149 Fed. Rep. 48, 79 C. C. A. 70, 17 Am. B. R. 565, affirming, 140 Fed. Rep. 495, 15 Am. B. R. 390; *In re New York Tunnel Co.* (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 558, 20 Am. B. R. 25; *In re Crescent Lumber Co.*, 154 Fed. Rep. 724, 19 Am. B. R. 112; *In re Hirschman*, 104 Fed. Rep. 69, 4 Am. B. R. 715.

As to the provability of a judgment for a tort, see judgments prior to bankruptcy, Sec. 296, *post*.

<sup>9</sup> *In re Moore*, 111 Fed. Rep. 145, 6 Am. B. R. 590; *In re Sutherland*, No. 13639 Fed. Cas., Deady, 416; *Spalding v. New York*, 4 How. 21, affirming 7 Hill (N. Y.). 301;

A judgment to enforce a natural or moral duty is not a debt. A judgment for alimony is not a debt.<sup>10</sup> A claim against a father to pay for the support of his minor children, which at common law he is bound to support, is not such a debt as may be proved in bankruptcy.<sup>11</sup> A judgment for seduction or the support of a bastard child is not a debt in the sense that the word is used in bankruptcy.<sup>12</sup>

**§ 290. Only debts existing when petition filed are provable.**

The rights of creditors to prove debts and share in the distribution of the estate of the bankrupt are fixed by the status of their claims at the time of filing the petition in bankruptcy.<sup>1</sup>

<sup>10</sup> Paige (N. Y.), 284; Wilson v. Nat. Bank, 3 Fed. Rep. 391; Macey v. Jordan, 2 Den. (N. Y.), 570.

As to penalties due the United States, a state or municipality, see B. A. 1898, Sec. 57j.

<sup>11</sup> Audubon v. Shufeldt, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; Wetmore v. Markoe, 196 U. S. 68, 49 L. Ed. 390, 13 Am. B. R. 1; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

In Audubon v. Shufeldt, *supra*, the court said: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, expressed or implied, but on the natural and legal duty of the husband to support the wife," \* \* \* Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings."

<sup>11</sup> Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re* Baker, 96 Fed. Rep. 954, 3 Am. B. R. 101; *In re* Hubbard, 98 Fed. Rep. 710, 3 Am. B. R. 528.

<sup>12</sup> *In re* Cotton, No. 3269 Fed. Cas., 2 N. Y. Leg. Obs. 370; Comm. v. Erisman, 21 Pitts. L. Jour. 69; Nassau v. Parker, 2 Penn. L. Jour. 298.

<sup>1</sup> Board of Com'rs of Shawnee County v. Hurley (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94 C. C. A. 362, 22 Am. B. R. 209; Swarts v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673; *In re* Reading Hosiery Co., 171 Fed. Rep. 795, 22 Am. B. R. 562; *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223; Phillips v. Dreher Shoe Co., 112 Fed. Rep. 404, 7 Am. B. R. 326; *In re* Graff, 117 Fed. Rep. 343, 8 Am. B. R. 744; Phoenix Nat. Bank v. Waterbury, 197 N. Y. 161, 23 Am. B. R. 250.



It is sufficient that a claim becomes provable as a consequence of filing the petition in bankruptcy.<sup>2</sup> In such case the debt and bankruptcy are coincident.

A debt contracted by a bankrupt subsequent to the filing of the petition can not be proved in bankruptcy.<sup>3</sup> The payment of such debts may be sought out of the property acquired after the adjudication of bankruptcy at any time. The bankrupt is not released from such debts by discharge in bankruptcy.<sup>4</sup>

If, at the time of filing the petition, the liability of the bankrupt is fixed, so that, upon the happening of a contingency, the amount can be ascertained by computation, it is a provable claim, if that contingency happens in time to prove the claim under section 57*n*.<sup>5</sup> Such claims may be liquidated, if necessary, under section 63*b*.<sup>6</sup> If the contingency does not

<sup>2</sup> *In re* Neff (C. C. A. 6th Cir.), 157 Fed. Rep. 57, 84 C. C. A. 561, 19 Am. B. R. 23; *In re* Swift (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 50 C. C. A. 264, 7 Am. B. R. 375; *In re* Duquesne Incandescent Light Co., 176 Fed. Rep. 785, 24 Am. B. R. 419; *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728.

<sup>3</sup> *In re* Adams, 130 Fed. Rep. 381, 12 Am. B. R. 368; *Phoenix Nat. Bank v. Waterbury*, 197 N. Y. 161, 23 Am. B. R. 250; *In re* Merrell, 19 Fed. Rep. 874; *In re* Ward, 12 Fed. Rep. 325; *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12; *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 55 C. C. A. 571, 9 Am. B. R. 490; *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 602; *In re* Rome, 162 Fed. Rep. 971, 19 Am. B. R. 820; *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588.

<sup>4</sup> *Phoenix Nat. Bank v. Waterbury*, 197 N. Y. 161, 23 Am. B. R. 250.

But see *Spalding v. Dixon*, 21 Vt. 45, where it was held under the act of 1841, that a debt arising after the petition filed and before the adjudication was provable, and, therefore, barred by a discharge in bankruptcy.

<sup>5</sup> See damages for breach of an executory contract, Sec. 309, *post*; *Moch v. Market St. Nat. Bank* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11; *In re* Swift (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 50 C. C. A. 264, 7 Am. B. R. 375; *In re* Neff (C. C. A. 6th Cir.), 157 Fed. Rep. 57, 84 C. C. A. 561, 19 Am. B. R. 23; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112; *In re* Dunlap Carpet Co., 163 Fed. Rep. 541, 20 Am. B. R. 882; *In re* Pettingill, & Co., 137 Fed. Rep. 143, 14 Am. B. R. 478; *In re* Spittler, 151 Fed. Rep. 942, 18 Am. B. R. 425; *In re* National Wire Co., 166 Fed. Rep. 631, 22 Am. B. R. 186.

<sup>6</sup> See Sec. 291, *post*.

happen until after a year from bankruptcy, it is a contingent claim not provable.<sup>7</sup>

If at the time of filing the petition, damages arising from the breach of a contract are so far contingent that they can not be computed by any process known to law, the claim is not provable.<sup>8</sup> The liability may be contingent on future defaults and the amount of liability wholly uncertain, depending upon the nature of the default, or the claim may be of such character as to be incapable of liquidation within the year prescribed for proving the claim. Such claims are deemed so far contingent that they can not be proved in bankruptcy, nor are they released by the bankrupt's discharge.

A contract by a husband to pay a wife a certain sum at stated periods during her life or widowhood,<sup>9</sup> or for the support of his minor children is not provable against his estate in bankruptcy.<sup>10</sup>

Where an administrator commits a breach of his bond before the bankruptcy of the surety, a claim for damages is provable against the estate of the surety.<sup>11</sup> But if the breach is committed after the bankruptcy of the surety, no provable claim exists.<sup>12</sup>

## § 291. Unliquidated debts.

In order that a claim may be proved and allowed against the estate of a bankrupt it must be liquidated.<sup>1</sup>

<sup>7</sup> See Sec. 293, *post*.

<sup>8</sup> See damages for breach of executory contract, Sec. 309, *post*, and contingent debts, Sec. 293, *post*; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re Sweetser, Pembroke & Co.* (C. C. A. 2d Cir.), 142 Fed. Rep. 131, 73 C. C. A. 349, 15 Am. B. R. 650; *In re Inman & Co.*, 171 Fed. Rep. 185, 22 Am. B. R. 524; *In re Ellis* (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 74 C. C. A. 297, 16 Am. B. R. 221.

<sup>9</sup> *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>10</sup> *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>11</sup> *Hibberd v. Bailey* (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104; *Harmon v. McDonald*, 187 Mass. 578.

<sup>12</sup> *Loring v. Kendall*, 1 Gray (Mass.), 305.

<sup>1</sup> B. A. 1898, Sec. 63b; *In re Rubel*, 166 Fed. Rep. 131, 21 Am.

In section 63*b* provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct and may thereafter be proved and allowed against his estate. It adds nothing to the class of debts which may be proved.<sup>2</sup> If the claim is not among the debts which may be proved in section 63*a*, it can not be liquidated under this provision.<sup>3</sup>

Subdivision *b* of section 63 relates to procedure. It provides for the liquidation of such of the claims enumerated in section 63*a* as may require such process. If the claim is provable and unliquidated, the creditor may apply to the court to have it liquidated. This is regularly done by petition and setting forth the nature of the claim and praying that it may be liquidated and proved against the estate of the bankrupt, and for an order directing the manner in which the liquidation may be had.<sup>4</sup> The court, usually the referee, will thereupon direct the course to pursue.

B. R. 566; *In re* Silverman, 101 Fed. Rep. 219, 4 Am. B. R. 83; *In re* Big Meadows Gas Co., 113 Fed. Rep. 974, 7 Am. B. R. 697.

*In re* Rubel, *supra*, the court observed: "The damages which he claims are entirely unliquidated, and, under the provisions of section 63*b*, would not be ripe for presentation or allowance until they had been liquidated by such means as the court might direct upon a petition to that effect. It appears that no application has been made to liquidate this claim. Under these circumstances it would not be necessary to go further in order to justify the ruling of the referee."

<sup>2</sup> See observation of Mr. Justice Peckham in *Dunbar v. Dunbar*, 190 U. S. 340, 350, 47 L. Ed. 1084, 10 Am. B. R. 139; *Brown & Adams v. United Button Co.* (C. C. A. 3d

Cir.), 149 Fed. Rep. 48, 79 C. C. A. 70, 17 Am. B. R. 565; *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 558, 20 Am. B. R. 25; *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715.

<sup>3</sup> *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 558, 20 Am. B. R. 25; *Brown & Adams v. United Button Co.* (C. C. A. 3d Cir.), 149 Fed. Rep. 48, 79 C. C. A. 70, 17 Am. B. R. 565; *In re* Crescent Lumber Co., 154 Fed. Rep. 724, 19 Am. B. R. 112; *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715; *In re* Imperial Brewing Co., 148 Fed. Rep. 579, 16 Am. B. R. 110.

<sup>4</sup> See *In re* Imperial Brewing Co., 148 Fed. Rep. 579, 16 Am. B. R. 110.

This may be done either by directing a hearing before the referee or the judge, or a submission to a jury on an issue framed, or by directing plenary suit to be brought in any state or federal court, having jurisdiction, or by permitting an action pending in any such court to proceed to judgment.<sup>5</sup>

Formal proof of an unliquidated claim is regularly made after liquidation. This is clearly contemplated by section 57*n*, which expressly provides for proving a claim within sixty days after judgment of liquidation, although it may be rendered after the one year period.<sup>6</sup> It has been suggested that formal proof may be made before liquidation and that the claim be liquidated and allowed subsequently.<sup>7</sup> The course ordinarily pursued is to apply to the court to have the claim liquidated, and after the claim has been liquidated to file formal proof for the specific amount so found.

<sup>5</sup> *In re* United Button Co., 140 Fed. Rep. 495, 15 Am. B. R. 390; *In re* Buchan's Soap Corporation, 169 Fed. Rep. 1017, 22 Am. B. R. 382; *In re* Rubel, 166 Fed. Rep. 131, 133, 21 Am. B. R. 566; *In re* Keyes, 160 Fed. Rep. 763, 20 Am. B. R. 183; *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43, 18 Am. B. R. 10.

*In re* Duquesne Incandescent Light Co., 176 Fed. Rep. 785, 791, 24 Am. B. R. 419, the court said: "As the parties submitted themselves to the referee, who after a full hearing and careful consideration of all the evidence, adjudicated the claim, which in our opinion was a most satisfactory and appropriate method for the proper liquidation of the damages, we see no reason why the claim is not to be considered as having been proved and liquidated in accordance with sections 63*a* and *b* of the act."

*In re* Rouse, 40 Law Bull. (Ohio), 220, the referee held that in cases

of stockholder's double liability the court may direct that a stockholder's liability suit be instituted by the creditor making the application, or that an already pending suit in the state court be maintained for the purpose of liquidating the claim; or, if the facts are simple and undisputed, may itself undertake to determine the amount provable as the bankrupt's stockholder's liability, and to whom the same is payable.

<sup>6</sup> See Sec. 332, *post*; *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43, 18 Am. B. R. 10; *Buckingham v. Estes* (C. C. A. 6th Cir.), 128 Fed. Rep. 584, 63 C. C. A. 20, 12 Am. B. R. 182; *Hutchinson v. Otis* (C. C. A. 1st Cir.), 115 Fed. Rep. 937, 53 C. C. A. 419, 8 Am. B. R. 419; *In re* Strobel, 160 Fed. Rep. 916, 20 Am. B. R. 884.

<sup>7</sup> *In re* Mertens & Co., 147 Fed. Rep. 177, 77 C. C. A. 473, 16 Am. B. R. 829.

Unliquidated claims which may be liquidated and proved under this provision are numerous and varied. Familiar examples are damages for breach of executory contracts,<sup>8</sup> damage for breach of covenants in a contract and stockholder's liability.<sup>9</sup> Notes and contracts to deliver specific articles of merchandise may be liquidated.<sup>10</sup>

Creditors who are not scheduled and have no notice of bankruptcy proceedings, settled and dismissed, are entitled to have their claims liquidated and considered.<sup>11</sup>

It may be said generally that a claim for unliquidated damages to the person or his property, sounding in tort and not based upon contract, can not be liquidated.<sup>12</sup> But if the claim arises *ex delicto* and is also of such a character as to constitute a claim arising in contract, it is provable and may be liquidated.<sup>13</sup>

An unliquidated contingent debt, not provable, can not be liquidated under this clause.<sup>14</sup> The act of 1867 expressly pro-

<sup>8</sup> Grant Shoe Co. v. Laird, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.

*In re* Neff (C. C. A. 6th Cir.), 157 Fed. Rep. 57, 84 C. C. A. 561, 19 Am. B. R. 23; *In re* Swift (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 50 C. C. A. 264, 7 Am. B. R. 375; *In re* Pettingill, 137 Fed. Rep. 143, 14 Am. B. R. 728.

*In re* Crocker (Ref.), 8 Am. B. R. 188, damages for breach of contract of marriage were held subject to liquidation.

<sup>9</sup> Fourth National Bk. v. Francklyn, 120 U. S. 747, 30 L. Ed. 825; Garrett v. Sayles, 1 Fed. Rep. 371; James v. Atlantic Delaine Co., No. 7179 Fed. Cas., 11 N. B. R. 390; Gibson v. Lewis, No. 5398 Fed. Cas., 11 N. B. R. 247; *In re* Rouse, 40 Law Bull. (Ohio), 220.

<sup>10</sup> Chandler v. Windship, 6 Mass. 310; McMullen v. Bank of Penn., 2 Penn. St. 243; *In re* Structural Steel

Car Co. (Ref.), 13 Am. B. R. 373, 385.

<sup>11</sup> *In re* Lockwood, 104 Fed. Rep. 794, 4 Am. B. R. 731.

<sup>12</sup> Brown & Adams v. United Button Co. (C. C. A. 3d Cir.), 149 Fed. Rep. 48, 79 C. C. A. 70, 17 Am. B. R. 565; *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 558, 20 Am. B. R. 25; *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715; *In re* Crescent Lumber Co., 154 Fed. Rep. 724, 19 Am. B. R. 112.

<sup>13</sup> Grant Shoe Co. v. Laird, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484; Crawford v. Burke, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659; *In re* Filer, 125 Fed. Rep. 262, 5 Am. B. R. 835; *In re* Hildebrandt, 120 Fed. Rep. 992, 10 Am. B. R. 184; *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715.

<sup>14</sup> *In re* Shaffer, 124 Fed. Rep. 111, 10 Am. B. R. 633; *In re* Imperial

vided for proving and liquidating "contingent debts and contingent liabilities."<sup>15</sup> The act of 1841 provided for proving and liquidating "uncertain or contingent demands."<sup>16</sup> No similar provision is contained in the present act.

## § 292. Equitable debts.

An equitable debt, as well as a legal debt, may be proved against an estate in bankruptcy under the present act.<sup>1</sup> The same rule has long prevailed in England,<sup>2</sup> and was recognized in this country under the former bankrupt acts.<sup>3</sup>

The statute makes no special provision with respect to equitable claims. They must fall within one of the classes enumerated in section 63a to be provable. An equitable debt may be created by the breach of a trust, or by right of subrogation or suretyship, or by an equitable demand for services rendered and expenses incurred, and in many other ways. In most cases equitable debts are to be regarded as claims founded "upon a contract express or implied," because such a contract is usually involved.<sup>4</sup>

Brewing Co., 143 Fed. Rep. 579, 16 Am. B. R. 110; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588.

See also Contingent Debts, Sec. 293, *post*.

But see *In re* Dunlap Carpet Co., 163 Fed. Rep. 541, 20 Am. B. R. 882, where contingency happened within a year.

<sup>15</sup> R. S. Sec. 5068.

<sup>16</sup> Sec. 5 of the Act of 1841, 5 Stat. at L. 445.

<sup>1</sup> *James v. Gray* (C. C. A. 1st Cir.), 131 Fed. Rep. 401, 65 C. C. A. 385, 12 Am. B. R. 573; *In re* Peasley, 137 Fed. Rep. 190, 14 Am. B. R. 496; *In re* Arnold & Co., 133 Fed. Rep. 789, 13 Am. B. R. 320; *In re*

*Dillon*, 100 Fed. Rep. 627, 4 Am. B. R. 63; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815; *In re* Dix, 176 Fed. Rep. 582, 23 Am. B. R. 889; *In re* Burlage Bros., 169 Fed. Rep. 1006, 22 Am. B. R. 410.

<sup>2</sup> *Ex parte* Yonge, 3 Ves. & B. 31; *Jeffs v. Wood*, 2 P. Williams 128; *Murphy's Case*, 1 Schoaels 8 L. 44; *Ex parte* Watson, 4 Madd. 477.

<sup>3</sup> *In re* Kelly, 18 Fed. Rep. 528; *In re* Fortune, No. 4955 Fed. Cas., 1 Low. 306; *In re* Secor, 18 Fed. Rep. 319; *In re* Wells, 4 Fed. Rep. 68; *Butcher v. Forman*, 6 Hill (N. Y.), 583.

<sup>4</sup> *James v. Gray* (C. C. A. 1st Cir.), 131 Fed. Rep. 401, 65 C. C. A. 385, 12 Am. B. R. 573.

Thus, a solvent partner upon winding up the partnership is entitled to prove against bankrupt partners the share of the loss which each partner should have borne as a debt against his separate estate.<sup>5</sup> The reason for this is that the solvent partners having paid all of the joint debts of the firm are regarded as standing in the light of sureties or persons liable for him, and therefore entitled to come in and prove in respect to the bankrupt's share of the copartnership debts.<sup>6</sup>

Where a trustee demanded wagons of the bankrupt which were in the possession of a bailee, it was held that the bailee was entitled to an equitable compensation for storage.<sup>7</sup> So also charges against the estate for expenses incurred in the administration of it, as wages, rent, etc., are provable debts in bankruptcy.<sup>8</sup>

Creditors of a bankrupt "get rich quick" concern have been allowed to prove claims for money advanced on false representations (although intended by the creditors to be used in gambling) on the ground that the bankrupt debtor was a trustee for them.<sup>9</sup>

In the absence of any authoritative state decision or statute governing the case, a vendee under a contract for the purchase of land, who has recorded his bond for a deed and paid the purchase money on the bankruptcy of the vendor without having conveyed, is entitled to prove his claim as one secured by an equitable lien on the land.<sup>10</sup>

Where in Iowa a bill of sale given as security before four months' period, but not regarded (and therefore can not be en-

<sup>5</sup> *In re* Dillon, 100 Fed. Rep. 627, 4 Am. B. R. 63; *In re* Carmichael, 96 Fed. Rep. 594, 2 Am. B. R. 815; *Ex parte* Watson, 4 Madd. 477; *Sigsby v. Willis*, No. 12489 Fed. Cas., 3 Ben. 371.

<sup>6</sup> *Ex parte* Yonge, 3 Ves. & B. 31; *Aflalo v. Fourdrinier*, 6 Bing. 306; *Sigsby v. Willis*, No. 12489 Fed. Cas., 3 Ben. 371.

<sup>7</sup> *In re* Kelly, 18 Fed. Rep. 528.

<sup>8</sup> *In re* Wells, 4 Fed. Rep. 68; *In re* Secor, 18 Fed. Rep. 319; *In re* Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 787; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38.

<sup>9</sup> *In re* Arnold & Co., 133 Fed. Rep. 789, 13 Am. B. R. 320.

<sup>10</sup> *In re* Peasley, 137 Fed. Rep. 190, 14 Am. B. R. 496.



forced against other creditors) there still is a provable claim against the bankrupt's estate for the unpaid purchase price.<sup>11</sup>

It has been held that a mortgagee purchasing the property at foreclosure sale may prove the balance of his debt equitably due after subtracting the actual value of the property from the original debt.<sup>12</sup>

A debt created by a married woman may be enforced against her separate estate on the ground that it is a valid obligation in equity.<sup>13</sup>

### § 293. Contingent demands and liabilities not debts.

The statute makes no special provision with respect to contingent debts and contingent liabilities. In this respect it differs from former bankrupt acts.<sup>1</sup>

Where a liability of the bankrupt is not fixed so that it can be liquidated by legal proceedings instituted at the time of bankruptcy, it is not a debt. It is deemed so far contingent that it can not be proved in bankruptcy, nor is it released by the bankrupt's discharge.<sup>2</sup> A sum of money payable upon a contingency is not provable, because it does not become a

<sup>11</sup> *In re Burlage Bros.*, 169 Fed. 1006, 22 Am. B. R. 410.

<sup>12</sup> *In re Dix*, 176 Fed. Rep. 582, 23 Am. B. R. 889; *In re Davis* (C. C. A. 3d Cir.), 174 Fed. Rep. 556, 98 C. C. A. 338, 23 Am. B. R. 446.

<sup>13</sup> *James v. Gray* (C. C. A. 1st Cir.), 131 Fed. Rep. 401, 65 C. C. A. 385, 12 Am. B. R. 573, as explained in *Tucker v. Curtin* (C. C. A. 1st Cir.), 148 Fed. Rep. 929, 78 C. C. A. 557, 18 Am. B. R. 378; *McDonald v. Tefft-Weller Co.* (C. C. A. 5th Cir.), 128 Fed. Rep. 381, 65 C. C. A. 123, 11 Am. B. R. 800; *Ex parte Wells*, 2 M. & D. DeG. 504.

In *McDonald v. Tefft-Weller Co.*, *supra*, after referring to the status of a married woman in Florida, the court said: "The creditors' legal

remedy upon her contracts being in equity, under which all her separate property may be taken. That is to say, that such married woman may contract a debt which she morally owes—owes in equity and good conscience, lawfully owes—but which she can not be personally adjudged to pay." The limited obligation thus resulting was held to be a provable debt in that case.

<sup>1</sup> R. S. Sec. 5068 expressly provided for proving "contingent debts and contingent liabilities," and Sec. 5 of the Act of 1841, 5 Stat. at L. 445, provided for proving "uncertain or contingent demands." *Dunbar v. Dunbar*, 190 U. S. 340, 350, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>2</sup> *In re Pettingill & Co.*, 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re*



debt until the contingency has happened.<sup>3</sup> *Non constat* the contingency will not happen.

Thus, under the trustee laws of Massachusetts, it has been held that the wages of a sailor, being contingent on the arrival of the ship, are not a debt until the ship has arrived, and therefore, until then not attachable.<sup>4</sup> So of a covenant to pay rent quarterly. It creates no debt until it becomes due, for before that time the lessee may quit, with the consent of the lessor, or he may assign his term with his consent, or he may be evicted by a title paramount to that of the lessor, in either of which cases he will be discharged from his covenant.<sup>5</sup> So a contract between the shippers of a cargo and the owners of the ship, that the latter shall receive a share of the profits, does not create a debt from the former to the latter until the termination of the voyage.<sup>6</sup> Under a contract between a building contractor and a sub-contractor that the building contractor shall not pay until he has been paid by the owner the sub-contractor has no provable claim against the building contractor until the owner pays the building contractor.<sup>7</sup> A contract to pay \$8,000, with interest annually, at the bankrupt's election, at any time before the payee's death or to his heirs,

Ellis (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 16 Am. B. R. 221; Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re* Inman & Co., 171 Fed. Rep. 185; *In re* Imperial Brewing Co., 143 Fed. Rep. 579, 16 Am. B. R. 110; *In re* Thompson Milling Co., 144 Fed. Rep. 314, 16 Am. B. R. 454.

*In re* Rutland Realty Co., 157 Fed. Rep. 296, 298, 19 Am. B. R. 546, Judge Hough said: "The petitioner, Marcuson, has no provable debt, so far as the petition shows, because he is under no fixed liability. There is nothing *debitum in presenti*; and, although his liability may be *solvendum in futuro*, there is absolutely nothing to show at what figure it will be liquidated, and until

it is liquidated there is nothing due at all. "

<sup>3</sup> Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1184, 10 Am. B. R. 139; Godding v. Rosenthal, 180 Mass. 43; Morgan v. Wordell, 178 Mass. 350; Insley v. Garside (C. C. A. 9th Cir.), 121 Fed. Rep. 699, 58 C. C. A. 119, 10 Am. B. R. 52; *In re* Hartman, 166 Fed. Rep. 776, 21 Am. B. R. 610.

<sup>4</sup> Wentworth v. Whittemore, 1 Mass. 471.

<sup>5</sup> Wood v. Partridge, 11 Mass. 488. See also Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232.

<sup>6</sup> Davis v. Ham, 3 Mass. 33; Frothingham v. Haley, 3 Mass. 68.

<sup>7</sup> *In re* Ellis (C. C. A. 6th Cir.), 143 Fed. Rep. 103, 16 Am. B. R. 221.

etc., within five years after his death, is a contingent debt and not provable.<sup>7\*</sup>

So a claim for damages upon a bond conditioned upon the faithful performance of certain duties is not a debt until the contingency has happened and the damage has been assessed.<sup>8</sup> But it has been held that where an agreement indemnifying a contractor's surety assigned to the latter all the contractor's plant in the event of the contractor being unable to complete the contract, and the contractor subsequently abandoned the contract, and was declared a bankrupt, the surety became a creditor of the bankrupt from the date of the latter's abandonment of the contract, though the amount of the surety's claim depended upon contingencies, and was not liquidated.<sup>9</sup> Before the day at which rent is covenanted to be paid it is in no sense a debt. It is neither *debitum* nor *solvendum*.<sup>10</sup>

A contract by a husband to pay his wife a certain sum annually during her lifetime or widowhood is not provable in bankruptcy.<sup>11</sup>

It has been held sufficient to admit proof in case of debts founded upon contracts, if the rights of parties and the amount of liability are fixed at the time of filing the petition, and the contingency happens within the period allowed for proof. The bond of the bankrupt to secure payment to the obligee of an annuity for life may be proved against the estate of the obligor,<sup>12</sup> and a creditor may prove against the estate of the bankrupt after the liability had become fixed, where the contingency was that the bankrupt was the indorser of commercial paper not due at the time of filing the petition.<sup>13</sup> Where an ad-

<sup>7\*</sup> *In re* Hartman, 166 Fed. Rep. 776, 21 Am. B. R. 610.

<sup>8</sup> *Ellis v. Ham*, 28 Me. 385; *Woodward v. Herbert*, 24 Me. 358; *Godding v. Rosenthal*, 180 Mass. 43.

<sup>9</sup> *Wood v. United States Fidelity & Guarantee Co.*, 143 Fed. Rep. 424, 16 Am. B. R. 21.

<sup>10</sup> *Deane v. Caldwell*, 127 Mass. 244.

<sup>11</sup> *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>12</sup> *Cobb v. Overman* (C. C. A. 4th Cir.), 109 Fed. Rep. 65, 48 C. A. 223, 6 Am. B. R. 324, as explained *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728.

<sup>13</sup> *Moch v. National Bank* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 6 Am. B. R. 11; *In re* Philip Sem-

ministrator commits a breach before bankruptcy of his surety, damages for the breach is provable against the estate of the surety.<sup>14</sup> No provable claim exists where the breach is after bankruptcy.<sup>14\*</sup>

It has been held that, where the claim was contingent at the time the petition was filed, but became definite and capable of liquidation within a year, it is a provable debt.<sup>15</sup>

It was held under the act of 1841, which provided for proving uncertain and contingent demands, that so long as the demand remained wholly uncertain whether a contract or engagement would ever give rise to an actual debt or liability and there was no means of removing the uncertainty by calculation, such contract or engagement was unprovable under the act.<sup>16</sup>

#### **§ 294. Debts which are a fixed liability provable.**

Debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, without any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.<sup>1</sup>

In order to be a debt provable under this provision three things must concur. *First*, it must be a debt, *second*, the debt must be a fixed liability absolutely owing at the time of the filing of the petition; and, *third*, the debt must be evidenced by a judgment or an instrument in writing.

mer Glass Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 14 Am. B. R. 25; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112.

<sup>14</sup> *Hibberd v. Bailey* (C. C. A. 5th Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104; *Harmon v. McDonald*, 187 Mass. 578.

<sup>14\*</sup> *In re* Dunlap Carpet Co., 163

Fed. Rep. 541, 20 Am. B. R. 882; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112; *In re* Caloris Mfg. Co., 179 Fed. Rep. 722, 24 Am. B. R. 609.

<sup>15</sup> *Loring v. Kendall*, 1 Gray (Mass.), 305.

<sup>16</sup> *Riggen v. Magwire*, 15 Wall. 549, 21 L. Ed. 232.

<sup>1</sup> B. A. 1898, Sec. 63a.

Under this provision debts may be proved, which are owing at the time of filing the petition in bankruptcy on judgments, bonds for a determinate sum, some debts arising under contract, notes, bills of exchange, checks, etc., as will be further pointed out in the next few sections.

The words "a fixed liability" "absolutely owing" are limited to debts provable under the first clause of section 63a. The ruling word in this section is "debts." Five distinct and independent classes of provable debts are described in the five clauses.

It has been suggested that these words should be read into the fourth clause as a limitation on contract debts.<sup>2</sup> If Congress had intended to so limit the fourth clause it would have been easy to have said so. The fourth clause is clearly limited to debts at the time of bankruptcy. The obligation to pay must be fixed and the amount ascertainable at that time, although the debt may not become owing until the happening of some event.<sup>3</sup> Such claims are "debts founded on a contract," in which the rights of the parties are absolutely fixed as between them at the time of filing the petition.

### **§ 295. What constitutes a fixed liability absolutely owing.**

A fixed liability absolutely owing means that the obligation to pay exists at the time of filing the petition and is sufficiently definite in amount to permit of computation.<sup>4</sup>

<sup>2</sup> *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588; *In re* Swift (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 50 C. C. A. 264, 7 Am. B. R. 375.

<sup>3</sup> *Moch v. Market St. Nat. Bank* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11; *In re* Philip Semmer Glass Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 67 C. C. A. 551, 14 Am. B. R. 25; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112; *In re* Dunlap

*Carpet Co.*, 163 Fed. Rep. 541, 20 Am. B. R. 882; *In re* Caloris Mfg. Co., 179 Fed. Rep. 722, 24 Am. B. R. 609.

<sup>4</sup> *Loeser v. Alexander* (C. C. A. 6th Cir.), 176 Fed. Rep. 265, 100 C. C. A. 89, 24 Am. B. R. 75; *Cobb v. Overman* (C. C. A. 4th Cir.), 109 Fed. Rep. 65, 48 C. C. A. 223, 6 Am. B. R. 324; *Hibberd v. Bailey* (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104; *In re* Thompson Milling Co., 144 Fed. Rep. 314, 16 Am. B. R. 454.

It has been held that the bond of a bankrupt to secure the payment to the obligee of an annuity for life may be proved under this section.<sup>1</sup> A judgment note waiving exemptions is a provable debt.<sup>2</sup> The liability of a bankrupt as surety on the bond of an administrator is held to be a fixed liability absolutely owing where no final decree has been rendered in the state court adjudging the liability of the principal.<sup>3</sup> The liability of a bankrupt surety on a deputy collector's bond to a county treasurer is a fixed liability upon the failure of the deputy collector to pay to the treasurer the money collected.<sup>3\*</sup> A liability may become fixed by the filing of the petition in bankruptcy.<sup>3\*\*</sup>

Contingent debts or liabilities or demands, the valuation or estimation of which it is substantially impossible to prove, are not provable debts under this clause,<sup>4</sup> or a claim for a breach of a covenant in a lease where no breach is shown prior to bankruptcy,<sup>5</sup> or an attorney's fee stipulated in a judgment note where the note has been placed in the hands of an attorney for collection prior to the filing of the petition in bankruptcy,<sup>6</sup> or for the breach of a contract of lease where the

<sup>1</sup> Cobb v. Overman (C. C. A. 4th Cir.), 109 Fed. Rep. 65, 48 C. C. A. 223, 6 Am. B. R. 324, overruling Bray v. Cobb, 100 Fed. Rep. 270, 3 Am. B. R. 788.

<sup>2</sup> Claster v. Soble, 22 Pa. Super. Ct. 631, 10 Am. B. R. 446.

<sup>3</sup> Hibberd v. Bailey (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104, reversing *In re Wiseman*, 123 Fed. Rep. 185, 10 Am. B. R. 545.

<sup>3\*</sup> Loeser v. Alexander (C. C. A. 6th Cir.), 176 Fed. Rep. 100, C. C. A. 89, 24 Am. B. R. 75.

<sup>3\*\*</sup> *In re Neff* (C. C. A. 6th Cir.), 157 Fed. Rep. 57, 84 C. C. A. 561,

19 Am. B. R. 23; *In re Swift* (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 50 C. C. A. 264, 7 Am. B. R. 375.

<sup>4</sup> Dunbar v. Dunbar, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>5</sup> *In re Pennewell* (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 55 C. C. A. 571, 9 Am. B. R. 490.

<sup>6</sup> McCabe v. Patton (C. C. A. 3d Cir.), 174 Fed. Rep. 217, 98 C. C. A. 225, 23 Am. B. R. 335; *In re Garlington*, 115 Fed. Rep. 999, 8 Am. B. R. 602; *In re Keeton*, 126 Fed. Rep. 462, 11 Am. B. R. 357; *In re Gerson* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49,

lessor has re-entered and taken possession of the leased property.<sup>7</sup> The liability of a bankrupt as surety does not become a fixed liability until maturity notice and nonpayment of the debt,<sup>8</sup> but it may be proved under clause 4 as a contract of endorsement.<sup>9</sup>

The word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. Whether the debt is owing or not is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable, is a debt absolutely owing without regard to the fact whether it be payable now or at a future time. The provision requires the debt to be absolutely owing, and expressly includes both classes of debts; namely, those debts which are payable at the date of the commencement of bankruptcy and those debts which are payable at a subsequent date. It is sufficient if the debt is a fixed liability absolutely owing when the petition in bankruptcy is filed.<sup>10</sup>

It is the actual value of the debt owing at the commencement of bankruptcy proceedings that is provable.<sup>11</sup> This provision establishes that date as the time at which the liability is to be ascertained and determined. Accrued interest at that date is as much a part of the indebtedness as the princi-

6 Am. B. R. 11; *In re* Gebhard, 140 Fed. Rep. 571, 15 Am. B. R. 381.

But see *Merchants' Bank v. Thomas* (C. C. A. 5th Cir.), 121 Fed. Rep. 306, 57 C. C. A. 374, 10 Am. B. R. 299.

<sup>7</sup> *Lamson Consol. Store Service v. Bowland* (C. C. A. 6th Cir.), 114 Red. Rep. 639, 52 C. C. A. 335.

<sup>8</sup> *In re* Schaefer, 104 Fed. Rep. 973, 5 Am. B. R. 92n; *In re* Gerson, 105 Fed. Rep. 891, 5 Am. B. R. 89, affirmed (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11.

<sup>9</sup> *Moch v. Market St. Nat. Bank* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11.

<sup>10</sup> B. A. 1898, Sec. 63a, clause 1.

<sup>11</sup> *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 602; *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 55 C. C. A. 571, 9 Am. B. R. 490; *Merchants' Bank v. Thomas* (C. C. A. 5th Cir.), 10 Am. B. R. 299, 57 C. C. A. 374, 121 Fed. Rep. 306; *Hibberd v. Bailey*, (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104, reversing *In re* Wiseman, 123 Fed. Rep. 185, 10 Am. B. R. 545.

pal.<sup>12</sup> But interest accruing thereafter is not provable. The question of interest is further considered elsewhere.<sup>13</sup>

### § 296. Judgments prior to bankruptcy provable.

A debt evidenced by a judgment obtained prior to the commencement of bankruptcy proceedings is provable against the estate of the bankrupt.<sup>1</sup>

A debt is not evidenced by a judgment until one is actually rendered.<sup>2</sup> A mere verdict in an action is not sufficient. A certified copy of the judgment is evidence of the debt.<sup>3</sup>

A judgment carries costs and interest to the date of the filing of the petition, where it would do so under the laws of the state in which it was rendered. Such costs and interest form a part of the provable debt in such cases.<sup>4</sup> A judgment for costs is regularly a provable debt.<sup>5</sup> A judgment for breach of promise of marriage is a provable debt.<sup>6</sup>

A judgment, if not outlawed, obtained at any time prior to the filing of the petition, even within four months, is provable.<sup>7</sup> It should be observed that while a judgment lien may be invalid as a preference for the reason that it was obtained within four months, the judgment is not for this reason in-

<sup>12</sup> *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832; *In re Bartenbach*, No. 1068 Fed. Cas., 11 N. B. R. 61; *In re Haake*, No. 5883 Fed. Cas., 2 Saw. 231; *In re New Brunswick Carpet Co.*, 4 Fed. Rep. 514.

<sup>13</sup> Sec. 305, *post*.

<sup>1</sup> B. A. 1898, Sec. 63a, clause 1; *In re McCauley*, 101 Fed. Rep. 223, 4 Am. B. R. 122; *In re Alderson*, 98 Fed. Rep. 588, 3 Am. B. R. 544; *In re Farmer*, 116 Fed. Rep. 763, 9 Am. B. R. 19; *In re Rebman* (C. C. A. 9th Cir.), 150 Fed. Rep. 759, 80 C. C. A. 594, 17 Am. B. R. 767.

<sup>2</sup> *Black v. McClelland*, No. 1462 Fed. Cas., 12 N. B. R. 481; *Crouch v. Gridley*, 6 Hill (N. Y.), 250; *Ex parte Columbian Ins. Co.*, No. 3037 Fed. Cas., 2 Low. 5.

<sup>3</sup> *Ex parte Anderson*, 14 Q. B. D. 606.

<sup>4</sup> *Ex parte O'Neil*, No. 10527 Fed. Cas., 1 Low. 163.

<sup>5</sup> *Graham v. Pierson*, 6 Hill (N. Y.), 247.

<sup>6</sup> *In re Fife*, 109 Fed. Rep. 880, 6 Am. B. R. 258; *In re McCauley*, 101 Fed. Rep. 223, 4 Am. B. R. 122; *Finnegan v. Hall* (N. Y. Sup. Ct.), 6 Am. B. R. 648; *Distler v. McCauley*, 66 N. Y. App. Div. 42, 7 Am. B. R. 138.

<sup>7</sup> *In re Farmer*, 116 Fed. Rep. 763, 9 Am. B. R. 19; *In re Rebman* (C. C. A. 9th Cir.), 150 Fed. Rep. 759, 80 C. C. A. 594, 17 Am. B. R. 767; *In re Pease* (Ref.), 4 Am. B. R. 547; *In re Scully* (Ref.), 5 Am. B. R. 716.



valid as an evidence of the debt. The creditor may not be entitled to a preference, but still be entitled to prove his debt as a general creditor.<sup>8</sup> But where the judgment no longer exists it is not evidence of the debt, and the proof of the claim will not be allowed.<sup>9</sup> Where a writ of error has been prosecuted the judgment debt may still be proved,<sup>10</sup> subject to having the dividends withheld until the appellate court disposes of the writ of error.

It should be observed that only a judgment which is evidence of a debt is provable. If the nature of the liability, the original cause of action, is not debt, it can not be proved under this clause. A judgment may be deemed *prima facie* evidence of a debt, but the court may look behind the judgment to see if it is evidence of a debt.<sup>11</sup> The reason for this is that the judgment does not change the nature of the liability.<sup>12</sup>

A court of bankruptcy at the instance of a trustee or creditors, has gone behind a judgment offered for proof, where the judgment was for a fine or penalty imposed for punishment under a state law,<sup>13</sup> or for alimony, whether in arrear at the time of the adjudication in bankruptcy, or for alimony accruing since the adjudication,<sup>14</sup> or for the support of minor chil-

<sup>8</sup> *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506.

<sup>9</sup> *In re* Bruce, No. 2044 Fed. Cas., 6 Ben. 515; *In re* Lipman, 94 Fed. Rep. 353, 2 Am. B. R. 46.

<sup>10</sup> *In re* Sheehan, No. 12737 Fed. Cas., 8 N. B. R. 345.

See *In re* Yates, 114 Fed. Rep. 365, 8 Am. B. R. 69.

<sup>11</sup> *Turner v. Turner*, 108 Fed. Rep. 785, 6 Am. B. R. 289; *Ex parte* Anderson, 14 Q. B. D. 606; *Ex parte* Lennox, 16 Q. B. D. 315; *Ex parte* Revell, 13 Q. B. D. 720; *Ex parte* Seaton, 8 Mor. 97.

<sup>12</sup> *In* Boynton v. Ball, 121 U. S. 457, 466, 30 L. Ed. 985, Mr. Justice Miller said: "But this court, to which this precise question is now

presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the state court and the existence of which was provable in bankruptcy."

<sup>13</sup> *In re* Moore, 111 Fed. Rep. 145, 6 Am. B. R. 590.

<sup>14</sup> *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; *Dunbar v. Dunbar*, 190 U. S.



dren by a father.<sup>15</sup> Judgments of this character and for the purpose of enforcing a natural or moral duty may evidence a fixed liability absolutely owing but are not provable, because not evidence of a debt.<sup>16</sup>

A judgment in tort, obtained prior to bankruptcy, is not evidence of a debt in the sense that word is used in bankruptcy.<sup>17</sup> It is the practice in some districts to allow a claim for damages for injury to the person or property, which has been reduced to judgment before bankruptcy, to be proved as a fixed liability absolutely owing.<sup>18</sup> The ruling word in section 63 of the act is the word "debts." If Congress intended to include a claim for damages for a tort it would have been easy to use words to express that intention. No provision is made for proving or allowing a claim in tort either before or after liquidation. Such judgments, like those for alimony, fines and penalties, not being evidence of a debt, are not provable against the estate of a bankrupt.

### § 297. Judgments pending bankruptcy proceedings provable.

Judgments pending bankruptcy proceedings are provable, when "founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and

340, 47 L. Ed. 1084, 10 Am. B. R. 139; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390, 13 Am. B. R. 1; *Turner v. Turner*, 108 Fed. Rep. 785, 6 Am. B. R. 289.

But see *Arrington v. Arrington* (Sup. Ct. N. C.), 10 Am. B. R. 103, where it was held that a final judgment for alimony entered in another state upon a decree for absolute divorce is a provable and dischargeable debt.

In England alimony is neither discharged nor provable in bankruptcy. *Linton v. Linton* (1885), 15 Q. B. D. 239; *Hawkins v. Hawkins* (1894), 1 Q. B. D. 25; *Wat-*

*kins v. Watkins* (1896), Prob. 22; *Kerr v. Kerr* (1897), 2 Q. B. 439.

<sup>15</sup> *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; *In re Hubbard*, 98 Fed. Rep. 710, 3 Am. B. R. 528; *In re Baker*, 96 Fed. Rep. 954, 3 Am. B. R. 101.

<sup>16</sup> Consult *Colwell v. Tinker* (N. Y. Sup. Ct.), 6 Am. B. R. 434; *In re Maples*, 105 Fed. Rep. 919, 5 Am. B. R. 426; *Burnham v. Pidcock* (N. Y. Sup. Ct. App. Div.), 5 Am. B. R. 590.

<sup>17</sup> As to what is a debt, see Sec. 289, *ante*.

<sup>18</sup> *In re Lorde*, 144 Fed. Rep. 320, 16 Am. B. R. 201.

interests accrued after the filing of the petition and up to the time of the entry of such judgments.”<sup>1</sup>

Two elements are necessary to make a judgment of this character provable. *First*, it must be founded upon a provable debt,<sup>1\*</sup> and *second*, it must be reduced to judgment pending bankruptcy proceedings before the bankrupt's application for a discharge is considered by the court. In this class all debts are on the same basis in respect to interest as other claims.<sup>2</sup> The actual value of the debt at the date of the filing of the petition is what is provable after costs have been deducted.

There was much conflict of opinion with reference to whether this class of debts was provable under the former bankrupt acts. Under these acts, as under the present statute, debts created during bankruptcy were not provable. The division of opinion grew out of the application of the doctrine of merger. Some judges conceived the debt existing at the time of filing the petition to be merged in the judgment obtained thereafter and to become a new debt, as of the date of the judgment, and hence not provable.<sup>3</sup> Others held the view that the judgment retained the character of the indebtedness out of which it arose, and was not to be regarded as a new debt arising subsequently to the filing of the petition.<sup>4</sup>

*In re United Button Co.*, 140 Fed. Rep. 495, 507, 15 Am. B. R. 390, Judge Bradford, deciding that unliquidated damages in tort were not provable, observed: “A judgment recovered against a bankrupt, prior to the filing of the petition, for a tort wholly unrelated to contractual or quasi contractual obligation, is provable as ‘a fixed liability, as evidenced by a judgment.’”

<sup>1</sup> B. A. 1898, Sec. 63, clause 5; *In re McBryde*, 99 Fed. Rep. 686, 3 Am. B. R. 729; *In re Fife*, 109 Fed. Rep. 880, 6 Am. B. R. 258.

<sup>1\*</sup> *In re Crescent Lumber Co.*, 154 Fed. Rep. 724, 19 Am. B. R. 112.

<sup>2</sup> See Sec. 305, *post*.

<sup>3</sup> *In re Williams*, No. 17705 Fed. Cas., 2 N. B. R. 229; *In re Mansfield*, No. 9049 Fed. Cas., 6 N. B. R. 388; *In re Gallison*, No. 5203 Fed. Cas., 2 Low. 72; *Sanford v. Sanford*, 58 N. Y. 67; *Bradford v. Rice*, 102 Mass. 472; *Cutter v. Evans*, 115 Mass. 27; *Woodbury v. Perkins*, 5 Cush. 86; *Ellis v. Ham*, 28 Me. 385; *Uran v. Houdlette*, 36 Me. 15; *Pike v. McDonald*, 32 Me. 418; *Kellogg v. Schuyler*, 2 Denio (N. Y.), 73; *Roden v. Jaco*, 17 Ala. 344; *McCarthy v. Goodwin*, 8 Mo. App. 380.

<sup>4</sup> *In re Crawford*, No. 3363 Fed. Cas., 3 N. B. R. 698; *In re Brown*, No. 1975 Fed. Cas., 5 Ben. 1;

The latter view was taken by the supreme court when the matter came before it for the first time, about eight years after the bankrupt law had been repealed.<sup>5</sup> No such conflict of opinion can arise under the present statute, which expressly declares such judgments to be provable debts.

**§ 298. Debts evidenced by an instrument in writing.**

A debt which is a fixed liability as evidenced by an instrument in writing and absolutely owing at the time of the filing of the petition is provable.<sup>1</sup>

An instrument in writing, as used in this connection, is a written document which is the legal evidence of a fixed liability to pay a debt, such as bonds for a determinate sum, notes, bills of exchange, checks, written contracts, etc. Checks, however, are not evidence of a debt accruing to a bank by reason of an overdraft.<sup>2</sup> A debt, created by oral agreement or upon an open account, is not provable under this provision but may be proved under the fourth clause of section 63a.<sup>3</sup>

Where the bankrupt is the maker, or the one principally bound by the written instrument, the debt evidenced by the written instrument is clearly provable.<sup>4</sup> In such cases it is

Barnes v. United States, No. 1023 Fed. Cas., 12 N. B. R. 526; *In re* Vickery, No. 16930 Fed. Cas., 3 N. B. R. 696; Fox v. Woodruff, 9 Barb. 498; Dresser v. Brooks, 3 Barb. 429; Johnson v. Fitzhugh, 3 Barb. Ch. 360; Clark v. Rowling, 3 N. Y. 216; Stockwell v. Woodward, 52 Vt. 234; Harrington v. McNaughton, 20 Vt. 293; Blanford v. Foote, 1 Cowp. 138; Rogers v. Ins. Co., 1 La. Ann. 161; Imlay v. Carpentier, 14 Cal. 173; Stratton v. Perry, 2 Tenn. Ch. 633; Raymond v. Merchant, 3 Cow. 147; Dick v. Powell, 2 Swan, 632; McDonald v. Ingraham, 30 Miss. 389; Anderson v. Anderson, 65 Ga. 518; Betts v. Bagley, 12 Pick. 572; Dawson v.

Hartsfield, 79 N. C. 334; Dinsdale v. Eames, 4 Moore, 350; 2 Brod. & B. 8.

<sup>5</sup> Boynton v. Ball, 121 U. S. 457, 466, 30 L. Ed. 985.

<sup>1</sup> B. A. 1898, Sec. 63a, clause 1. As to what constitutes a fixed liability, see Sec. 295, *ante*.

<sup>2</sup> *In re* New Brunswick Carpet Co., 4 Fed. Rep. 515; Fletcher v. Manning, 12 M. & W. 571.

<sup>3</sup> See Sec. 307, *et seq.*, *post*.

<sup>4</sup> Union Nat. Bank v. Neill (C. A. 5th Cir.), 149 Fed. Rep. 711, 79 C. C. A. 417, 17 Am. B. R. 841; *In re* Kyte, 164 Fed. Rep. 302, 21 Am. B. R. 110; *In re* Robinson, 136 Fed. Rep. 994, 14 Am. B. R. 626; *In re* New York Car Wheel Wks,

the debt in equity which is provable.<sup>5</sup> The provable debt does not include a penalty named in a contract,<sup>6</sup> or usurious interest on a note,<sup>7</sup> or that portion of a note by a corporation for debts of third parties in the hands of a purchaser with notice.<sup>8</sup>

A creditor, holding a note of the bankrupt and also another note, as collateral, on which he is liable as endorser, can prove for the real debt and not on both notes.<sup>9</sup> It is a well settled rule that an estate in bankruptcy must never pay two dividends to an unsecured creditor upon one and the same debt.<sup>10</sup>

A creditor may prove a debt evidenced by a written instrument signed by an individual, who has become bankrupt.<sup>11</sup> A wife has been permitted to prove a note given her by her husband, who was solvent at the time but afterwards adjudged bankrupt.<sup>12</sup>

A promissory note made by a partnership may be proved against the firm estate in bankruptcy.<sup>13</sup> A partner has the

139 Fed. Rep. 421, 14 Am. B. R. 595; *Mapes v. German Bank* (C. C. A. 8th Cir.), 176 Fed. Rep. 89, 99 C. C. A. 609, 23 Am. B. R. 713.

<sup>5</sup> *Mapes v. German Bank* (C. C. A. 8th Cir.), 176 Fed. Rep. 89, 99 C. C. A. 609, 23 Am. B. R. 713; *In re Robinson*, 136 Fed. Rep. 994, 14 Am. B. R. 626; *First Nat. Bank v. Eason* (C. C. A. 5th Cir.), 149 Fed. Rep. 204, 79 C. C. A. 162, 17 Am. B. R. 593; *Ex parte Fidgeon*, 4 Dea. 217; *Ex parte Maclean*, 2 Mont. D. & D. 564, 6 Jur. 609; *Wilson v. Nat. Bank*, 3 Fed. Rep. 391; *In re Sterling, Ahrens & Co.*, 1 Fed. Rep. 167.

<sup>6</sup> In *Ex parte Capper*, 4 Chan. D. 724, it was held that where a building contract provided that in case the contract should not be in all things duly performed by the contractors they should pay to the employer 1000*l* as and for liquidated damages, yet that the 1000*l* was in the nature of a penalty, and proof

could only be had for the actual damage sustained.

<sup>7</sup> *In re Robinson*, 136 Fed. Rep. 994, 14 Am. B. R. 626.

<sup>8</sup> *Mapes v. German Bank* (C. C. A. 8th Cir.), 176 Fed. Rep. 89, 99 C. C. A. 609, 23 Am. B. R. 713.

<sup>9</sup> *First Nat. Bank v. Eason* (C. C. A. 5th Cir.), 149 Fed. Rep. 204, 79 C. C. A. 162, 17 Am. B. R. 593.

<sup>10</sup> *First Nat. Bank v. Eason* (C. C. A. 5th Cir.), 149 Fed. Rep. 204, 79 C. C. A. 162, 17 Am. B. R. 593; *In re Sterling, Ahrens & Co.*, 1 Fed. Rep. 167; *Hitner v. Diamond State Steel Co.*, 176 Fed. Rep. 384, 404.

<sup>11</sup> *In re Robinson*, 136 Fed. Rep. 994, 14 Am. B. R. 626; *In re Kyte*, 164 Fed. Rep. 302, 21 Am. B. R. 110.

<sup>12</sup> *In re Kyte*, 164 Fed. Rep. 302, 21 Am. B. R. 110.

<sup>13</sup> *Union Nat. Bank v. Neill* (C. C. A. 5th Cir.), 149 Fed. Rep. 711, 79 C. C. A. 417, 17 Am. B. R. 841; *Merchants Bank v. Thomas* (C. C.

implied authority to borrow money on the credit of the firm, to draw and accept, make and endorse bills of exchange, and promissory notes in the name of the firm, which may be proved in bankruptcy.<sup>14</sup>

A private corporation may borrow money or become a party to negotiable paper in the transaction of its legitimate business unless expressly prohibited, and such debts are provable against its estate in bankruptcy.<sup>15</sup> Bonds or notes of a corporation, which are *ultra vires*, are not provable by a purchaser with notice of the infirmity.<sup>16</sup> It is beyond the powers of a corporation and of its officers to make accommodation paper, or to guarantee, or to pay the obligations of others in which it has no interest and from which it derives no benefit.<sup>17</sup> Notes given by a corporation to pay for shares of its own stock are not provable debts against the estate of the corporation.<sup>18</sup>

### § 299. Accommodation paper.

Where the bankrupt was the maker or endorser of accommodation paper, the debt is provable against his estate by a *bona fide* purchaser, although it was invalid and illegal in its inception.<sup>1</sup>

A. 5th Cir.), 121 Fed. Rep. 306, 57 C. C. A. 374, 10 Am. B. R. 299.

<sup>14</sup> Union Nat. Bank v. Neill (C. C. A. 5th Cir.), 149 Fed. Rep. 711, 79 C. C. A. 417, 17 Am. B. R. 841.

<sup>15</sup> *In re* New York Car Wheel Wks., 141 Fed. Rep. 430, 15 Am. B. R. 571, and 139 Fed. Rep. 421, 14 Am. B. R. 595; *In re* Waterloo Organ Co. (C. C. A. 2d Cir.), 134 Fed. Rep. 345, 67 C. C. A. 327, 13 Am. B. R. 477; Mapes v. German Bank (C. C. A. 8th Cir.), 176 Fed. Rep. 89, 99 C. C. A. 609, 23 Am. B. R. 713.

<sup>16</sup> *In re* Waterloo Organ Co. (C.

C. A. 2d Cir.), 134 Fed. Rep. 341, 67 C. C. A. 255, 13 Am. B. R. 466.

<sup>17</sup> Mapes v. German Bank (C. C. A. 8th Cir.), 176 Fed. Rep. 89, 99 C. C. A. 609, 23 Am. B. R. 713; *In re* Prospect Worsted Mills, 126 Fed. Rep. 1011, 11 Am. B. R. 502.

<sup>18</sup> *In re* Smith Lumber Co., 132 Fed. Rep. 618, 13 Am. B. R. 123.

<sup>1</sup> Mapes v. German Bank (C. C. A. 8th Cir.), 176 Fed. Rep. 89, 99 C. C. A. 609, 23 Am. B. R. 713; Merchants & Mn'frs Nat. Bank v. Galbraith (C. C. A. 6th Cir.), 157 Fed. Rep. 208, 84 C. C. A. 656, 19 Am. B. R. 319; Union Nat. Bank

If the owner of the accommodation paper has actual knowledge of the infirmity in the note, or want of title from the one from whom he takes it, the debt is not provable against the estate of the bankrupt maker or endorser.<sup>2</sup> In such cases there must be either actual knowledge or bad faith.<sup>3</sup> Bad faith may be shown by a wilful disregard of a refusal to learn the facts when available and at hand.<sup>4</sup>

A purchaser of an accommodation note, to be used as collateral merely, can not prove the debt when he bought it with knowledge of the limited use to which it might be put.<sup>5</sup>

### § 300. Attorney's collection fees.

Where a promissory note provides for an attorney's collection fee in addition to the principal and interest, the creditor is entitled to prove his claim for such fees in addition to the amount of the note, when the note matured and was placed in the hands of an attorney for collection before the maker became a bankrupt.<sup>1</sup>

A creditor is not entitled to prove a claim for attorney's collection fees in a note, which matured after the petition in

v. Neill (C. C. A. 5th Cir.), 149 Fed. Rep. 711, 79 C. C. A. 417, 17 Am. B. R. 841; *In re* New York Car Wheel Wks., 141 Fed. Rep. 430, 15 Am. B. R. 571; *In re* Hopper-Morgan Co., 154 Fed. Rep. 249, 19 Am. B. R. 528*n*; *In re* Akron Twine & Cordage Co. (Ref.), 11 Am. B. R. 321; *In re* Farmers & Mer. Bank v. Akron Machine Co. (Ref.), 12 Am. B. R. 6.

<sup>2</sup> *In re* Prospect Worsted Mills Co., 126 Fed. Rep. 1011, 11 Am. B. R. 502; *In re* Hopper-Morgan Co., 156 Fed. Rep. 525, 19 Am. B. R. 518.

<sup>3</sup> *In re* Hopper-Morgan Co., 156 Fed. Rep. 525, 19 Am. B. R. 518, and 154 Fed. Rep. 249, 19 Am. B. R. 528*n*; Union Nat. Bank v. Neill

(C. C. A. 5th Cir.), 149 Fed. Rep. 711, 79 C. C. A. 417, 17 Am. B. R. 841; Merchants & Mn'rs Bank v. Galbraith (C. C. A. 6th Cir.), 157 Fed. Rep. 208, 84 C. C. A. 656, 19 Am. B. R. 319.

<sup>4</sup> *In re* Hopper-Morgan Co., 156 Fed. Rep. 525, 530, 19 Am. B. R. 518; Union Nat. Bank v. Neill (C. C. A. 5th Cir.), 149 Fed. Rep. 711, 79 C. C. A. 417, 17 Am. B. R. 841.

<sup>5</sup> *In re* Hopper-Morgan Co., 156 Fed. Rep. 525, 19 Am. B. R. 518.

<sup>1</sup> Merchants Bank v. Thomas (C. C. A. 5th Cir.), 121 Fed. Rep. 306, 57 C. C. A. 374, 10 Am. B. R. 299; *In re* Edens Co., 151 Fed. Rep. 940, 18 Am. B. R. 643.

bankruptcy was filed,<sup>2</sup> or where no services were actually rendered in making the collection before bankruptcy.<sup>3</sup>

A claim for attorney's fees stipulated in a chattel mortgage has been denied.<sup>4</sup>

### § 301. Claims against bankrupts as indorsers.

A provable debt may be based upon the contract of indorsement of a bankrupt before the petition was filed.<sup>1</sup>

In case the bankrupt is the person secondarily liable as an indorser, the debt thus created being founded on a contract,<sup>2</sup> may be proved under clause 4 of section 63a.<sup>3</sup> It is not necessary that the liability of the indorser has become absolute and fixed by maturity and notice of nonpayment of the debt before bankruptcy to be provable and released by a discharge.<sup>4</sup> If the note matures within one year after bank-

<sup>2</sup> *In re* Garlington, 115 Fed. Rep. 999, 8 Am. B. R. 601; *In re* Keeton, 126 Fed. Rep. 426, 11 Am. B. R. 367, and 126 Fed. Rep. 429, 11 Am. B. R. 370; *In re* Thompson Milling Co., 144 Fed. Rep. 314, 16 Am. B. R. 454.

<sup>3</sup> *McCabe v. Patton* (C. C. A. 3d Cir.), 174 Fed. Rep. 217, 98 C. C. A. 225, 23 Am. B. R. 335; *In re* Gebhard, 140 Fed. Rep. 571, 15 Am. B. R. 381.

<sup>4</sup> *In re* Chadwick, 140 Fed. Rep. 674, 15 Am. B. R. 528.

<sup>1</sup> *Moch v. Market St. Nat. Bank* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11, affirming 105 Fed. Rep. 891, 5 Am. B. R. 89; *In re* Philip Semmer Glass Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 67 C. C. A. 551, 14 Am. B. R. 25; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112.

<sup>2</sup> *Martin v. Cole*, 104 U. S. 30, 27, 26 L. Ed. 647.

<sup>3</sup> *Moch v. Market St. Nat. Bank* (C. C. A. 3d Cir.), 107 Fed. Rep.

897, 47 C. C. A. 49, 6 Am. B. R. 11; *In re* Philip Semmer Glass Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 67 C. C. A. 551, 14 Am. B. R. 25; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112.

<sup>4</sup> *Moch v. Market St. Nat. Bank* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11; *In re* Philip Semmer Glass Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 67 C. C. A. 551, 14 Am. B. R. 25; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112.

In *McNeil v. Knott*, 11 Ga. 142, Segur and Crawford made a note for \$100, payable Christmas next thereafter to Henry Kunkle or bearer. Kunkle, the payee, transferred the note by delivery to Knott, who indorsed it "to be liable in the second instance" to McNeil. Segur paid off and discharged the note to Kunkle while the note was in his possession, McNeil then sued Knott, who, pending the action, had been discharged under the bankrupt act



ruptcy it may be proved.<sup>5</sup> If it does not mature within that period, it falls within the class of contingent debts not provable, because the contingency did not happen within time to prove the claim.

Where the holder has forfeited his right, or the debt has been discharged by payment, no provable debt exists against the estate of a bankrupt surety. Thus, where the note is barred by the statute of limitations, or where a note payable on demand is not presented for payment, and no demand made within a reasonable time, the indorser is released.<sup>6</sup> Where the maker has paid a part of the note to the holder, the holder can prove against the bankrupt surety only for the balance not paid.<sup>7</sup> So also where a settlement has been, with leave of court, made with the makers of a note at forty cents on the dollar, the creditor is only entitled to prove for sixty per cent. against the estate of the bankrupt sureties.<sup>8</sup> The reason is that the bankrupt, as surety, is only contingently liable to pay in case the maker does not do so. The unpaid balance is the whole debt for which the indorser is liable.

A creditor is entitled to prove the entire debt against a bankrupt indorser or surety without regard to other collateral securities held by him, because each surety is liable for the whole debt. The equitable rule that a creditor having a claim upon two funds must exhaust that one upon which other creditors have no claim does not apply in cases where it operates to the injury of the party having the double lien.<sup>10</sup>

of 1841. Knott pleaded discharge in bankruptcy. The court held the debt to be a provable debt in bankruptcy and the plea of discharge in bankruptcy a good defense.

<sup>5</sup> *Moch v. Market St. Nat. Bank* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11; *In re Philip Semmer Glass Co.* (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 67 C. C. A. 551, 14 Am. B. R. 25; *In re Smith*, 146 Fed. Rep. 923, 17 Am. B. R. 112.

<sup>6</sup> *In re Crawford*, No. 3364 Fed. Cas., 5 N. B. R. 301.

<sup>7</sup> *In re Pulsifer*, 14 Fed. Rep. 247.

<sup>8</sup> *In re Howard*, No. 6750 Fed. Cas., 4 N. B. R. 571; *In re Burchell*, 4 Fed. Rep. 406; *Lowell v. Estate of French*, 54 Vt. 191, 199.

<sup>9</sup> *Gorman v. Wright* (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 69 C. C. A. 76, 14 Am. B. R. 135; *Board of County Comm. v. Hurley* (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94 C. C. A. 362, 22 Am. B. R. 209.

<sup>10</sup> B. A. 1898, Sec. 16; *Gorman v. Wright* (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 69 C. C. A. 76, 14 Am. B. R. 135.



It may be observed in this connection that the liability of a person who is a codebtor with, or guarantor, or in any manner a surety for, a bankrupt, is not altered by the discharge of such bankrupt.<sup>11</sup>

### § 302. Claims against bankrupts as sureties.

Where the bankrupt is the person secondarily liable as surety on a bond, a claim for damages for a breach, committed by the principal before bankruptcy of his surety, is provable against the estate of the bankrupt surety.<sup>1</sup>

Such claims are provable under clause 1 of section 63a, as a fixed liability absolutely owing and evidenced by a written instrument.<sup>2</sup> The reason for this is that the debt arises from the breach and not from the mere existence of the obligation. When the breach occurs the liability of the principal, and therefore of the surety, is fixed. If necessary it may be liquidated under section 63b.

A treasurer may prove, for the amount of taxes collected and not paid over, against the estate of a bankrupt surety on the bond of a deputy collector of taxes, who had become a defaulter by reason of the failure of a bank in which he deposited his collections.<sup>3</sup>

An administrator may prove for the amount of the estate in administration against the surety on his predecessor's bond, where the amount due had been fixed by order of court prior to bankruptcy.<sup>4</sup>

Where a city treasurer defaulted and the city council passed a resolution that the sureties might give their individual bonds

<sup>11</sup> B. A. 1898, Sec. 16.

<sup>1</sup> Loeser v. Alexander (C. C. A. 6th Cir.), 176 Fed. Rep. 265, 100 C. C. A. 89, 24 Am. B. R. 75; Hibberd v. Bailey (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104; Harmon v. McDonald, 187 Mass. 578; *In re Letchworth*, 19 Fed. Rep. 873; *In re Blumer*, 13 Fed. Rep. 623.

<sup>2</sup> Loeser v. Alexander (C. C. A. 6th Cir.), 176 Fed. Rep. 265, 100

C. C. A. 89, 24 Am. B. R. 75; Hibberd v. Bailey (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104.

<sup>3</sup> Loeser v. Alexander (C. C. A. 6th Cir.), 176 Fed. Rep. 265, 100 C. C. A. 89, 24 Am. B. R. 74.

<sup>4</sup> Hibberd v. Bailey (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104; Harmon v. McDonald, 187 Mass. 578.

for their *pro rata* of the balance due, but that the old bonds should be retained and remain in full force, the estates of the bankrupt sureties who did not give such bonds were held liable, and that the city might prove against their estates for the whole debt.<sup>5</sup>

It has been held that where a person previous to becoming a bankrupt was liable on a bond, by the terms of which he became a continuing guarantor of notes discounted by a certain bank for a company of which he was the president, and at the time of his bankruptcy the bank held a note so discounted indorsed by him, the fact that a renewal note was given after the filing of his petition did not prevent the debt from being proved as a claim against his estate.<sup>6</sup>

No provable claim against a surety exists where the breach was committed after bankruptcy.<sup>7</sup> The liability of the surety at the time of bankruptcy was contingent upon a future default. The amount of the liability was then wholly uncertain, depending upon the nature of the default, and was incapable of liquidation. Such claims are deemed so far contingent as not to be debts provable in bankruptcy.<sup>8</sup>

**§ 303. Claims against principal and indorser or surety, when both are bankrupt.**

Where a maker and an indorser or surety, whose liability is fixed, are both adjudged bankrupts the whole debt at the date of bankruptcy, may be proved against either or both estates.<sup>1</sup> But he can receive in dividends from both parties no more than his whole debt.

The reason of this doctrine is that the creditor holds the credit of both the principal and indorser or surety for his

<sup>5</sup> *In re* Blumer, 13 Fed. Rep. 623.

<sup>6</sup> *In re* Letchworth, 19 Fed. Rep. 873.

But see *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72.

<sup>7</sup> *Loring v. Kendall*, 1 Gray (Mass.), 305.

<sup>8</sup> See contingent debts, Sec. 293, *ante*.

<sup>1</sup> *Board of County Com'rs v. Hurley* (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94 C. C. A. 362, 22 Am. B. R. 209; *Wollaston v. Porter*, 122 Mass. 308; *In re Hicks*, No. 6456 Fed. Cas., 19 N. B. R. 299; *Ex parte Farnsworth*, No. 4672 Fed. Cas., 1 Low. 497; *In re Effinger*, 184 Fed. Rep. 728, 25 Am. B. R. 930.

whole debt. The creditor may prove against both estates because he then gets precisely the security he bargains for, and no one is injured. If he realizes on one of them first and deducts what he obtains from him, he loses a part of the credit of the other party.

The debt, which may be proved against the estate of the principal, or the indorser or surety is the real debt due at the date of bankruptcy.<sup>2</sup> It is immaterial that a part of this debt may have been paid by others subsequently to bankruptcy.<sup>3</sup> The creditor is not required to exhaust his rights against the principal before resorting to the indorser or surety for payment of his debt.<sup>4</sup>

In the case of a collateral note having been given, the creditor may prove for the full amount of the note against the estate of the maker or the indorser, because that was the very purpose of pledging it to him for a larger amount than his debt.<sup>5</sup>

If a mortgage, pledge or other lien is given by a principal debtor to secure his indorser or other surety, and both become bankrupts, the holders of the notes or other debts for which the surety is bound have an equity to apply the property to the discharge of their debts specifically.<sup>6</sup> A distinction has been

<sup>2</sup> Board of County Comm. v. Hurley (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94 C. C. A. 362, 22 Am. B. R. 209.

<sup>3</sup> In Board of County Comm. v. Hurley (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94 C. C. A. 362, 22 Am. B. R. 209, Judge Sanborn said: "The obligee in a bond, or the holder of a claim, upon which several parties are personally liable, may prove his claim against the estates of those who become bankrupt and may at the same time pursue the others at law, and, notwithstanding partial payments after the bankruptcy by other obligors or their estates, he may recover dividends from each estate in bank-

ruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein until from all sources he has received full payment of his claim, but no longer."

<sup>4</sup> Board of County Comm. v. Hurley (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94 C. C. A. 362, 22 Am. B. R. 209; Gorman v. Wright (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 69 C. C. A. 76, 14 Am. B. R. 135.

<sup>5</sup> *Ex parte* Farnsworth, No. 4672 Fed. Cas., 1 Low. 497.

<sup>6</sup> *In re* Effinger, 184 Fed. Rep. 728, 25 Am. B. R. 930; *Ex parte* Morris, No. 9823 Fed. Cas., 2 Low. 424; Matthews v. Abbott, No. 9275 Fed. Cas., 2 Hask. 289.

sometimes taken between a security for the indemnity of the surety and one conditioned for the payment of the debt. But it seems well settled by the authorities that the creditor has an equitable claim to the security as well when a mortgage is given for mere indemnity as when the condition is added that the principal shall pay the debt.<sup>7</sup>

If the estate of the indorser discharges a part of the debt it would seem that the trustee of the indorser might prove such claim against the estate of the maker.<sup>8</sup>

### **§ 304. Claims of indorsers and sureties for the bankrupt against his estate.**

A person who is secondarily liable for a debt of the bankrupt, as indorser or surety, has a provable claim against the estate, provided the principal creditor fails to prove his debt.<sup>1</sup> He is a creditor within the meaning of the act.<sup>2</sup>

The statute provides that "whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated

<sup>7</sup> *New Bedford Institution v. Fair Haven Bank*, 9 Allen (Mass.), 178; approved in *Matthews v. Abbott*, No. 9275 Fed. Cas., 2 Hask. 289.

<sup>8</sup> B. A. 1898, Sec. 57*m*. See *Wolleston v. Porter*, 122 Mass. 308; *Downing v. Traders Bank*, No. 4046 Fed. Cas., 2 Dill. 136.

<sup>1</sup> B. A. 1898, Sec. 57*i*; *Livingstone v. Heineman* (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39; *Swarts v. Siegel* (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 54 C. C. A. 399, 8 Am. B. R. 689; *Sessler v. Paducah Distilleries Co.* (C. C. A. 5th Cir.), 168 Fed. Rep. 44, 93 C. C. A. 466, 121

Am. B. R. 723; *Insley v. Garside* (C. C. A. 9th Cir.), 121 Fed. Rep. 699, 58 C. C. A. 119, 10 Am. B. R. 52; *In re Heyman*, 95 Fed. Rep. 800, 2 Am. B. R. 651; *In re Nickerson*, 116 Fed. Rep. 1003, 8 Am. B. R. 707; *In re Carter*, 138 Fed. Rep. 846, 15 Am. B. R. 126.

<sup>2</sup> *Kobush v. Hand* (C. C. A. 8th Cir.), 156 Fed. Rep. 660, 84 C. C. A. 372, 19 Am. B. R. 379; *Swarts v. Siegal* (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 54 C. C. A. 399, 8 Am. B. R. 689; *Huttig Mfg. Co. v. Edwards* (C. C. A. 8th Cir.), 160 Fed. Rep. 619, 87 C. C. A. 521, 20 Am. B. R. 349.

to that extent to the rights of the creditor."<sup>3</sup> The surety has no provable claim until the creditor fails to prove.<sup>4</sup>

This provision is intended to protect the surety or indorser. The creditor may prove his debt under section 63 of the act, but he is not compelled to do so. He has the double security of the bankrupt's liability and that of the surety. He may prefer not to prove his debt against the bankrupt's estate, but rely wholly upon the indorser or surety. In such case, were it not for this provision, the surety clearly would be without protection, for it is evident that the debt to be proved by the surety is not the indebtedness of the bankrupt to him. He therefore would have no provable claim against his estate. This clause of the act, however, expressly gives him this right. •

If the creditor proves his debt, and receives his proportionate share of the bankrupt's estate with other creditors, the surety or indorser has no provable claim. For, were he also permitted to prove the debt, it would be to allow the same debt to be proved, in part at least, twice. Whatever the creditor receives in dividends diminishes *pro tanto* the surety's liability, and is equivalent to a payment made on his account and for his benefit.

Where the surety has paid a part of the debt to the creditor, such creditor may prove for the full amount owing by the bankrupt upon the obligation and after receiving in dividends satisfaction of the balance due him, will hold as trustee for the surety any dividends received by him in excess.<sup>5</sup> In case the creditor does not so receive the full amount of his debt the surety can not complain if called upon to pay the balance. Where the creditor has insisted upon the double liability he had secured, the surety has no right to intercept any sums

<sup>3</sup> B. A. 1898, Sec. 57i. Compare R. S. Sec. 5070.

<sup>4</sup> Phillips v. Dreher Shoe Co., 112 Fed. Rep. 404, 7 Am. B. R. 326; *In re Lange & Co.*, 170 Fed. Rep. 114, 22 Am. B. R. 414.

<sup>5</sup> Swarts v. Fourth Nat. Bank (C.

C. A. 8th Cir.), 117 Fed. Rep. 1. 54 C. C. A. 387, 8 Am. B. R. 673; *In re Bingham*, 94 Fed. Rep. 796, 2 Am. B. R. 223; *In re Heyman*, 95 Fed. Rep. 800, 2 Am. B. R. 651; *Downing v. Traders Bank*, No. 4046 Fed. Cas., 2 Dill. 136.

which the creditor can collect from the bankrupt's estate, or to diminish the funds to which he has a right to look for satisfaction. It is only when the holder is fully satisfied that the surety can urge any claims to dividends payable on the original debt of the bankrupt.

Where a judgment recovered against a maker and payee of a note is satisfied by the payee, the latter's claim against the maker is provable under section 57*i* and barred by discharge.<sup>6</sup>

In case the creditor omits to prove, the surety may do so, and will hold any dividends he may receive to meet his liability to the original creditor to the extent he shall have actually discharged it and no further. It is not necessary to make the claim provable that the surety has paid the debt for which he is liable.<sup>7</sup> He may prove his claim although he does not pay the note or other liability until after the commencement of proceedings in bankruptcy,<sup>8</sup> or although the debt does not fall due until after the petition is filed.<sup>9</sup> A joint maker who takes up the note by giving his own individual note is entitled to prove his debt.<sup>10</sup> A wife, who is a surety for her husband, may prove against his estate although a contract between a husband and wife can not be enforced in that state.<sup>10\*</sup> An indorser or a surety is authorized to prove a debt in case only that the principal creditor could prove it and fails to do so.<sup>11</sup> He can not participate in the dis-

<sup>6</sup> *Smith v. Wheeler*, 55 N. Y. App. Div. 170.

<sup>7</sup> *Mace v. Wells*, 7 How. 272, 12 L. Ed. 698, 17 Vt. 503; *In re Schwechel Cloak & Suit Co.*, 104 Fed. Rep. 64, 4 Am. B. R. 719; *Morse v. Hovey*, 1 Sandf. Ch. (N. Y.) 186, 1 Barb. Ch. 404; *Kyle v. Bostick*, 10 Ala. 589; *Tubbs v. Williams*, 9 Ired. 1; *Fulwood v. Bushfield*, 14 Penn. 90.

*Contra*, *Cake v. Lewis*, 8 Penn. 493; *McMullin v. Bank*, 2 Penn. 343.

<sup>8</sup> *Sessler v. Paducah Distilleries Co.* (C. C. A. 5th Cir.), 168 Fed.

Rep. 44, 93 C. C. A. 466, 21 Am. B. R. 723; *Hardy v. Carter*, 8 Humph. (Tenn.), 153; *Tunno v. Bethune*, 2 Dessau (S. C.) 285.

<sup>9</sup> *Crafts v. Mott*, 5 Barb. (N. Y.) 305, affirmed in 4 N. Y. 606.

<sup>10</sup> *In re Nickerson*, 116 Fed. Rep. 1003, 8 Am. B. R. 707; *In re Carter*, 138 Fed. Rep. 846, 15 Am. B. R. 126; *In re Morrow*, No. 9821 Fed. Ces., 2 Saw. 356.

<sup>10\*</sup> *In re Nickerson*, 116 Fed. Rep. 1003, 8 Am. B. R. 707; *In re Carter*, 138 Fed. Rep. 846, 15 Am. B. R. 126.

<sup>11</sup> B. A. 1898, Sec. 57*i*; *Morgan v.*

tribution of the estate until he has surrendered preferences received by the creditor.<sup>12</sup> He acquires no higher or better rights than the prior holder.

A creditor or a surety or indorser is entitled regularly to prove the whole debt against the estate of a bankrupt maker, irrespective of whether payments have been made by the surety to the creditor or not.<sup>13</sup> It is evident that the estate of the bankrupt is indebted to the creditor for the whole debt. This debt is not affected by dealings between the surety and the principal. It is immaterial whether the payment of this indebtedness is made to the creditor directly or to an indorser or surety who has been subrogated to the rights of the creditor by actual payments made by him.

### § 305. Interest.

In ascertaining the amount of a debt actually owing at the time the petition in bankruptcy is filed, the question of interest becomes important. Debts which are provable under the first clause of section 63 are allowable "with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

Wordell, 178 Mass. 350, 3 N. B. N. 513; Sigsby v. Willis, No. 12849 Fed. Cas., 3 Ben. 371; Ellis v. Ham, 28 Me. 385; Crafts v. Mott, 4 N. Y. 606.

<sup>12</sup> Livingston v. Heineman (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39; *In re* Lyon (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 10 Am. B. R. 25; Swarts v. Siegel (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 54 C. C. A. 399, 8 Am. B. R. 689; *In re* Schwechel Cloak & Suit Co., 104 Fed. Rep. 64, 4 Am. B. R. 719.

<sup>13</sup> Gorman v. Wright (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 69 C. C. A. 76, 14 Am. B. R. 135; *In re*

Noyes Bros. (C. C. A. 1st Cir.), 127 Fed. Rep. 286, — C. C. A. —, 11 Am. B. R. 506; *In re* Heyman, 95 Fed. Rep. 800, 2 Am. B. R. 651; *In re* Swift, 110 Fed. Rep. 65, 5 Am. B. R. 415; Swartz v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223; *In re* Ellerhorst, No. 4381 Fed. Cas., 5 N. B. R. 144; Downing v. Traders Bank, No. 4046 Fed. Cas., 2 Dill. 136; as explained *In re* Hollister, 3 Fed. Rep. 452; *Ex parte* Talcott, No. 13184 Fed. Cas., 9 Am. B. R. 502.

By this provision, interest which has accrued and would have been recoverable at the date of filing the petition is to be added to and become a part of the principal debt.<sup>1</sup> The interest which is to be so added is clearly that which could have been recovered under the state law,<sup>2</sup> or, in the absence of state law, under the laws of the United States.<sup>3</sup> Hence if the interest is usurious, so much of the debt and interest is provable as could be recovered under the local law.<sup>4</sup> It is obvious that interest which accrues subsequently is not a debt absolutely owing at the time of the filing of the petition in bankruptcy. Where a debt bearing interest at specified intervals, becomes due and payable before proceedings in bankruptcy are commenced, the creditor is entitled to prove for such interest, and also for interest from the date of maturity.<sup>5</sup>

Where the debt is payable at a future date the present value of the debt only is provable. If such debts bear interest, all interest subsequent to the filing of the petition is rebated.<sup>5\*</sup> Where such debts do not bear interest and are payable at a future date, the present value of the debt is ascertained by deducting from the amount of the debt the amount of interest on it, from the date of the filing of the petition until the time it becomes payable.<sup>6</sup> The remainder only is provable.

<sup>1</sup> *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832; *In re Fenn*, 172 Fed. Rep. 620, 22 Am. B. R. 833; *In re Haake*, No. 5883 Fed. Cas., 2 Saw. 231; *In re Bartenbach*, No. 1068 Fed. Cas., 11 N. B. R. 61; *In re Orne*, No. 10581 Fed. Cas., 1 Ben. 161.

<sup>2</sup> *In re Prescott*, No. 11389 Fed. Cas., 5 Biss. 523; *In re Conrad*, No. 3126 Fed. Cas., 6 A. M. Law Rev. 385; *Providence County Sav. Bank v. Frost*, No. 11453 Fed. Cas., 8 Ben. 293; *In re Pittock*, No. 11189 Fed. Cas., 2 Saw. 416; *Nat. Exchange Bank v. Moore*, No. 10041 Fed. Cas., 2 Bond, 170.

<sup>3</sup> *In re Wild*, No. 17645 Fed. Cas., 11 Blatch. 243; *Nat. Exchange Bank v. Moore*, No. 10041 Fed. Cas., 2 Bond, 170.

<sup>4</sup> See cases cited in last two notes above; *In re Worth*, 130 Fed. Rep. 927, 12 Am. B. R. 566.

<sup>5</sup> *In re Bartenbach*, No. 1068 Fed. Cas., 11 N. B. R. 61.

<sup>5\*</sup> *In re Chandler* (C. C. A. 7th Cir.), 184 Fed. Rep. 887, — C. C. A. —, 25 Am. B. R. 865.

<sup>6</sup> *In re Orne*, No. 10581 Fed. Cas., 1 Ben. 361.



It is manifest that both classes of creditors, namely, those whose debt has matured and those whose debt is payable at a future date, are to be on an equal footing. The date of the filing of the petition is established as the time at which the liability is to be ascertained and determined. It may also be observed that where, as in most of the states of the Union, interest is regulated by law, and all the debts of the bankrupt bear the same or nearly the same rate of interest, it is immaterial to the creditor at what time the interest stops on his debts, provided interest on all the debts stops simultaneously with his own. For his proportionate share of the assets will be the same if the same period is fixed for the stoppage of interest on all the debts.

Where assets remain after the claims are paid in full by a trustee, interest may be allowed upon such claims before and after allowance as upon judgments.<sup>6\*</sup>

A secured creditor is entitled to interest upon his debt to the time of payment, if the proceeds of the sale of the security are sufficient for that purpose.<sup>7</sup> If they are not adequate for that purpose, the secured creditor is not entitled to interest after bankruptcy.<sup>8</sup> He can not first apply the proceeds to interest accrued since the petition was filed. But interest and dividends accruing upon the securities after bankruptcy may be applied to the after-accruing interest on the debt.<sup>9</sup>

A penalty for the nonpayment of taxes in Ohio has been treated as interest, and is therefore provable.<sup>10</sup>

### § 306. Costs.

Where costs are incident to a judgment obtained prior to bankruptcy proceedings <sup>1</sup> it is regularly a provable debt under

<sup>6\*</sup> *In re* Osborn's Sons Co. (C. C. A. 2d Cir.), 177 Fed. Rep. 184, 100 C. C. A. 392, 24 Am. B. R. 65.

<sup>7</sup> *Sexton v. Dreyfus*, 219 U. S. 339, *Coder v. Arts* (C. C. A. 8th Cir.), 152 Fed. Rep. 943, 950, 82 C. C. A. 91, 18 Am. B. R. 513; *In re* Strachen, No. 13519 Fed. Cas., 3 Biss. 181.

<sup>8</sup> *Sexton v. Dreyfus*, 219 U. S. 339.

<sup>9</sup> *Sexton v. Dreyfus*, 219 U. S. 339.

<sup>10</sup> *In re* Scheidt Bros., 177 Fed. Rep. 599, 23 Am. B. R. 778.

<sup>1</sup> *Ex parte* O'Neil, No. 10527 Fed. Cas., 1 Low. 163; *Graham v. Pierson*, 6 Hill (N. Y.), 247.

section 63. The reason for this is that it is a fixed liability evidenced by a judgment.

The former acts contained no provision for costs in pending cases, or where the judgment was obtained pending bankruptcy proceedings.<sup>2</sup> But the present act expressly provides that costs are provable in such cases. Among the debts of the bankrupt which may be proved and allowed against his estate are debts

"Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice;"<sup>3</sup> and debts

"Founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt."<sup>4</sup>

Costs to be provable must fall within one of these provisions.<sup>5</sup> All costs which are taxable in an action for a provable debt, and incurred in good faith before bankruptcy, constitute provable debts.<sup>6</sup> Costs adjudged against a bankrupt after his adjudication are not provable.<sup>7</sup>

Costs incident to an attachment proceeding may be proved as an unsecured claim, although the lien is avoided by section 67f.<sup>8</sup> The question of provability of taxable costs must not be confounded with the right to priority of payment under

<sup>2</sup> *In re* Fortune, No. 4955 Fed. Cas., 1 Low. 306; *Sandford v. Sandford*, 58 N. Y. 66.

<sup>3</sup> B. A. 1898, Sec. 63, cl. 2.

<sup>4</sup> B. A. 1898, Sec. 63, cl. 3; *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51.

<sup>5</sup> *In re* Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 45 C. C. A. 115, 5 Am. B. R. 365.

<sup>6</sup> *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51; *In re* Thompson Mercantile Co. (Ref.), 11 Am. B. R. 579.

<sup>7</sup> *In re* Marcus (C. C. A. 1st Cir.), 105 Fed. Rep. 907, 45 C. C. A. 115, 5 Am. B. R. 365, affirming 104 Fed. Rep. 331, 5 Am. B. R. 19; *Aiken, Lambert & Co. v. Haskins*, 6 Am. B. R. 46, 34 N. Y. Misc. 505.

<sup>8</sup> *In re* Allen, 96 Fed. Rep. 512, 3 Am. B. R. 38; *In re* Lewis, 99 Fed. Rep. 935, 4 Am. B. R. 51; *In re* Thompson Mercantile Co. (Ref.), 11 Am. B. R. 579; *Aiken, Lambert & Co. v. Haskins*, 6 Am. B. R. 46, 34 N. Y. Misc. 505.

But see *In re* Young, 96 Fed. Rep. 606, 2 Am. B. R. 673.

section 64*b*, clause 5.<sup>9</sup> A claim may be provable as unsecured, although the creditor is not entitled to priority of payment.

Costs awarded against a trustee as substituted defendant in a suit pending in a state court have been ordered paid in full.<sup>10</sup>

### § 307. Debts founded upon contract.

Debts "founded upon an open account, or upon a contract, express or implied" are provable in bankruptcy.<sup>1</sup>

This provision makes provable all debts founded upon open accounts and contracts at the date of bankruptcy. Debts provable under this clause need not be evidenced by a writing, but may be founded upon an oral agreement.<sup>2</sup> They may be founded upon an implied, as well as upon an express contract.<sup>3</sup>

A claim arising *ex delicto* and also of such a character as to constitute a claim on the theory of a *quasi* contract is provable under section 63, clause 4.<sup>4</sup> Such a claim is provable though the plaintiff elect to sue *ex delicto*.<sup>5</sup>

<sup>9</sup> *In re* The Copper King, 143 Fed. Rep. 649, 16 Am. B. R. 148; *In re* Beaver Coal Co., 107 Fed. Rep. 98, 5 Am. B. R. 787; *In re* Daniels, 110 Fed. Rep. 745, 6 Am. B. R. 699.

<sup>10</sup> *In re* Neely, 108 Fed. Rep. 371, 5 Am. B. R. 836.

<sup>1</sup> B. A. 1898, Sec. 63, clause 4.

<sup>2</sup> *In re* Neff (C. C. A. 6th Cir.), 157 Fed. Rep. 57, 84 C. C. A. 561, 19 Am. B. R. 23; *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; Capelle v. M. E. Church, No. 2392 Fed. Cas., 11 N. B. R. 536.

<sup>3</sup> Crawford v. Burke, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659; Moch v. Market St. Nat. Bank (C. C. A. 2d Cir.), 107 Fed. Rep.

897, 47 C. C. A. 49, 6 Am. B. R. 11; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112; Barrett v. Prince (C. C. A. 7th Cir.), 143 Fed. Rep. 302, 74 C. C. A. 440, 16 Am. B. R. 64.

<sup>4</sup> Crawford v. Burke, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659; Barrett v. Prince (C. C. A. 7th Cir.), 143 Fed. Rep. 302, 74 C. C. A. 448, 16 Am. B. R. 64; *In re* Filer, 125 Fed. Rep. 262, 5 Am. B. R. 835; *In re* Hildebrant, 120 Fed. Rep. 992, 10 Am. B. R. 184; *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715.

<sup>5</sup> Crawford v. Burke, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659; Barrett v. Prince (C. C.

It has been suggested that the words "a fixed liability" "absolutely owing" should be read into this clause as a limitation on contract debts.<sup>6</sup> If Congress had intended to so limit this clause it would have been easy to have said so. The ruling word in section 63 is "debts." Five distinct and independent classes of provable debts are described in the five clauses. The fourth clause is clearly limited to debts at the time of bankruptcy. The obligation to pay must be fixed and the amount ascertainable at that time, although the debt may not become owing until the happening of some event.<sup>7</sup> Such claims are clearly debts founded on a contract in which the rights of the parties are absolutely fixed as between them at the time of filing the petition and are therefore provable debts.

Under this clause debts arising upon open accounts or the usual contracts of bargain and sale, although for future delivery, are provable. Where a creditor proves for goods sold and delivered he is not entitled to damages sustained by fraudulent representations in making the contract,<sup>8</sup> or generally for speculative profits or damages.<sup>9</sup> Where a loss upon a policy of insurance has been duly and regularly adjusted in good faith before the company is adjudicated a bankrupt, the claim can be proved like any other debt arising upon a contract.<sup>10</sup> Where a bankrupt has received property in trust, and has appropriated it in violation thereof, the debt

A. 7th Cir.), 143 Fed. Rep. 302, 74 C. C. A. 448, 16 Am. B. R. 64.

<sup>6</sup> *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588; *In re* Swift (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 50 C. C. A. 264, 7 Am. B. R. 375.

<sup>7</sup> *Moch v. Market St. Nat. Bank* (C. C. A. 3d Cir.), 107 Fed. Rep. 897, 47 C. C. A. 49, 6 Am. B. R. 11; *In re* Philip Semmer Glass Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 77,

67 C. C. A. 551, 14 Am. B. R. 25; *In re* Smith, 146 Fed. Rep. 923, 17 Am. B. R. 112; *In re* Dunlap Carpet Co., 163 Fed. Rep. 541, 20 Am. B. R. 882; *In re* Caloris Mfg. Co., 179 Fed. Rep. 722, 24 Am. B. R. 609.

<sup>8</sup> *In re* Hildebrant, 120 Fed. Rep. 992, 10 Am. B. R. 184.

<sup>9</sup> *In re* Silverman Brothers, 101 Fed. Rep. 219, 4 Am. B. R. 83.

<sup>10</sup> *In re* Firemen's Ins. Co., No. 4796 Fed. Cas., 3 Biss. 462.

thus created is provable.<sup>11</sup> So also a claim founded upon a covenant to repay a part of a premium, paid upon a policy of insurance upon the cancellation of the policy, is provable in the absence of provisions in the state laws, the charter or by-laws of the company which would make it void.<sup>12</sup>

A stockholder's statutory liability in an insolvent corporation,<sup>13</sup> or an unpaid subscription for stock in a corporation, may be proved against the estate of a bankrupt stockholder on the theory that it is a claim founded on an implied contract.

The value of an annuity based upon the expectancy of life, has been held to be a provable debt.<sup>15</sup> A claim for margins<sup>16</sup> or a claim for damages for conversion of collaterals in his possession,<sup>17</sup> against a bankrupt broker has been allowed. A claim for commissions for sales of goods has been allowed.<sup>18</sup> A county may prove a claim for money due for the hire of

<sup>11</sup> *In re Jordan*, 2 Fed. Rep. 319; *In re Upson*, 123 Fed. Rep. 807, 10 Am. B. R. 602; *In re Rundle*, No. 12138 Fed. Cas., 2 N. B. R. 113; *Ungewitter v. Von Sachs*, No. 14343 Fed. Cas., 4 Ben. 167.

<sup>12</sup> *In re Independent Ins. Co.*, No. 7019 Fed. Cas., 2 Low. 187.

<sup>13</sup> *Dight v. Chapman*, 44 Ore. 265; *Longfuld v. Minnesota Sav. Bank*, 95 Minn. 54, 14 Am. B. R. 413.

*In re Rouse*, 40 Law Bull. (Ohio) 220, the referee held that a stockholder's statutory liability in an insolvent Ohio corporation is not only a liability created by statute, but is also a claim founded upon an implied contract, and as such is a provable debt against the estate of the bankrupt stockholder, whenever the circumstances are such that a stockholder's liability suit would lie.

<sup>15</sup> *Cobb v. Overman* (C. C. A. 4th Cir.), 109 Fed. Rep. 65, 48 C. C. A. 223, 6 Am. B. R. 324, overruling *Bray v. Cobb*, 110 Fed. Rep. 270, 3 Am. B. R. 788. The circuit court

of the appeals in that case held the annuity was provable under Sec. 63a, clause 1, as a fixed liability absolutely owing. The claim would seem provable more easily under clause 4. See *In re Pettingill & Co.*, 137 Fed. Rep. 143, 147, 14 Am. B. R. 728.

See *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>16</sup> *In re Swift*, 105 Fed. Rep. 493, 5 Am. B. R. 335; *In re Graff*, 117 Fed. Rep. 343, 8 Am. B. R. 744; *In re McIntyre* (C. C. A. 2d Cir.), 174 Fed. Rep. 627, 98 C. C. A. 331, 24 Am. B. R. 1.

But see *In re Silverman*, 101 Fed. Rep. 219, 4 Am. B. R. 83.

<sup>17</sup> *In re Floyd, Crawford & Co.* 15 Am. B. R. 277.

<sup>18</sup> *In re Ladue, Tate Mfg. Co.*, 135 Fed. Rep. 910, 14 Am. B. R. 235; *In re Dunlap Carpet Co.*, 163 Fed. Rep. 541, 20 Am. B. R. 882.

But see *In re Silverman*, 101 Fed. Rep. 219, 4 Am. B. R. 83.

convict labor.<sup>19</sup> A claim for damages for breach of a contract of marriage is provable.<sup>19\*</sup>

A debt has been held provable against the estate of a corporation in bankruptcy, where it was contracted by the company and amounted to more than one-half the sum of its available assets, but did not exceed one-half the amount of the stock paid up and actually issued to stockholders and held by them, where the articles of association limited the amount of indebtedness which it might contract to one-half the amount of the paid up capital stock.<sup>20</sup>

A claim which is not founded upon a contractual relation is not provable under this clause.<sup>21</sup> An annual corporation fee required by state law solely as a condition of its continued existence without regard to the value of its property and franchises is not provable as a debt upon contract, express or implied.<sup>22</sup> It has been held that salary of an officer of a bankrupt corporation is not provable, unless, prior to the services, the compensation was fixed by by-law or a resolution of the directors duly entered on the minutes of the board.<sup>23</sup>

### § 308. Claims founded on illegal contracts not provable.

A claim is not provable, if it is founded on an illegal contract which is not enforceable at law.<sup>1</sup>

<sup>19</sup> *In re Wright*, 95 Fed. Rep. 807, 2 Am. B. R. 592, affirmed on appeal *sub nom.*; *In re Worcester County*, 102 Fed. Rep. 808, 4 Am. B. R. 496.

<sup>19\*</sup> *In re Fife*, 109 Fed. Rep. 880, 6 Am. B. R. 258.

<sup>20</sup> *Cunningham v. German Insurance Bank* (C. C. A. 6th Cir.), 101 Fed. Rep. 977, 4 Am. B. R. 363.

<sup>21</sup> *In re Danville Rolling Mill Co.*, 121 Fed. Rep. 432, 10 Am. B. R. 327.

<sup>22</sup> *In re Danville Rolling Mill Co.*, 121 Fed. Rep. 432, 10 Am. B. R. 327.

As to such fees being a tax entitled to priority, see *New Jersey*

*v. Anderson*, 203 U. S. 483, 51 L. Ed. 284, 17 Am. B. R. 63.

<sup>23</sup> *In re Grubbs-Wiley Grocery Co.*, 96 Fed. Rep. 183, 2 Am. B. R. 442.

<sup>1</sup> *Colonial Trust Co. v. Montello Brick Works* (C. C. A. 3rd Cir.), 172 Fed. Rep. 311, 97 C. C. A. 144, 23 Am. B. R. 380, affirming 163 Fed. Rep. 621, 20 Am. B. R. 859; *In re Montello Brick Works*, 174 Fed. Rep. 498, 23 Am. B. R. 375; *In re Aetna Cotton Mills*, 171 Fed. Rep. 994, 22 Am. B. R. 629; *In re Smith Lumber Co.*, 132 Fed. Rep. 618, 13 Am. B. R. 123; *In re Waterloo Organ Co.* (C. C. A. 2d Cir.),

Contracts prohibited by statute, or declared illegal or void, or made in the exercise of a power expressly denied, or are against public policy, are void. Claims growing out of such contracts are not provable.

A claim growing out of a contract founded upon an illegal consideration is not provable.<sup>2</sup> Claims growing out of gaming contracts,<sup>3</sup> or where money is loaned a debtor for the purpose of committing an act of bankruptcy,<sup>4</sup> or where an overdraft has been made by collusion with the cashier,<sup>5</sup> or an illegal arrangement by which a principal in the administration bond is enabled to commit a gross breach of trust.<sup>6</sup>

A claim founded on a contract by a corporation is not provable, if the corporation was without power to make it.<sup>7</sup> Where a foreign corporation is "doing business" in Pennsylvania, it can not prove claims upon contracts unless it has complied with the statute with respect to registration.<sup>8</sup> Notes given by a corporation to purchase shares of its own stock are not provable.<sup>9</sup> Bonds issued by a corporation which are *ultra vires* and void under the state law are not provable against the estate of the corporation.<sup>10</sup>

134 Fed. Rep. 341, 67 C. C. A. 255, 13 Am. B. R. 466.

<sup>2</sup> *In re* Aetna Cotton Mills, 171 Fed. Rep. 994, 22 Am. B. R. 629; Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207; *In re* Hatje, No. 6215 Fed. Cas., 6 Biss. 436; *In re* Eureka Ins. Co., No. 4550 Fed. Cas., 1 Low. 500.

<sup>3</sup> *In re* Aetna Cotton Mills, 171 Fed. Rep. 994, 22 Am. B. R. 629.

But see *In re* Arnold, 133 Fed. Rep. 789, 13 Am. B. R. 320.

<sup>4</sup> *In re* Hatje, No. 6215 Fed. Cas., 6 Biss. 436.

<sup>5</sup> *In re* Eureka Ins. Co., No. 4550 Fed. Cas., 1 Low. 500.

<sup>6</sup> Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207.

<sup>7</sup> Colonial Trust Co. v. Montello Brick Works (C. C. A. 3d Cir.), 172 Fed. Rep. 311, 97 C. C. A. 144,

23 Am. B. R. 380, affirming 163 Fed. Rep. 621, 20 Am. B. R. 859; *In re* Montello Brick Works, 174 Fed. Rep. 498, 23 Am. B. R. 375; *In re* Smith Lumber Co., 132 Fed. Rep. 618, 13 Am. B. R. 123; *In re* Waterloo Organ Co. (C. C. A. 2d Cir.), 134 Fed. Rep. 341, 67 C. C. A. 255, 13 Am. B. R. 466.

<sup>8</sup> Colonial Trust Co. v. Montello Brick Works (C. C. A. 3d Cir.), 172 Fed. Rep. 311, 97 C. C. A. 144, 23 Am. B. R. 380, affirming 163 Fed. Rep. 621, 20 Am. B. R. 859; *In re* Montello Brick Works, 174 Fed. Rep. 498, 23 Am. B. R. 375.

<sup>9</sup> *In re* Smith Lumber Co., 132 Fed. Rep. 618, 13 Am. B. R. 123.

<sup>10</sup> *In re* Waterloo Organ Co. (C. C. A. 2d Cir.), 134 Fed. Rep. 341, 67 C. C. A. 255, 13 Am. B. R. 466.

Where a claim can be established without aid from an illegal transaction it may be proved and allowed.<sup>11</sup> When a statute imposes specific penalties for its violation, where the act is not *malum in se*, and the purpose of the statute can be accomplished without declaring contracts in violation of it illegal, the inference is that it was not the intention of the law makers to render such contracts illegal and unenforceable.<sup>12</sup>

### § 309. Measure of damages for breach of contract.

The measure of damages for the breach of a contract is the amount of the loss, which the injured party has sustained thereby. In this respect claims provable in bankruptcy are governed by the same rules as in cases at law or equity.

Where the claim for damages for the breach of a contract is based upon a failure to pay a definite sum of money promised, the measure of damages is the full amount of the promise.<sup>1</sup> In bonds it is the sum due by the condition. In promissory notes it is the amount of the debt with due allowance for interest. In a contract for financial reports from a commercial agency for a fixed period, the sum agreed to be paid is provable.<sup>2</sup>

Where the claim for damages for the breach of a contract is unliquidated, it may be liquidated under the provisions of section 63b.<sup>3</sup>

A vendor may prove against the estate of a bankrupt vendee for the contract price or value of the property sold, in case the contract is executed and the title to the property has passed to the vendee. If no price is fixed by the agreement the measure of damages is what it was reasonably worth in the market. When articles are ordered to be manufactured they are treated as the property of the vendee when made and tendered to him.

<sup>11</sup> *In re Bunch Co.*, 180 Fed. Rep. 519, — Am. B. R. —.

<sup>12</sup> *In re Bunch Co.*, 180 Fed. Rep. 519, — Am. B. R. —.

<sup>1</sup> *In re Glick*, 184 Fed. Rep. 967, 25 Am. B. R. 871.

<sup>2</sup> *In re Glick*, 184 Fed. Rep. 967, 25 Am. B. R. 871.

<sup>3</sup> See Sec. 291, *ante*; *In re Duquesne Incandescent Light Co.*, 176 Fed. Rep. 785, 24 Am. B. R. 419; *In re Silverman Bros.*, 101 Fed. Rep. 219, 4 Am. B. R. 83.



Where an executory contract requires a subsequent acceptance of the property by the buyer to complete the sale, the vendor is entitled to damages only to the extent of his actual injury in case of refusal to accept. This is ordinarily the difference between the contract price and the actual value at the time and place of the breach, and interest. This may be fixed by a resale within a reasonable time. If the title has passed, the vendor may abandon it without reselling it, and recover the full contract price.

The rules for the measure of damages for the breach of a contract to manufacture and deliver articles have been thus stated.<sup>5</sup>

1. The measure of damages for a breach of a contract to purchase personal property is the difference between the market value and the contract price of the property at the time of the breach, if the latter be greater than the former.

2. The same rule is applicable to the measure of damages resulting from the failure to accept articles which have been made and are ready for delivery at the time of the breach by the purchaser of the contract to purchase goods of a manufacturer, but it is not the true rule for the measure of damages resulting from the breach on account of those not then made and ready for delivery.

3. Where materials have been purchased and labor has been bestowed upon such articles under such a contract before the manufacturer has notice of the breach, his damages on these articles are the difference between the amount it would cost him to make and deliver them and their contract price, if greater, plus the difference between the value of the partly manufactured articles and the cost of the labor and materials that had been bestowed upon them at the time of the breach, if the cost be greater than the value.

<sup>5</sup> Judge Sanborn speaking for the Circuit Court of Appeals for the 8th Circuit in *Kingman & Co. v. Weston Mfg. Co.* (C. C. A. 8th

Cir.), 92 Fed. Rep. 486, 24 C. C. A. 684.

See also *In re Saxton Furnace Co.*, 142 Fed. Rep. 293, 15 Am. B.

4. If materials have been purchased with which to fulfill the contract, but no work has been bestowed upon them at the time of the breach, the measure of the manufacturer's damages upon the articles which might have been made with such materials under the contract is the difference between the amount it would cost him to make and deliver them, including the cost of the materials, and their contract price, if greater, plus the difference between the cost and the market value of the materials that have been purchased at the time of the breach, if the market value be less than the cost.

5. The measure of damages upon articles covered by such a contract for which no materials had been bought, and upon which no work had been expended at the time of the breach, is the difference between the amount it would cost the manufacturer to make and deliver them and their contract price, if that price is greater than the cost.

A vendee may prove against the estate of a bankrupt vendor for the difference between the contract price and a higher market price at the day and place fixed for delivery, or the nearest market.<sup>6</sup> The vendee may go into the market and purchase like goods at the current prices and thus save himself from loss. In the case of stocks it is the difference between the contract price and the value of the property at the time of the breach. In some cases he has been allowed the difference between the highest price between the breach and the time of trial, and the contract price.

The measure of damages for the breach of warranty of personal property as to quantity and quality is the difference between the actual value of the property at the time of the sale and what its value would have been if it had conformed to the warranty.

R. 445; *In re* Duquesne Incandescent Light Co., 176 Fed. Rep. 785, 24 Am. B. R. 419; *In re* Stolver, 127 Fed. Rep. 394, 11 Am. B. R. 349.

116 Fed. Rep. 609, 608, 54 C. C. A. 60, 8 Am. B. R. 569; *In re* National Wire Corp., 166 Fed. Rep. 631, 22 Am. B. R. 186.

<sup>6</sup> *In re* Sterns (C. C. A. 2d Cir.),

The measure of damages recoverable against a surety is the amount of the debt which he has undertaken to pay or the loss he has consented to be answerable for.<sup>7</sup>

A creditor is entitled to recover from a guarantor an amount as damages for the breach of a contract which is equivalent to the benefit he would have derived from its performance.

Where the general rules will *not* afford to the injured party full compensation for his actual loss he may recover interest, and any expense or other special damages naturally and proximately resulting from the breach.<sup>8</sup>

### § 310. Executory contracts.

Bankruptcy does not dissolve or terminate the contractual relations of the bankrupt.<sup>1</sup> An unexecuted contract continues after bankruptcy.

The trustee in bankruptcy may elect to execute the contract on behalf of the bankrupt. In such cases no question of damages arises. In case he does not do this, the creditor may ignore the breach arising from bankruptcy and in some cases keep the contract alive against the bankrupt. In some cases the creditor may prove for damages for breach of the unexecuted contract of the bankrupt.<sup>2</sup>

Whether a claim for damages for breach of an executory contract is provable depends upon its status at the time the petition in bankruptcy is filed.<sup>3</sup>

<sup>7</sup> *Loeser v. Alexander* (C. C. A. 6th Cir.), 176 Fed. Rep. 265, 100 C. C. A. 89, 24 Am. B. R. 75.

<sup>8</sup> *In re Saxton Furnace Co.*, 182 Fed. Rep. 293, 15 Am. B. R. 445; Commissions that would have been earned if the contract had been carried out were allowed.

<sup>1</sup> *Watson v. Merrill* (C. C. A. 8th Cir.), 136 Fed. Rep. 359, 69 C. C. A. 719, 14 Am. B. R. 453; *In re Imperial Brewing Co.*, 143 Fed. Rep. 579, 16 Am. B. R. 110.

<sup>2</sup> As to the measure of damages, see Sec. 309, *ante*.

<sup>3</sup> See Sec. 290, *ante*; *In re Neff* (C. C. A. 6th Cir.), 157 Fed. Rep. 57, 84 C. C. A. 561, 19 Am. B. R. 23; *Swarts v. Fourth Nat. Bank* (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673; *Board of County Comm. v. Hurley* (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 99 C. C. A. 362, 22 Am. B. R. 209; *In re Pettingill & Co.*, 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re*

If the breach of the contract was committed prior to the filing of the petition, a claim for damages is clearly provable.<sup>4</sup> The liability of the bankrupt is fixed and absolutely owing at that time.

Where, prior to bankruptcy, the bankrupt has destroyed the subject-matter of the contract or disabled himself so as to make performance impossible, his conduct is deemed equivalent to a breach of the contract, although the time for performance had not arrived and the other party to the contract may prove a claim for damages for breach of the contract.<sup>5</sup> The doctrine that a suit may be maintained to recover damages under the entire contract, when there is an anticipatory breach of an executory contract by an absolute refusal to perform it is well settled.<sup>6</sup> If at the time the petition in bankruptcy is filed the liability of the bankrupt is so fixed that the proving creditor could maintain such a suit he has a provable claim.

Where there was no breach of an executory contract prior to bankruptcy, the filing of an involuntary petition is deemed the equivalent of disablement and repudiation, and a claim for damages for such a breach is provable.<sup>7</sup>

Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223.

<sup>4</sup> Hibberd v. Bailey (C. C. A. 3d Cir.), 129 Fed. Rep. 575, 64 C. C. A. 143, 12 Am. B. R. 104; Loeser v. Alexander (C. C. A. 6th Cir.), 176 Fed. Rep. 265, 100 C. C. A. 89, 24 Am. B. R. 79; *In re Worcester County* (C. C. A. 2d Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; *In re Ladue, Tate Mfg. Co.*, 135 Fed. Rep. 910, 14 Am. B. R. 235; *In re Silverman Bros.*, 101 Fed. Rep. 219, 4 Am. B. R. 83; *In re Fife*, 109 Fed. Rep. 880, 6 Am. B. R. 258.

<sup>5</sup> *In re Stern* (C. C. A. 2d Cir.), 116 Fed. Rep. 604, 54 C. C. A. 60, 8 Am. B. R. 569; *In re Grant Shoe Co.* (C. C. A. 2d Cir.), 130 Fed. Rep. 881, 66 C. C. A. 78, 12 Am.

B. R. 349 and 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484; *In re National Wire Corp.*, 166 Fed. Rep. 631, 22 Am. B. R. 186; *In re Spittler*, 151 Fed. Rep. 942, 18 Am. B. R. 425; *In re Saxton Furnace Co.*, 142 Fed. Rep. 293, 15 Am. B. R. 445; *In re Silverman Bros.*, 101 Fed. Rep. 219, 4 Am. B. R. 83.

As to the right of a surety on a contractor's bond to prove, see *Wood v. Guaranty Co.*, 143 Fed. Rep. 424, 16 Am. B. R. 21.

<sup>6</sup> *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953, and cases collected in the opinion.

<sup>7</sup> *In re Neff* (C. C. A. 6th Cir.), 157 Fed. Rep. 57, 84 C. C. A. 561, 19 Am. B. R. 23; *In re Swift* (C. C. A. 1st Cir.), 112 Fed. Rep. 315, 50 C. C. A. 264, 7 Am. B. R. 375; *In re*

If a claim for damages for breach of an executory contract is of such nature that it may be liquidated, it is provable.<sup>8</sup> In ascertaining the damages which a party has sustained by reason of the breach of the contract, resort may be had to the tables of mortality, and to other means of ascertaining as nearly as possible the present damages for a failure to perform in the future.<sup>9</sup>

A claim may be allowed for breach of an unexecuted contract to deliver certain stocks at a fixed price by a stockbroker,<sup>10</sup> or to purchase or redeem stock at a stated price and time,<sup>11</sup> or to purchase goods and merchandise upon terms and prices fixed in the agreement,<sup>12</sup> or to sell goods and merchandise upon terms and prices fixed in the agreement,<sup>13</sup> or for financial reports from a commercial agency.<sup>14</sup>

A claim for damages for breach of warranty upon the sale of personal property may be liquidated and proved,<sup>15</sup> even if,

Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728; *In re* Duquesne Incandescent Light Co., 176 Fed. Rep. 785, 24 Am. B. R. 419.

But see *In re* Inman & Co., 175 Fed. Rep. 312, 23 Am. B. R. 566; *In re* Imperial Brewing Co., 143 Fed. Rep. 579, 16 Am. B. R. 110.

<sup>8</sup> *In re* Stern (C. C. A. 2d Cir.), 116 Fed. Rep. 604, 54 C. C. A. 60, 8 Am. B. R. 569; *In re* Duquesne Incandescent Light Co., 176 Fed. Rep. 785, 24 Am. B. R. 419; *In re* Dunlap Carpet Co., 163 Fed. Rep. 541, 20 Am. B. R. 882; *In re* Grant Shoe Co. (C. C. A. 2d Cir.), 130 Fed. Rep. 881, 66 C. C. A. 478, 12 Am. B. R. 349.

<sup>9</sup> *Pierce v. Tennessee Coal Co. & I. R. Co.*, 173 U. S. 1, 43 L. Ed. 591; *Roehm v. Horst*, 178 U. S. 1, 44 L. Ed. 953; *Schell v. Plumb*, 55 N. Y. 592; *Eastern Tenn. & R. Co. v. Staobs*, 7 Lea (Tenn.), 397.

<sup>10</sup> *In re* Swift (C. C. A. 1st Cir.),

112 Fed. Rep. 315, 50 C. C. A. 264, 7 Am. B. R. 375.

<sup>11</sup> *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728.

<sup>12</sup> *In re* Duquesne Incandescent Light Co., 176 Fed. Rep. 785, 24 Am. B. R. 419; *In re* National Wire Corp., 166 Fed. Rep. 631, 22 Am. B. R. 186; *In re* Saxton Furnace Co., 142 Fed. Rep. 293, 15 Am. B. R. 445.

*In re* Inman & Co., 175 Fed. Rep. 312, 23 Am. B. R. 566.

<sup>13</sup> *In re* Stern (C. C. A. 2d Cir.), 116 Fed. Rep. 604, 54 C. C. A. 60, 8 Am. B. R. 569; *In re* Stoeber, 127 Fed. Rep. 394, 11 Am. B. R. 345.

<sup>14</sup> *In re* Glick, 184 Fed. Rep. 967, 25 Am. B. R. 871; *In re* Buffalo Mirror & Beveling Co. (Ref.), 15 Am. B. R. 122.

<sup>15</sup> *In re* Grant Shoe Co. (C. C. A. 2d Cir.), 130 Fed. Rep. 881, 66 C. C. A. 78, 12 Am. B. R. 349 and

in case of actual fraud, there may be an independent claim in tort.<sup>16</sup> The words "representation and warrant" do not imply a promise to respond in damages to a copurchaser for failure of the representations to hold goods.<sup>17</sup>

If, at the time of filing the petition, the damages for breach of contract are so far contingent that they can not be computed by any process known to law, the claim is not provable.<sup>18</sup> A claim will not be allowed for damages arising from an executory breach of a contract for the sale of annual crops to be raised in successive years.<sup>19</sup> Where A. guarantees to B. the payment of dividends by a corporation at a certain rate, B. will not be allowed damages against the estate of A. for future dividends.<sup>20</sup> Damages for the breach of a contract to pay a divorced wife a certain sum annually during life or so long as she remains unmarried, can not be liquidated.<sup>21</sup> Damages for the breach of a covenant to pay rent in a lease are not provable for the same reason.<sup>22</sup>

### § 311. Contracts of employment.

A claim for services rendered before bankruptcy under a contract of employment is provable.<sup>1</sup>

212, U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.

<sup>16</sup> *In re* Grant Shoe Co., 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484.

<sup>17</sup> *Switzer v. Henking* (C. C. A. 6th Cir.), 158 Fed. Rep. 784, 86 C. C. A. 140, 19 Am. B. R. 300.

<sup>18</sup> *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1048, 10 Am. B. R. 139; *In re* Inman & Co., 171 Fed. Rep. 185, 22 Am. B. R. 524; *In re* Hartman, 166 Fed. Rep. 776, 21 Am. B. R. 610; *In re* Imperial Brewing Co., 143 Fed. Rep. 579, 16 Am. B. R. 110.

<sup>19</sup> *In re* Imperial Brewing Co., 143 Fed. Rep. 579, 16 Am. B. R. 110.

<sup>20</sup> *In re* Pettingill & Co., 137 Fed. Rep. 143, 14 Am. B. R. 728.

<sup>21</sup> *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139.

<sup>22</sup> See rent, Sec. 313, *post*; *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; *In re* Shaffer, 124 Fed. Rep. 111, 10 Am. B. R. 633.

<sup>1</sup> *Randolph v. Scruggs*, 190 U. S. 533, 47 L. Ed. 1165, 10 Am. B. R. 1; *In re* Ladue, Tate Mfg. Co., 135 Fed. Rep. 910, 14 Am. B. R. 435; *Mason v. St. Albans Furniture Co.* 149 Fed. Rep. 898, 17 Am. B. R. 868.

Where the bankruptcy of the employer prevents the servant from performing his contract, the latter may prove a claim against his estate for damages, as for a total breach of the entire contract.<sup>2</sup> The right to recover damages accrues upon the breach of the contract.<sup>3</sup> The filing of an involuntary petition is deemed the equivalent of disenablement and repudiation of an executory contract and constitutes a breach of it.<sup>4</sup>

The measure of damages in such cases is the value to the servant of the contract at the time of the breach, including all the damages, past and future, resulting from the total breach of the contract.<sup>5</sup> The rule of damages is what would have come to him under the contract had it continued, less whatever he might earn by the exercise of due diligence on his part.<sup>6</sup> The burden of showing that the servant did or might have obtained other employment is on the party opposing the claim.<sup>7</sup>

In estimating damages it is proper to consider the wages or salary the servant would have earned under the contract, the probability whether his life and that of the employer would continue to the end of the contract period, whether the servant's working ability would continue, and any other uncertainties growing out of the terms of the contract, as well as the likelihood that the servant would be able to earn money in other

<sup>2</sup> *In re* Dunlap Carpet Co., 163 Fed. Rep. 541, 20 Am. B. R. 882; *In re* Silverman Bros., 101 Fed. Rep. 219, 4 Am. B. R. 83; *In re* Glick, 184 Fed. Rep. 967, 25 Am. B. R. 871.

But see *Inman & Co.*, 171 Fed. Rep. 185, 22 Am. B. R. 524.

<sup>3</sup> *Pierce v. Tennessee Coal, I. & R. Co.*, 173 U. S. 1, 43 L. Ed. 591.

<sup>4</sup> See executory contracts, Sec. 310, *ante*.

<sup>5</sup> *Pierce v. Tennessee Coal, I. & R. Co.*, 173 U. S. 1, 43 L. Ed. 591; *In re* Silverman, 101 Fed. Rep. 219,

4 Am. B. R. 83; *In re* Glick, 184 Fed. Rep. 967, 25 Am. B. R. 871.

<sup>6</sup> *Eastern Tennessee, etc., R. Co. v. Staub*, 7 Lea (Tenn.), 397, approved in *Pierce v. Tennessee Coal & I. R. Co.*, 173 U. S. 1, 15, 43 L. Ed. 591.

<sup>7</sup> *American China Development Co. v. Boyd*, 148 Fed. Rep. 258, 272; *Roberts v. Crowley*, 81 Ga. 429; *Strauss v. Meertief*, 64 Ala. 299; *Barker v. Knickerbocker Life Ins. Co.*, 24 Wis. 630; *Hinchcliffe v. Koontz*, 121 Ind. 422; *King v. Steisen*, 44 Pa. 99; *Ansley v. Jordan*, 61 Ga. 482.

work during the time.<sup>8</sup> Standard life and annuity tables, showing the age and probable duration of life are competent evidence in such cases.<sup>9</sup>

The difficulty and uncertainty of estimating the damages that the servant might suffer in the future does not prevent liquidation under section 63*b*. Such damages are often assessed in actions at law,<sup>10</sup> and admiralty.<sup>11</sup>

The measure of damages in the case of a breach of contract of employment of an attorney is the full compensation agreed upon, less such expenses as would have been incurred by him in carrying out the agreement.<sup>12</sup> If an attorney obtains "other employment and compensation inconsistent with his engagement under the contract," such compensation may be deducted from the agreed price.<sup>13</sup> These rules grow out of the nature of the relation existing between attorney and client.

It has been held that a contract of employment with a partnership is terminated by bankruptcy, because the partnership is dissolved by bankruptcy.<sup>14</sup> The same rule has been applied in the case of a corporation, where the contract provided that it might be terminated at the option of the corporation in case it should be dissolved.<sup>15</sup>

<sup>8</sup> *Eastern Tennessee, etc., R. Co. v. Staub*, 7 Lea (Tenn.), approved in *Pierce v. Tennessee Coal & Iron R.*, 173 U. S. 1, 15, 43 L. Ed. 591.

<sup>9</sup> *Pierce v. Tennessee Coal & Iron R. Co.*, 173 U. S. 1, 43 L. Ed. 591; *Vicksburg, etc., R. Co. v. Putman*, 118 U. S. 545, 554, 30 L. Ed. 257.

<sup>10</sup> *Pierce v. Tennessee Coal, I. & R. Co.*, 173 U. S. 1, 43 L. Ed. 591; *Hamilton v. Love*, 152 Ind. 641; *Cutter v. Gillett*, 163 Mass. 95; *Stearns v. Lake Shore R. Co.*, 112 Mich. 651.

<sup>11</sup> *Guffey Petroleum Co. v. Coastwise Transp. Co.* (C. C. A. 2d Cir.), 180 Fed. Rep. 677.

<sup>12</sup> *Brodie v. Watkins*, 33 Ark. 545, *Hunt v. Test*, 8 Ala. 713; *Myers v. Crockett*, 14 Tex. 257; *Moyer v. Cantieny*, 41 Minn. 242; *Barlett v. O. F. Savings Bank*, 79 Cal. 218; *Baldwin v. Bennett*, 4 Cal. 392.

<sup>13</sup> *Horn v. Western Land Assn.*, 22 Minn. 233.

<sup>14</sup> *In re Inman & Co.*, 171 Fed. Rep. 185, 22 Am. B. R. 524.

<sup>15</sup> *In re Sweetser, Pembroke & Co.* (C. C. A. 2d Cir.), 142 Fed. Rep. 131, 73 C. C. A. 349, 15 Am. B. R. 650.



### § 312. Commissions.

A claim for commissions, founded upon a contract or agreement, is a provable debt against the estate of the employer.<sup>1</sup>

The measure of damages for a breach of a contract for commissions is the amount actually earned at the time of bankruptcy under the terms of the agreement.<sup>2</sup> The claim may include commissions on contracts made by the bankrupt prior to bankruptcy, although the contracts were not carried out.<sup>3</sup>

In order to assess the amount of commissions the claimant must furnish some tangible, substantial data upon which to estimate the amount of commissions due.<sup>4</sup> The court will not enter the field of speculation and guess to determine commissions.

### § 313. Rent.

Rent due at the time the petition is filed is provable against the estate of the bankrupt tenant.<sup>1</sup>

Where bankruptcy occurs between rent days, the landlord can not prove rent beyond the last rent day, because rent can not be apportioned as to time.<sup>2</sup> The act of 1867 expressly provided for proving the proportionate part of rent due to the date of bankruptcy.<sup>3</sup> The present act contains no such provision.

<sup>1</sup> B. A. 1898, Sec. 63a clause 4; *In re Ladue, Tate Mfg. Co.*, 135 Fed. Rep. 910, 14 Am. B. R. 435; *In re Saxton Furnace Co.*, 142 Fed. Rep. 293, 15 Am. B. R. 445.

<sup>2</sup> *In re Ladue, Tate Mfg. Co.*, 135 Fed. Rep. 910, 14 Am. B. R. 435.

<sup>3</sup> *In re Saxton Furnace Co.*, 142 Fed. Rep. 293, 15 Am. B. R. 445.

<sup>4</sup> *In re Silverman*, 101 Fed. Rep. 219, 4 Am. B. R. 83.

<sup>1</sup> *In re Hinckel Brewing Co.*, 123 Fed. Rep. 942, 10 Am. B. R. 484; *In re Arnstein*, 101 Fed. Rep. 706, 4 Am. B. R. 246; *Witheow v. South Side Trust Co.* (C. C. A. 3d Cir.), 181 Fed. Rep. 753, 104 C. C. A. 289.

<sup>2</sup> *Hoagland v. Crum*, 113 Ill. 365; *Zule v. Zule*, 24 Wend. (N. Y.) 74; *The Mayor v. Ketchum*, 67 How. Prac., N. Y. 161; *Perry v. Aldrich*, 13 N. H. 343; *Randall v. Rich*, 11 Mass. 494.

*In re Roth and Appel*, 174 Fed. Rep. 64-68, 22 Am. B. R. 504, Judge Hough says: "The rent reserved in a lease is payable only at the dates prescribed in the lease, and until that date arrives and payment is not made the lessee is not liable for any installment whether sued on his rent contract or for damages measured by it."

<sup>3</sup> R. S. Sec. 5071.

The landlord is entitled to rent for the occupation and use of leased premises after bankruptcy, where such premises are actually used by a receiver or trustee.<sup>4</sup> Such claims are entitled to priority as costs of preserving the estate.<sup>5</sup> The trustee is not chargeable for rent, if he does not occupy the premises.<sup>6</sup> Where a trustee held over after a notice to quit he was held to be personally liable for the rent, but, as it was for the benefit of the estate, he was reimbursed the amount allowed for rent.<sup>7</sup>

Installments of rent under a lease, due after bankruptcy, are not provable debts against the estate of the bankrupt lessee, either as rent or damages measured by it,<sup>8</sup> and not barred by discharge.<sup>9</sup> That the lessor has no provable debt for future rent results from the very nature of rent. The obligation of a lessee to make payments of rent as they become due does not constitute a present debt to be paid in the future.<sup>10</sup> Rent

<sup>4</sup> *In re* Hinckel Brewing Co., 123 Fed. Rep. 242, 10 Am. B. R. 484; *In re* Grignard Lith. Co., 155 Fed. Rep. 699, 19 Am. B. R. 101; *In re* Hunter, 151 Fed. Rep. 904, 18 Am. B. R. 477.

*In re* Wiessner, 8 Am. B. R. 415, it was held that where a landlord makes no demand for possession of premises occupied by bankrupt, and after the trustee has vacated the premises, recovers judgment against the tenant for rent, including part of the time the trustee was in possession, he is estopped from making any claim against the trustee for use and occupation.

<sup>5</sup> B. A. 1898, Sec. 64b; *In re* Hersey, 171 Fed. Rep. 1001, 22 Am. B. R. 860; *In re* Youdelman-Walsh Foundry Co., 166 Fed. Rep. 381, 21 Am. B. R. 509; *In re* Morris, 159 Fed. Rep. 591, and cases cited.

<sup>6</sup> *In re* Rubel, 166 Fed. Rep. 131, 21 Am. B. R. 566.

<sup>7</sup> *In re* Hunter, 151 Fed. Rep. 904, 18 Am. B. R. 477.

<sup>8</sup> *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588, affirming 174 Fed. Rep. 64, 22 Am. B. R. 504; *Watson v. Merrill* (C. C. A. 8th Cir.), 136 Fed. Rep. 362, 69 C. C. A. 185, 14 Am. B. R. 453; *Atkins v. Wilcox* (C. C. A. 5th Cir.), 105 Fed. Rep. 965, 44 C. C. A. 626, 5 Am. B. R. 313; *In re* Rubel, 166 Fed. Rep. 131, 21 Am. B. R. 566; *In re* Mahler, 105 Fed. Rep. 428, 5 Am. B. R. 453; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; *In re* Jefferson, 93 Fed. Rep. 948, 2 Am. B. R. 206; *In re* Hays, 117 Fed. Rep. 879, 9 Am. B. R. 144; *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246;

<sup>9</sup> *Bernhardt v. Curtis*, 109 La. Ann. 131, 9 Am. B. R. 286, on rehearing.

<sup>10</sup> *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588;

accrues from time to time and is not and can not be due *in solido* beforehand, since it depends upon occupation from time to time.<sup>11</sup> Rent accruing after the filing of a petition against the lessee is not a debt at the time of bankruptcy. Both its existence and amount are contingent at that time upon uncertain events.

It is entirely competent to contract that the consequences of a default of rent for the use of property, or the bankruptcy of the lessee, shall be the precipitancy of the maturity of future installments for the rental of the property in respect to which default has been made.<sup>12</sup> Such terms in a lease make

Watson v. Merrill (C. C. A. 8th Cir.), 136 Fed. Rep. 359, 69 C. C. A. 185, 14 Am. B. R. 453.

In Bordman v. Osborn, 40 Mass. 295, 299, Chief Justice Shaw said: "Although there be a lease, which may result in a claim for rent, which will constitute a debt, yet no debt accrues until such enjoyment has been had."

<sup>11</sup> *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588, Judge Noyes, speaking for the circuit court of appeals for the second circuit, said: "Rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises

with the lessor's consent. The lessee may assign his term with the approval of the lessor so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in presenti solvendum in futuro*. On the contrary, the obligation upon the rent covenant is altogether contingent."

Lord Coke said that a release by the lessor of all actions against the lessee did not relieve him from liability for subsequently accruing rent, "Because it was neither *debitum* nor *solvendum* at the time of the release made; for if the land be evicted from the lessee before the rent become due, the rent is avoided." Coke on Litt. 292b.

<sup>12</sup> Lamson Consol. Store Service Co. v. Bowland (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335; *In re* Pittsburg Drug Co., 154 Fed. Rep. 482, 20 Am. B. R. 227; Platt v. Johnson, 168 Pa. 47; Grommes v. St. Paul Trust Co., 147 Ill. 634.

future rent provable.<sup>13</sup> But the trustee may reject the contract of lease and render such claim not provable.

Where by the terms of the lease future installments of rent are made immediately due and payable, the landlord may, acting under another clause of the lease, terminate it by re-entry,<sup>14</sup> or by accepting a surrender of a part of the lease,<sup>15</sup> and thereafter be estopped from proving for future rents after bankruptcy. The filing of a petition in bankruptcy does not mature notes given for rent to accrue in the future, although the lease provided that the rent for the unexpired term should at once become due upon default of any payment.<sup>16</sup>

Where the state law entitles the landlord to a lien upon the goods of his tenant for rent, the court of bankruptcy will enforce such lien as against the proceeds of such goods when sold by the trustee.<sup>17</sup>

### § 314. Damages for breach of a lease are not provable.

A lease containing the usual provisions is not terminated by the bankruptcy of the lessee.<sup>1</sup> If there is a provision that

<sup>13</sup> *In re* Pittsburg Drug Co., 164 Fed. Rep. 482, 20 Am. B. R. 227.

<sup>14</sup> *Lamson Consol. Store Service Co. v. Bowland* (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335; *In re* Mahler, 105 Fed. Rep. 428, 5 Am. B. R. 453; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564.

<sup>15</sup> *Wilson v. Penn. Trust Co.*, 114 Fed. Rep. 742, 8 Am. B. R. 169; *In re* Winfield Mfg. Co., 137 Fed. Rep. 984, 10 Am. B. R. 401, and 140 Fed. Rep. 185, 15 Am. B. R. 257. But see *Evans v. Lincoln Co.*, 204 Pa. St. 448, 10 Am. B. R. 401.

<sup>16</sup> *Atkins v. Wilcox* (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 44 C. C. A. 626, 5 Am. B. R. 513.

<sup>17</sup> *In re* West Side Paper Co. (C. C. A. 3d Cir.), 162 Fed. Rep. 110, 89 C. C. A. 110, 20 Am. B. R.

660; *Martin v. Orgain* (C. C. A. 5th Cir.), 174 Fed. Rep. 772, 98 C. C. A. 246, 23 Am. B. R. 454; *Wilson v. Penn. Trust Co.* (C. C. A. 3d Cir.), 114 Fed. Rep. 742, 52 C. C. A. 374, 8 Am. B. R. 169; *In re* Pittsburg Drug Co., 164 Fed. Rep. 482, 20 Am. B. R. 227; *In re* Bayley, 177 Fed. Rep. 522, 22 Am. B. R. 249; *Longstreth v. Pennock*, 87 U. S. 575, 22 L. Ed. 451.

<sup>1</sup> *In re* Roth & Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588; *In re* Pennewell (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 55 C. C. A. 571, 9 Am. B. R. 490; *Lamson Consol. Store Service Co. v. Bowland* (C. C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335; *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564; *Atkins v. Wilcox* (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 44

the lessor may re-enter and terminate the lease upon default for rent, bankruptcy of the lessee or breach of any covenant, he may, of course, exercise his right to end the lease.<sup>2</sup>

A claim for damages, sustained by a lessor on account of the premises remaining unleased or relet for less rent after bankruptcy to the end of the term of the lease, is not provable against the estate of the bankrupt lessee.<sup>3</sup>

The reason of this is that such claims at the time the petition is filed are so far contingent that the damages can not be assessed. The obligation to pay rent depends upon occupation. If the right to occupy terminates, the obligation to pay ceases. This may occur in many ways, so that the existence and the amount of damages are contingent upon uncertain events. No measure of damages can be applied in such cases to ascertain the loss to the lessor until the term is ended. An action at law will not lie at the time of the breach to recover such damages, as for an anticipatory breach of an executory contract. Neither can a court of bankruptcy liquidate them.<sup>4</sup>

A provision in a lease that the lessor may re-enter and relet the premises at the risk of the lessee, who shall remain liable for the rent and be credited with sums actually realized does not give rise to a provable claim, as one founded upon a contract.<sup>5</sup> The claim can not be liquidated.

C. C. A. 646, 5 Am. B. R. 313; *Watson v. Merrill* (C. C. A. 8th Cir.), 136 Fed. Rep. 359, 69 C. C. A. 185, 14 Am. B. R. 453.

But see *In re Jefferson*, 93 Fed. Rep. 948, 2 Am. B. R. 206; *In re Hays, Foster & Ward Co.*, 117 Fed. Rep. 879, 9 Am. B. R. 144; *Bray v. Cobb*, 100 Fed. Rep. 270, 3 Am. B. R. 788.

<sup>2</sup> *In re Roth & Appel* (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588; *In re Ells*, 98 Fed. Rep. 967, 3 Am. B. R. 564.

<sup>3</sup> *In re Roth & Appel* (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104

C. C. A. 649, 24 Am. B. R. 588; *Watson v. Merrill* (C. C. A. 8th Cir.), 136 Fed. Rep. 359, 69 C. C. A. 185, 14 Am. B. R. 453; *In re Ells*, 98 Fed. Rep. 967, 3 Am. B. R. 564; *In re Shaffer*, 124 Fed. Rep. 111, 10 Am. B. R. 633; *In re Rubel*, 166 Fed. Rep. 131, 21 Am. B. R. 566.

<sup>4</sup> *In re Rubel*, 166 Fed. Rep. 131, 21 Am. B. R. 566.

<sup>5</sup> *In re Roth & Appel* (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588, affirming 174 Fed. Rep. 64, 22 Am. B. R. 504; *In re Ells*, 98 Fed. Rep. 967, 3 Am. B. R. 564;

The landlord can not ordinarily prove for damages occasioned by restoring alterations made by the lessee when in possession.<sup>6</sup> But where the tenant covenanted to make all repairs and the landlord was obliged to pay for repairs made by the Board of Health, she was entitled to prove a claim therefor against the bankrupt's estate as a general creditor.<sup>7</sup>

A sublessee can not prove against his lessor a claim for damages for a breach of covenant for quiet enjoyment of premises under a lease to begin after the date of bankruptcy.<sup>8</sup>

Where five thousand dollars was deposited with the landlord by a tenant as security for the lease and the landlord adjudicated a bankrupt, the tenant was permitted to prove his claim for five thousand dollars as a general creditor.<sup>9</sup>

### § 315. Open accounts.

A debt founded upon an open account is provable against the estate of the bankrupt.<sup>1</sup>

In the case of an open account a balance is struck and the claim is allowed for the balance at the time the petition is filed. If the creditor owes the bankrupt's estate a larger amount than is due him from the estate he can not prove his debt.<sup>2</sup> His remedy in such cases is in the court in which the claim against him is sought to be enforced.

Where a creditor has a claim upon an open account for goods sold and delivered, the account being made up of debits and credits, leaving a net amount due from the bankrupt's

*In re Shaffer*, 124 Fed. Rep. 111, 10 Am. B. R. 633; *In re Lake*, No. 7991 Fed. Cas., 2 Low. 544.

But see *In re Caloris Mfg. Co.*, 179 Fed. Rep. 722, 24 Am. B. R. 609.

<sup>6</sup> *In re International Milling Co.*, 175 Fed. Rep. 308, 23 Am. B. R. 664; *In re Arnstein*, 101 Fed. Rep. 706, 4 Am. B. R. 246.

<sup>7</sup> *In re Schomacker Piano Forte Mfg. Co.*, 163 Fed. Rep. 413, 20 Am. B. R. 899.

<sup>8</sup> *In re Pennewell* (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 55 C. C. A. 571, 9 Am. B. R. 490.

<sup>9</sup> *In re Banner*, 149 Fed. 936, 18 Am. B. R. 61.

<sup>1</sup> B. A. 1898, Sec. 63a, clause 4.

As to what constitutes an open account, see *In re Girvin*, 160 Fed. 197, 20 Am. B. R. 490.

<sup>2</sup> *In re Gerson*, 105 Fed. Rep. 893, 5 Am. B. R. 89; *In re Leshner & Son*, 176 Fed. Rep. 650, 25 Am. B. R. 218.

estate, the creditor may prove for the balance, although payments have been made within four months of bankruptcy, if the effect is to enrich the bankrupt's estate by the total sales less the total payments.<sup>3</sup>

### § 316. Mutual debts and credits.

The present bankrupt statute provides that "In all cases of mutual debts or mutual credits between the estate of a bankrupt and the creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months after such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."<sup>1</sup>

Similar provisions are contained in the former United States bankrupt acts and in the English acts.<sup>2</sup> The opinions of the courts construing these provisions are valuable in determining the true meaning of the present section.

<sup>3</sup> Wild v. Provident Trust Co., 214 U. S. 292, 53 L. Ed. 1003, 22 Am. B. R. 109; Yaple v. Dahl, Millikan Grocery Co., 193 U. S. 526, 48 L. Ed. 776, 11 Am. B. R. 596; Jaquith v. Alden, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773; *In re* Peacock, 178 Fed. Rep. 851, 24 Am. B. R. 159.

<sup>1</sup> B. A. 1898, Sec. 68.

<sup>2</sup> Act of 1867. "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its

nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition."—R. S. Sec. 5073; Act of March 2, 1867, 14 Stat. at L. 526, Sec. 20.

Act of 1841: "In all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off."—Act of August 19, 1841, 5 Stat. at L. 445, Sec. 5.

Act of 1800: "*And be it further enacted*, That where it shall appear to the said commissioners that there hath been mutual credit



The right of set-off in bankruptcy does not rest on the same principle as the right of set-off between solvent parties. The latter is given by the statutes of set-off and counterclaim to prevent cross actions. But under the bankrupt statutes the mutual credit clause has not been so construed. The object of this clause is not to avoid cross actions, for none would lie against trustees in bankruptcy, and one against the bankrupt would be unavailing, but to do substantial justice between the parties where a debt is really due from the bankrupt to a debtor to his estate.<sup>3</sup>

The time when the right of set-off is determined is the date of filing the petition.<sup>3\*</sup> If such claim was acquired within four months prior to that date to be used as a set-off and with knowledge that the bankrupt was insolvent, or had committed an act of bankruptcy, it can not be allowed.<sup>3\*\*</sup>

given by the bankrupt, and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set-off, and no more, shall be claimed or paid on either side respectively."—Act of April 4, 1800, 2 Stat. at L. 33, Sec. 42.

English Act of 1883: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off

against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him."—46 and 47 Vic., Chap. 52, Sec. 38. This is in substance a re-enactment of the prior English statutes, beginning with the temporary act of IV and V Anne, Chap. 17. Each act differs slightly from the others.

<sup>3</sup> Forster v. Wilson, 12 M. & W. 203.

<sup>3\*</sup> Steinhardt v. National Park Bank, 52 N. Y. Misc. 464, 18 Am. B. R. 86, reversed, 19 Am. B. R. 72; Taylor v. Nichols, 134 N. Y. App. Div. 783, 119 N. Y. Supp. 919, 23 Am. B. R. 306.

<sup>3\*\*</sup> B. A. 1898, Sec. 68b.



It may be doubted whether this mutual credit clause applies except between a creditor and trustee.<sup>4</sup>

**§ 317. What are "mutual debts" and "mutual credits."**

The words "mutual debts" and "mutual credits" appear in all of the bankrupt acts. The word "debt" includes any debt, demand or claim provable in bankruptcy in the present act.<sup>1</sup>

Prior to the leading case of *Rose v. Hart*,<sup>2</sup> decided in 1818, the words "mutual credit" generally received a very wide interpretation, much more extensive than the words "mutual debt."<sup>3</sup> In that case this phrase was defined in the following words: "Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet, upon the final settlement, it is enacted merely that one *debt* shall be set against another. We think this shows that the legislature meant such *credits* only as must in their nature terminate in *debts*, as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with; but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute."<sup>4</sup> The

<sup>4</sup> Consult *New Quebrada Co. v. Carr*, 4 L. R. C. P. 651; *Turner v. Thomas*, 6 L. R. C. P. 610; *In re Fort Wayne Electric Corp.*, 95 Fed. Rep. 264, 2 Am. B. R. 503.

<sup>1</sup> B. A. 1898, Sec. 1, clause 11.

<sup>2</sup> 8 Taunt. 499, s. c. 2 Smith's Leading Cases, Part 1, 308, where the doctrine of set-off in bankruptcy is considered at length and

the English and American cases on the subject collated and reviewed in a note at the end of the opinion.

<sup>3</sup> *Ex parte Deeze*, 1 Atk. 228; *Murray v. Riggs*, 15 John. (N. Y.) 571.

<sup>4</sup> *Rose v. Hart*, 8 Taunt. 506, s. c. 2 Smith's Leading Cases, Part 1, 308, and note.

rule established in this case as to the nature of the credits which can be subject of set-off has been declared in other cases.<sup>5</sup>

In the case of *Libby v. Hopkins*,<sup>6</sup> speaking of the act of 1867, which is almost identical with the present statute in this respect, the supreme court said: "In our act the terms 'credits' and 'debts' are used as correlative. What is a debt on one side is a credit on the other, so that the term 'credits' can have no broader meaning than the term 'debts.' We find no warrant in the language of this section or its contents for extending the terms so as to include trusts." Having in mind the definition of debts as used in the bankrupt law, this language would not seem to limit the rule laid down in *Rose v. Hart*.<sup>7</sup> But "mutual debts" and "mutual credits" would include debts, demands or claims provable in bankruptcy which must in their nature terminate in debts. In *Rose v. Hart*, the word "debt" is evidently used with its technical legal meaning.

A claim for unliquidated damages provable under the act can not be set off against the debt of a creditor or a bankrupt until it has been put into the shape of a debt.<sup>8</sup> Such claims must be liquidated for this purpose.

In order that a debt or credit may be set off it is necessary that four things concur. *First*. The debts or credits must be mutual. *Second*. They must be in the same right. *Third*. They must be debts or credits provable in bankruptcy. *Fourth*. They must be debts or credits which were not purchased by or transferred to the debtor of the bankrupt after

<sup>5</sup> *Libby v. Hopkins*, 104 U. S. 307, 26 L. Ed. 769; *In re Caylus*, No. 2534 Fed. Cas., 1 Low. 550; *Catlin v. Foster*, No. 2519 Fed. Cas., 1 Saw. 37; *Easum v. Cato*, 5 B. & Ald. 861; *Young v. Bank*, 1 Moore, P. C. 150; *Palmer v. Day* (1895), 2 Q. B. 618; *Smith v. Hodson*, 4 T. R. 212; *Goodrich v. Dobson*, 43 Conn. 576.

<sup>6</sup> 104 U. S. 309, 26 L. Ed. 769.

<sup>7</sup> 8 Taunt. 499, s. c. 2 Smith's Leading Cases, Part 1, 308.

<sup>8</sup> *In re Orne*, No. 10581 Fed. Cas., s. c. 1 Ben. 361; *Brown v. Cuming*, 2 Caines (N. Y.), 33; *Booth v. Hutchinson*, 15 L. R. Eq. 30; *Palmer v. Day*, 2 Q. B. 618.

the filing of the petition, or within four months before such filing for the purpose of setting them off, and with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy. If any one of these elements is wanting, the debt or credit can not be used as a set-off.

**§ 318. Mutual debts and credits must be between the same parties.**

The debts and credits which are to be set off one against the other must be mutual.<sup>1</sup>

In order to constitute that mutuality of debts or credits which is required by the statute it is necessary that the debt or credit which is set off, and the debt or credit against which it is set off, should be between the same parties. Thus ordinarily a joint debt can not be set off against a separate debt, nor a separate debt against a joint debt, nor debt due from three persons against a debt due to two of them, or the like.<sup>2</sup> Where the joint debt may be collected from the property of either of the joint debtors, and is provable in bankruptcy against the estate of him who has been adjudged a bankrupt, it may be set off against any claim which the bankrupt has against the creditor.<sup>3</sup> A debt of one of two partners to the other partner may be set off against a balance in his hands arising upon the settlement of the partnership accounts.<sup>4</sup>

<sup>1</sup> *Libby v. Hopkins*, 104 U. S. 307, 26 L. Ed. 769; *Gray v. Rollo*, 18 Wall. 632, 21 L. Ed. 927; *Sawyer v. Hoag*, 17 Wall. 622, 21 L. Ed. 731; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Wilson v. Nat. Bank*, 3 Fed. Rep. 391.

<sup>2</sup> *In re Shults*, 132 Fed. Rep. 573, 13 Am. B. R. 84; *Gray v. Rollo*, 18 Wall. 629, 21 L. Ed. 927; *Forsyth v. Woods*, 11 Wall. 484, 20 L. Ed. 207; *Clark v. Sparhawk*, No. 2836 Fed. Cas., 2 Weekly Notes, Cas. 115; *In re Crystal Spring Bottling Co.*, 100 Fed. Rep.

265, 4 Am. B. R. 55, 3 N. B. N. 179; *In re Bingham*, 94 Fed. Rep. 796, 2 Am. B. R. 223.

*Ex parte Twogood*, 11 Ves. 517; *Ex parte Ross*, Buck, 125; *Stanforth v. Fellows*, 1 Marsh, 184.

<sup>3</sup> *Tucker v. Oxley*, 5 Cranch. 34, 3 L. Ed. 29, as explained in *Gray v. Rollo*, 18 Wall. 633, 21 L. Ed. 927; *Cosgrove v. Cosby*, 86 Ind. 511.

<sup>4</sup> *In re Voetter*, 4 Fed. Rep. 632; *Clark v. Sparhawk*, No. 2836 Fed. Cas., 2 Weekly Notes, Cas. 115.

The question whether a debt payable *in futuro* could be set off against a debt payable *in præsenti* was one of the earliest which arose under the English bankrupt act. It was decided in the affirmative on the ground that, though there might not be debts mutually payable between the parties, there were mutual credits, and that the case came within the equity of the statute.<sup>5</sup> The same question has received a similar answer in the United States in cases arising under the former bankrupt acts.<sup>6</sup>

In order to render debts and credits mutual, it is not necessary that the creditor and bankrupt should have had any intention to create cross demands.<sup>7</sup>

**§ 319. Mutual debts and credits may be different in their nature.**

It is not necessary that the demands should be of the same nature. They may be different in their nature.

Thus, one may be founded on deed and the other on simple contract. A loss upon a policy of insurance may be set off

<sup>5</sup> *Ex parte* Prescott, 1 Atk. 230; *Alsagar v. Currie*, 12 M. & W. 751; *Ex parte* Wagstaff, 13 Ves. 65; *Sheldon v. Rothschild*, 8 Taunt. 156; *Atkinson v. Elliott*, 7 T. R. 378.

<sup>6</sup> *Marks v. Barker*, No. 9096 Fed. Cas., 1 Wash. C. C. 178; *Catlin v. Foster*, No. 2519 Fed. Cas., s. c. 1 Saw. 37; *Fort v. McCully*, 59 Barb. (N. Y.) 87; *In re City Bank*, No. 2742 Fed. Cas., 6 N. B. R. 71; *Drake v. Rollo*, No. 4066 Fed. Cas., 3 Biss. 273.

<sup>7</sup> *Hankey v. Smith*, 3 T. R. 507; *Edmeads v. Newman*, 1 B. & C. 418.

But see observation of Mr. Justice Bradley in *Gray v. Rollo*, 18 Wall. 632, 21 L. Ed. 927. He said: "Nor does the case present one of

mutual credit. There was no connection between the claims whatever, except the accidental one of the complainant's being concerned in both. The insurance company, so far as appears, took the notes without any reference to the policies of insurance; and Gray Brothers insured with the company without any reference to the notes. Neither transaction was entered into in consequence of, or in reliance on, the other; and no agreement was ever made between the parties that the one claim should stand against the other. There being neither mutual debts nor mutual credits, the case does not come within the terms of the bankrupt law."

against an indebtedness for money borrowed from an insurance company,<sup>1</sup> or for money deposited with the holder as a banker.<sup>2</sup>

A person may set off a credit on deposit in a bankrupt bank against his indebtedness on notes or as the indorser upon a note held by the bank which has been protested.<sup>3</sup> A check issued by a bankrupt may be set off against a note due the bankrupt's estate.<sup>4</sup>

A bank may set off a regular bank balance against a note of a bankrupt held by it,<sup>5</sup> unless the note is not due,<sup>5\*</sup> or against a note on which the bankrupt was an indorser.<sup>6</sup> Where a bank transfers all its assets to another bank which agrees to pay all the liabilities of its assignor, the right of set-off existing in the assignor's bank inures to the benefit of the assignee bank.<sup>7</sup>

<sup>1</sup> *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483; *Drake v. Rollo*, No. 4066 Fed. Cas., 3 Biss. 273; *Commonwealth v. Shoe Insurance Co.*, 112 Mass. 131.

<sup>2</sup> *In re Fornsworth*, No. 4673 Fed. Cas., 5 Biss. 223; *Scammon v. Kimball*, No. 12435 Fed. Cas., 5 Biss. 431; *In re Petrie*, No. 11040 Fed. Cas., 5 Ben. 110; *Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380, 11 Am. B. R. 42.

<sup>3</sup> *In re Shults*, 132 Fed. Rep. 573, 13 Am. B. R. 84; *Marks v. Barker*, No. 9096 Fed. Cas., 1 Wash. C. C. 178; *Winslow v. Bliss*, 3 Lans. (N. Y.) 220; *In re Meyers*, 99 Fed. Rep. 691, 3 Am. B. R. 760; *In re Henry L. Meyer*, 5 Am. B. R. 593, 106 Fed. Rep. 828. But see *Henry L. Meyer*, 107 Fed. Rep. 86, 5 Am. B. R. 596.

<sup>4</sup> *Ogden v. Cowley*, 2 Johns. (N. Y.) 274.

<sup>5</sup> *New York County Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380, 11 Am. B. R. 42; *In re Geo. M.*

*Hill Co.* (C. C. A. 7th Cir.), 130 Fed. Rep. 315, 64 C. C. A. 561, 12 Am. B. R. 221; *In re Scherzer*, 130 Fed. Rep. 631, 12 Am. B. R. 451; *Tomlinson v. Bank of Lexington* (C. C. A. 4th Cir.), 145 Fed. Rep. 824, 76 C. C. A. 400, 16 Am. B. R. 632; *Steinhardt v. Nat. Park Bank*, 120 N. Y. App. Div. 255, 19 Am. B. R. 72; *In re Medaris-Vine Carriage Co.* (Ref.), 17 Am. B. R. 897, 15 Ohio Fed. Dec. 223; *West v. Bank of Lahoma*, 16 Okl. 508, 16 Am. B. R. 733; *In re Myers*, 99 Fed. Rep. 691, 4 Am. B. R. 456; *In re Little*, 110 Fed. Rep. 621, 6 Am. B. R. 681; *Booth v. Prete*, 81 Conn. 636, 22 Am. B. R. 579.

<sup>5\*</sup> *Irish v. Citizens Trust Co.*, 163 Fed. Rep. 880, 21 Am. B. R. 39.

<sup>6</sup> *In re Philip Semmer Glass Co.* (C. C. A. 2d Cir.), 135 Fed. Rep. 77, 14 Am. B. R. 25.

<sup>7</sup> *Frank v. Mercantile National Bank*, 100 Sup. Ct. (N. Y.) Appellate Div. 449.

Where bills, money or chattels are deposited with the creditor for a specific purpose, he can not claim to set off a debt owing to him from the bankrupt against the trustee claiming such bills or goods.<sup>8</sup> Such a case exists where goods are deposited with a bailee for the purpose of having work done upon them,<sup>9</sup> or where money is deposited for a specific purpose.<sup>10</sup> So where a trustee seeks to set aside a preference the defendant can not set off notes of the bankrupt.<sup>11</sup> But if a mutual debt or credit within the meaning of this section is once established a temporary suspension of it has been held not to destroy the right to set off where the mutual debt or credit afterwards revives.<sup>12</sup>

Where there is a debt on one side and on the other a delivery of property with power to turn it into money, he may turn it into money and the two debts may be set off one against the other. The test is whether the credit given by the delivery of the property must in its nature terminate in a debt. Thus a creditor, who at the time of the bankruptcy has in his hands goods or chattels of the bankrupt with a power of sale or choses in action with a power of collection, may sell those goods or collect those claims, and set them off against the debt the bankrupt owes him, and this although the power to sell or collect were revocable by the bankrupt before his bankruptcy.<sup>13</sup> A creditor may set off unpaid insurance and percentages on sales arising under a bailment

<sup>8</sup> *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 721; *Rose v. Hart*, 8 Taunt. 499; *Jenkins v. Armour*, No. 7260 Fed. Cas., 6 Biss. 312; *Goodrich v. Dobson*, 43 Conn. 576; *In re Lane*, No. 8043 Fed. Cas., 2 Low. 305.

<sup>9</sup> *Rose v. Hart*, 8 Taunt. 499.

<sup>10</sup> *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769.

<sup>11</sup> *Fleming v. Andrews*, 3 Fed. Rep. 632.

<sup>12</sup> *Collins v. Jones*, 10 B. & C. 777; *Boland v. Nash*, 8 B. & C. 105.

<sup>13</sup> *Ex parte Whiting*, No. 17573 Fed. Cas., 2 Low. 572; *Rose v. Hart*, 8 Taunt. 506, 2 Smith Leading Cases, Part 1, 330, and notes thereto; *Goodrich v. Dobson*, 43 Conn. 576; *In re McVay*, 13 Fed. Rep. 443.

But see *Brown v. New Bedford Savings Inst.*, 137 Mass. 262.

contract against his indebtedness to the bankrupt estate on account of inventory excess in the stock of goods bailed.<sup>18\*</sup>

**§ 320. The debts and credits must be in the same right.**

In order that debts and credits may be set off they must be due respectively in the same right.<sup>1</sup> This rule is subject to a few exceptions to be mentioned presently. It is evident that there is a distinction between debts being mutual and debts being held in the same right. Debts may be mutual and held in different rights.

Thus it has been held that a debt due to an executor, as executor, can not be set off against a debt due from him in his own right.<sup>2</sup> But where a person as executor and residuary legatee had a balance in the hands of bankers he has been allowed to set off, in an action by the trustee of the bankers for a debt due from him to them, the balance due him as executor and residuary legatee, it appearing that he had in his hands more than sufficient assets to pay all the testator's debts and legacies remaining unpaid.<sup>3</sup>

Money expended by a father for the support of his children or given to them without expectation that it will be repaid can not be set off against a fund held by him as guardian for them.<sup>3\*</sup>

<sup>18\*</sup> Walther v. Williams Mercantile Co. (C. C. A. 6th Cir.), 169 Fed. Rep. 270, 94 C. C. A. 546, 22 Am. B. R. 328.

<sup>1</sup> Walthers v. Williams Mercantile Co. (C. C. A. 6th Cir.), 169 Fed. Rep. 270, 94 C. C. A. 546, 22 Am. B. R. 328; *In re White* (C. C. A. 7th Cir.), 177 Fed. Rep. 194, 101 C. C. A. 364, 24 Am. B. R. 197; *In re Leshner & Son*, 176 Fed. Rep. 650, 25 Am. B. R. 218; *Sawyer v. Hoag*, 17 Wall. 622, 21 L. Ed. 731; *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769; *Wright v. Rogers*, No.

18090 Fed. Cas., 3 McLean, 229; *West v. Pryce*, 2 Bing. 455; *In re Bevins* (C. C. A. 2d Cir.), 165 Fed. Rep. 434, 91 C. C. A. 502, 21 Am. B. R. 344.

<sup>2</sup> *Bishop v. Church*, 3 Atk. 691.

<sup>3</sup> *Bailey v. Finch*, 7 L. R. Q. B. 34. See observations on this case in *Ex parte Morier*, 12 Chan. Div. 491.

<sup>3\*</sup> *Embry v. Bennett* (C. C. A. 6th Cir.), 162 Fed. Rep. 139, 89 C. C. A. 163, 20 Am. B. R. 651.

But see *In re Brewster* (Ref.), 7 Am. B. R. 486.

A debt due for stock in a corporation can not be set off against a debt due from the corporation.<sup>4</sup> The reason for this is, that the debt which the appellant owed for his stock is a trust fund held by the corporation, for the benefit of all creditors of the company, and, therefore, not in the same right as a debt between the company and the debtor. A stockholder, after bankruptcy of the corporation can not rescind his stock subscription on the ground of fraud and misrepresentation and share as creditors in the estate.<sup>4\*</sup>

Where a creditor of a bankrupt knowing him to be in failing circumstances agrees to open a new account irrespective of the old indebtedness he can not set off the amount due by him on the new account against the amount due to him on the old account.<sup>5</sup> Where an agreement between a bankrupt and another person obligates the latter to pay laborers after deducting from the pay rolls amounts furnished laborers by the bankrupt for supplies and to remit to the bankrupt the amount of such deductions irrespective of the account between him and the bankrupt is not a case of mutual credits and debts because as to such deductions such persons stood toward the bankrupt in the relation of a trustee.<sup>6</sup>

A judgment for a penalty incurred by the violation of a statute against usury is not a proper set-off against a claim of the judgment debtor against the bankrupt's estate.<sup>7</sup>

A debt owing to a wife when sole can not be set off against a debt from her husband,<sup>8</sup> or a debt owing by the bankrupt's

<sup>4</sup> *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Morgan County v. Allen*, 103 U. S. 498, 26 L. Ed. 498; *In re Wiener & Goodman Shoe Co.*, 96 Fed. Rep. 949, 3 Am. B. R. 200; *In re Standard Dairy & Ice Co. (Ref.)*, 20 Am. B. R. 321; *Babbitt v. Read*, 173 Fed. Rep. 712, 23 Am. B. R. 254.

<sup>4\*</sup> *Scott v. Abbott* (C. C. A. 8th Cir.), 160 Fed. Rep. 573, 87 C. C. A. 475, 20 Am. B. R. 335; *In re Alleman Hardware Co.*, 172 Fed. Rep. 611, 22 Am. B. R. 871.

<sup>5</sup> *In re Troy Woolen Co.*, No. 14203 Fed. Cas., 8 N. B. R. 412.

<sup>6</sup> *Western Tie & T. Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

<sup>7</sup> *Wilson v. National Bank of Rolla*, 3 Fed. Rep. 391.

<sup>8</sup> *Ex parte Blagden*, 19 Ves. 465.



wife before marriage against a debt owing to him,<sup>9</sup> unless after marriage he makes the wife's debt his own.<sup>10</sup>

A debt due to or from the trustee in bankruptcy and arising after the bankruptcy in the management of the estate can not be set off against a debt due from or to the bankrupt before the bankruptcy.<sup>11</sup>

A claim by a bankrupt's assignee for the benefit of creditors against a creditor for damages for wrongful attachment is in a different right from the creditor's claim against the bankrupt's estate and can not be used as a set-off.<sup>11\*</sup>

The separate debt of one partner can not be set off against a partnership debt or *vice versa*.<sup>12</sup> But the rule excluding a set-off as between joint and separate debts does not apply to a surviving partner, as the right to sue for partnership debts survives to him alone.<sup>13</sup> Neither does it apply where the joint debt is in fact a security for the separate debt, as where one partner joins in a bond merely as surety for another.<sup>14</sup> In such case the debt on the joint security is in reality the debt of the principal debtor only, who may set off a debt owing to him by the obligee. It has been thought that the mutual credit clause does not apply to partnership debts unless all the members of the firm are bankrupt; for it was intended to operate only in respect of demands by and against bankrupts. Hence it would not apply if there was a solvent partner.<sup>15</sup> If it

<sup>9</sup> *Yates v. Sherrington*, 11 M. & W. 42; s. c. 12 M. & W. 855.

<sup>10</sup> *Wood v. Akers*, 2 Esp. 594.

<sup>11</sup> *Alloway v. Steere*, 10 Q. B. D. 22; *West v. Pryce*, 2 Bing. 455.

<sup>11\*</sup> *In re Bevins* (C. C. A. 2d Cir.), 165 Fed. Rep. 434, 91 C. C. A. 502, 21 Am. B. R. 344.

<sup>12</sup> *In re Leshner & Son*, 176 Fed. Rep. 650, 25 Am. B. R. 218; *Forsyth v. Woods*, 11 Wall. 484, 20 L. Ed. 207; *Gray v. Rollo*, 18 Wall. 629, 21 L. Ed. 927; *Clark v. Sparhawk*, No. 2836 Fed. Cas., 2 Weekly Notes, Cas. 115; *Ex parte Twogood*, 11 Ves. 517; *Lanes-*

*borough v. Jones*, 1 P. W. 326; *Ex parte Ross*, Buck, 125; *Abbott v. Hicks*, 5 Bing. N. C. 578.

<sup>13</sup> *Tucker v. Oxley*, 5 Cranch, 34, 3 L. Ed. 29; as explained in *Gray v. Rollo*, 18 Wall. 633, 21 L. Ed. 927; *Cosgrove v. Cosby*, 86 Ind. 511; *French v. Andrade*, 6 T. R. 582; *Slipper v. Stidstone*, 5 T. R. 493.

<sup>14</sup> *Ex parte Hanson*, 12 Ves. 346; s. c. 18 Ves. 232; *In re Dillon*, 100 Fed. Rep. 627, 4 Am. B. R. 63.

<sup>15</sup> See *Vullian v. Noble*, 3 Mer. 621; *Ex parte Stephens*, 11 Ves. 24.

should be held to apply in such cases, it is manifest that it would not release the liability of the solvent partner.<sup>16</sup>

There are a few exceptions to the general rule. Thus, in the case of a factor selling goods as his own without disclosing his principal, the debtor may set off against the principal any debt which he could have set off against the factor.<sup>17</sup> So also it seems that by special agreement debts in separate rights may be set off, one against the other.<sup>18</sup>

### § 321. Set-offs must be provable debts.

The statute expressly provides that a set-off, or counterclaim in favor of any debtor of the bankrupt must be provable against the estate.<sup>1</sup>

The debtor of a bankrupt can use only claims provable in bankruptcy as set-offs or counterclaims.<sup>2</sup> If he were permitted to use other claims for this purpose, it would diminish the estate of the bankrupt to the injury of other creditors. It has been held that the right of the trustee to use any claim, which he may enforce against the creditor presenting a claim against the estate of the bankrupt as a set-off or counterclaim, is not so limited.<sup>3</sup>

<sup>16</sup> B. A. 1898, Sec. 16.

<sup>17</sup> *George v. Clagett*, 7 T. R. 359.

<sup>18</sup> *Cuxon v. Chadley*, 1 C. & P. 174.

<sup>1</sup> B. A. 1898, Sec. 68*b*; *Morgan v. Wordell*, 178 Mass. 350, 3 N. B. N. 513; *In re Harper*, 175 Fed. Rep. 412, 23 Am. B. R. 918.

<sup>2</sup> *In re Harper*, 175 Fed. Rep. 412, 422, 23 Am. B. R. 918; *In re Becker*, 139 Fed. Rep. 366.

<sup>3</sup> *In re Harper*, 175 Fed. Rep. 412, 422, 23 Am. B. R. 918; after quoting subdivision *b* of Sec. 68, Judge Ray said: "This is not a limitation or restriction on the right of the trustee to set up, prove and use any claim he has and which he may enforce against a creditor of the bankrupt pre-

sending a claim against the estate he represents, provided it be a 'debt' owing by such creditor to the bankrupt estate within the meaning of Sec. 68*a*. . . . There is no provision or suggestion in the act that a claim against a creditor of the bankrupt in the hands of the trustee, and which came to him by operation of law on his appointment, can not be used as an off-set to or counterclaim against the claim of such creditor of the bankrupt estate, unless such claim in the hands of the trustee be one of a character provable in bankruptcy in case the one liable thereon had been adjudicated a bankrupt."

It was held formerly that the liability of an indorser or surety could not be made a subject of set-off unless he had actually paid the debt.<sup>3</sup> Where, under section 57i, such claim is provable it would seem that it may be set off against any claim of the principal debtor against the surety to the extent that the indorser or surety can prove his claim.<sup>3\*</sup>

Costs provable under the act may be the subject of set-off.<sup>4</sup> Under the former acts untaxed costs were not provable, and, therefore, could not be used as set-offs, but under the present act they are provable, and consequently can be the subject of set-off.<sup>5</sup>

If the claim of a creditor, who is also a debtor, of the estate is one provable in its nature, the fact that he has not proved it within the year does not affect his right to plead it as a set-off or counterclaim in an action by the trustee to recover his indebtedness to the estate as a claim "provable against the estate" within the meaning of section 68b.<sup>6</sup>

### § 322. Debts acquired by purchase as set-offs.

The statute forbids the allowance of a set-off or counterclaim in favor of any debtor of the bankrupt which "was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."<sup>1</sup>

<sup>3</sup> Abbott v. Hicks, 5 Bing., N. C. 578.

<sup>3\*</sup> *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223.

<sup>4</sup> See Staniforth v. Fellowes, 1 Marsh, 184; Thomason v. Frere, 10 East, 418.

But see Robarts v. Bree, 8 Chan. Div. 198.

<sup>5</sup> See costs, Sec. 306, *ante*.

<sup>6</sup> Norfolk & W. Ry. Co. v. Graham (C. C. A. 4th Cir.), 145 Fed.

Rep. 809, 76 C. C. A. 385, 16 Am. B. R. 610; Steinhardt v. Nat. Park Bank, 120 N. Y. App. Div. 255, 19 Am. B. R. 92.

See also Ommen v. Talcott, 175 Fed. Rep. 259, 23 Am. B. R. 570.

<sup>1</sup> B. A. 1898, Sec. 63b; *In re* White (C. C. A. 7th Cir.), 177 Fed. Rep. 194, 98 C. C. A. 205, 24 Am. B. R. 197; *In re* Shults, 135 Fed. Rep. 623, 14 Am. B. R. 378.

The act of 1867, as amended in 1874, forbid a set-off of debts brought after the filing of the petition, or after an act of bankruptcy, with a view to such set-off.<sup>2</sup>

The plain object of these provisions is to prevent the bankrupt estate from being diminished by a debtor offsetting against his debts the entire claim of a creditor against the estate, and to prevent a creditor from obtaining an unlawful preference by transferring his claim to a debtor for this purpose.

Where a person has acquired a claim after bankruptcy or within four months prior thereto with a view to use such claim as a set-off, and with knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy, he can not use it as a set-off or counterclaim.<sup>3</sup> Thus a debtor has been denied the right to set off a certificate of deposit, bought for that purpose, against his indebtedness on notes.<sup>4</sup> Where a committee for the creditors sold a portion of the debtor's property, in part on credit, the purchasing creditor was not permitted to set off the amount due as a credit on his claim against the estate.<sup>5</sup> A purchaser of claims against a bankrupt corporation for supplies furnished to laborers can not set them off against a debt due from him to the bankrupt estate.<sup>6</sup>

<sup>2</sup> Sec. 6 of the Act of June 22, 1874, 18 Stat. at L. 179, amending Sec. 20 of the original act.—R. S. Sec. 5073.

*Mattocks v. Lovering*, 3 Fed. Rep. 212; *Lloyd v. Turner*, No. 8436 Fed. Cas., 5 Saw. 463; *Hovey v. Home Insurance Co.*, No. 6743 Fed. Cas., 10 N. B. R. 224; *Humphreys v. Blight*, No. 6870 Fed. Cas., 4 Dall. 370; *Hitchcock v. Rollo*, No. 6535 Fed. Cas., 3 Biss. 276; *Rollins v. Twitchell*, No. 12027 Fed. Cas., 2 Hask. 66; *Smith v. Hill*, 8 Gray, 572.

<sup>3</sup> *In re White* (C. C. A. 7th Cir.), 177 Fed. Rep. 194, 98 C. C. A. 205, 24 Am. B. R. 197; *West-*

*ern Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447; reversing (C. C. A. 8th Cir.), 129 Fed. Rep. 728, 64 C. C. A. 256, 12 Am. B. R. 111; *In re Shults*, 135 Fed. Rep. 623, 14 Am. B. R. 378.

<sup>4</sup> *In re Shults*, 135 Fed. Rep. 623, 14 Am. B. R. 378.

<sup>5</sup> *In re White* (C. C. A. 7th Cir.), 177 Fed. Rep. 194, 98 C. C. A. 205, 24 Am. B. R. 197.

<sup>6</sup> *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447, reversing (C. C. A. 8th Cir.), 129 Fed. Rep. 728, 64 C. C. A. 256, 12 Am. B. R. 111.

Debts may be the subject of set-off, although bought within the prohibited period, if the purchase was made without a view to such use and without knowledge or notice that the bankrupt was insolvent or had committed an act of bankruptcy.<sup>7</sup> The burden of proof is upon the person using the set-off.<sup>8</sup>

The words "a view to such use" contemplates an actual intent at the time of purchase. The knowledge or notice of the insolvency of the bankrupt may be inferred from the circumstances at the time of the transaction. Knowledge or notice of an incomplete act of bankruptcy is not sufficient. It is not an act of bankruptcy until it is completed.

A debt purchased more than four months prior to the filing of the petition may be used as a set-off, irrespective of whether the person using it had knowledge or notice of the bankrupt's insolvency at the time. There is nothing unlawful in purchasing a debt, though it may be for the purpose of using it as a set-off, except as prohibited by the statute.<sup>9</sup>

### **§ 323. Set-off of a subsequent credit by a preferred creditor.**

Under the mutual credit clause<sup>1</sup> a creditor having a preference can not set off an individual debt in a suit by the trustee to set aside such preference.

The reason is, that the debts are not mutual nor in the same right. The preference which is being avoided is a debt between the preferred creditor and the general creditors—not the bankrupt. The individual debt is between the preferred

<sup>7</sup> Tomlinson v. Bank of Lexington (C. C. A. 4th Cir.), 145 Fed. Rep. 824, 76 C. C. A. 400, 16 Am. B. R. 632; Mason v. Herkimer County Bank (C. C. A. 2d Cir.), 172 Fed. Rep. 529, 97 C. C. A. 155, 22 Am. B. R. 733; Stich v. Ber-  
man, 96 N. Y. Supp. 743, 15 Am. B. R. 466.

<sup>8</sup> *In re* Shults, 135 Fed. Rep. 623, 14 Am. B. R. 378.

<sup>9</sup> Mattocks v. Lovering, 3 Fed. Rep. 212; Lloyd v. Turner, No. 8436 Fed. Cas., 5 Saw. 463; Hovey v. Home Insurance Co., No. 6743 Fed. Cas., 10 N. B. R. 224; Humphreys v. Blight, No. 6870 Fed. Cas., 4 Dall. 370; *In re* City Bank, No. 2742 Fed. Cas., 6 N. B. R. 71.

<sup>1</sup> B. A. 1898, Sec. 68.

creditor and the bankrupt. The trustee holds one of the debts as the representative of the general creditors and the other as the representative of the bankrupt.

But the act expressly provides for set-offs in such cases, as follows: "If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."<sup>2</sup>

Prior to the amendment of 1903 there was a conflict in the opinions of the different courts as to the construction of this provision in connection with section 57g.<sup>3</sup> The controversy turned upon the meaning of the word "recoverable." It is clear that only preferences voidable under section 60b need now be surrendered before having a claim allowed.<sup>4</sup>

A creditor, who after receiving a preference from a debtor extends him credit in good faith without security and the money or property actually passes into the debtor's possession, is entitled to have the amount of such credit set off from the amount recoverable by the trustee.<sup>5</sup> It is immaterial what the debtor does with the money or property after it comes into his possession.<sup>5</sup>

A preferred creditor is not entitled to a set-off under this section where the property was acquired by the bankrupt from a third person and not from the creditor,<sup>6</sup> or where the prop-

<sup>2</sup> B. A. 1898, Sec. 60c; *Kaufman v. Treadway*, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 862.

<sup>3</sup> *In re Topliff*, 114 Fed. Rep. 323, 8 Am. R. R. 141, where the cases are collated.

<sup>4</sup> *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

<sup>5</sup> *Kaufman v. Treadway*, 195 U.

S. 271, 49 L. Ed. 190, 12 Am. B. R. 862; *In re Morrow & Co.*, 134 Fed. Rep. 686, 13 Am. R. R. 392; *Price v. Derbyshire Coffee Co.*, 128 N. Y. App. Div. 472, 112 N. Y. Supp. 830, 21 Am. B. R. 280.

<sup>6</sup> *Carleton Dry Goods Co. v. Rogers* (C. C. A. 5th Cir.), 120 Fed. Rep. 14, 57 C. C. A. 34, 9 Am. B. R. 787.

erty was acquired before the preference was given,<sup>7</sup> or where the credit given by the preferred creditor to the bankrupt was not for any property passing from the creditor to the bankrupt but was in consideration of payments made on another's debt.<sup>8</sup>

### § 324. The effect of disallowance or waiver of set-off.

If a claim for set-off, or counterclaim, is not set up at the time of proving the claim in bankruptcy it will be deemed as waived. It has been held that the creditor could not maintain a suit upon such a debt thereafter.<sup>1</sup>

If the claim of set-off is denied a debtor, he will be a creditor of the estate for the whole amount of his claim and will be at the same time a debtor to the estate for the full amount of his debt.<sup>2</sup> If he fails to discharge his debt due the estate the court of bankruptcy has power to protect the estate in respect to the payment of dividends.<sup>3</sup>

### § 325. Torts.

A claim for unliquidated damages to the person or his property, sounding in tort and not based upon contract, is not provable in bankruptcy.<sup>1</sup> Such are damages for assault, slander, deceit, personal injury and the like.

<sup>7</sup> Carleton Dry Goods Co. v. Rogers (C. C. A. 5th Cir.), 120 Fed. Rep. 14, 57 C. C. A. 34, 9 Am. B. R. 787.

<sup>8</sup> Carleton Dry Goods Co. v. Rogers (C. C. A. 5th Cir.), 120 Fed. Rep. 14, 57 C. C. A. 34, 9 Am. B. R. 787.

<sup>1</sup> Hunt v. Holmes, No. 6890 Fed. Cas., 16 N. B. R. 101; Brown v. Farmers' Bank, 6 Bush (Ky.), 198; Russell v. Owens, 61 Mo. 185.

See also *In re* State Ins. Co., 16 Fed. Rep. 756.

<sup>2</sup> Western Tie & Timber Co. v. Brown, 196 U. S. 502, 511, 49 L.

Ed. 571, 13 Am. B. R. 447; Page v. Rogers, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; Ommen v. Talcott, 175 Fed. Rep. 259, 23 Am. B. R. 570.

<sup>3</sup> Western Tie & Timber Co. v. Brown, 196 U. S. 502, 511, 39 L. Ed. 571, 13 Am. B. R. 447; Babbitt v. Read, 173 Fed. Rep. 712, 715, 23 Am. B. R. 254; Ommen v. Talcott, 175 Fed. Rep. 259, 23 Am. B. R. 570.

<sup>1</sup> *In re* New York Tunnel Co. (C. C. A. 2d Cir.), 159 Fed. Rep. 688, 86 C. C. A. 558, 20 Am. B. R. 25; Brown & Adams v. United Button Co. (C. C. A. 3d Cir.),

A claim liquidated by a verdict on which no judgment is entered until after the petition is filed is not provable.<sup>2</sup>

A distinction exists in case a demand may arise upon contract or in tort, as in actions for negligence against carriers, or in actions against bailees to recover the pledge after the determination of the bailment, which may be either in trover or assumpsit. It is now well settled that where a claim arises *ex delicto*, but is also of such character as to constitute a claim on the theory of a *quasi* contract, the debt is provable in bankruptcy under section 63, clause 4.<sup>3</sup> The right to prove such claims is not waived by suing to recover damages for the torts.<sup>4</sup>

A judgment for damages in tort obtained prior to bankruptcy is not provable under the present act. In some districts it has been considered provable as "a fixed liability" "evidenced by judgment."<sup>5</sup> The ruling word in section 63 is "debts." A judgment does not change the nature of the

149 Fed. Rep. 48, 79 C. C. A. 70, 17 Am. B. R. 565; *In re* Crescent Lumber Co., 154 Fed. Rep. 724, 19 Am. B. R. 112; *In re* Hirschman, 104 Fed. Rep. 69, 4 Am. B. R. 715; *In re* Morales, 105 Fed. Rep. 761, 5 Am. B. R. 425; *In re* Brinckman, 103 Fed. Rep. 65, 4 Am. B. R. 551; *Beers v. Hanlin*, 99 Fed. Rep. 695, 3 Am. B. R. 745; *In re* Heinsfurter, 97 Fed. Rep. 198, 3 Am. B. R. 113.

<sup>2</sup> *In re* Ostrom, 185 Fed. Rep. 988, 26 Am. B. R. 273; *Black v. McClelland*, No. 1462 Fed. Cas.

<sup>3</sup> *Crawford v. Burke*, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659; *Grant Shoe Co. v. Laird*, 212 U. S. 445, 53 L. Ed. 591, 21 Am. B. R. 484; *Barrett v. Prince* (C. C. A. 7th Cir.), 143 Fed. Rep. 302, 74 C. C. A. 448, 16 Am. B. R. 64; *Clingman v. Miller* (C. C. A. 8th Cir.), 160 Fed. Rep. 326, 87

C. C. A. 278, 20 Am. B. R. 360; *In re* Hale, 161 Fed. Rep. 387, 20 Am. B. R. 633; *In re* Filer, 125 Fed. Rep. 262, 5 Am. B. R. 835; *In re* Hildebrandt, 120 Fed. Rep. 992, 10 Am. B. R. 184; *In re* Hirschmann, 104 Fed. Rep. 69, 4 Am. B. R. 715; *Johnson v. Spiller*, 1 Douglass, 168; *Parker v. Norton*, 6 T. R. 695.

<sup>4</sup> *Crawford v. Burke*, 195 U. S. 176, 193, 49 L. Ed. 147, 12 Am. B. R. 659; *Barrett v. Prince* (C. C. A. 7th Cir.), 143 Fed. Rep. 302, 74 C. C. A. 448, 16 Am. B. R. 64.

<sup>5</sup> B. A. 1898, Sec. 63a, clause 1; *In re* Lorde, 144 Fed. Rep. 320, 16 Am. B. R. 201; *United States v. Peters*, 166 Fed. Rep. 613, 22 Am. B. R. 177; see also dicta *In re* United Button Co., 140 Fed. Rep. 495, 507, 15 Am. B. R. 390; *In re* Crescent Lumber Co., 154 Fed. Rep. 724, 727, 19 Am. B. R. 112.



liability. It does not create a new debt.<sup>6</sup> It is the debt, as evidenced by a judgment, which is provable. The court may look behind the judgment to see if it is evidence of a debt.<sup>7</sup> A claim for damages in tort is not a debt in the sense that word is used in bankruptcy.<sup>8</sup> No provision is made for proving or allowing a claim in tort, either before or after liquidation. If Congress had intended to include such claims it would have been easy to have used words to express that intention. Judgments in tort, like those for alimony,<sup>9</sup> or fines and penalties,<sup>10</sup> are a fixed liability but not being evidence of a debt, are not provable against the estate of the bankrupt.

### § 326. Infringement of patents.

A claim for damages or profits arising from an infringement of a patent is not provable.<sup>1</sup>

The infringement of a patent sounds in tort and not in contract. The only remedies provided by Congress, which has, under the constitution, exclusive control of the subject, are a suit in equity and trespass on the case. Assumpsit will not lie. There is no implied contractual relations between an

<sup>6</sup> In *Boynton v. Ball*, 121 U. S. 457, 466, 30 L. Ed. 985, Mr. Justice Miller, speaking for the supreme court, said: "But this court, to which this precise question is presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the state court and the existence of which was provable in bankruptcy."

<sup>7</sup> *Turner v. Turner*, 108 Fed. Rep. 785, 6 Am. B. R. 289; *Ex parte Anderson*, 14 Q. B. D. 606.

<sup>8</sup> As to what is a debt, see Sec. 389, *ante*.

<sup>9</sup> *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. Ed. 1009, 5 Am. B. R. 829; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084, 10 Am. B. R. 139; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390, 10 Am. B. R. 1; *Turner v. Turner*, 108 Fed. Rep. 785, 6 Am. B. R. 289.

<sup>10</sup> *In re Moore*, 111 Fed. Rep. 145, 6 Am. B. R. 591.

<sup>1</sup> *In re Boston & Fairhaven Iron Works*, 23 Fed. Rep. 880, reversing 29 Fed. Rep. 783.

infringer and the owner of a patent right.<sup>2</sup> The infringer is a tortfeasor.

In England a patentee has been permitted to prove for the amount of profits made by an infringement of his patent as money had and received.<sup>3</sup> This rule does not obtain in this country.<sup>4</sup>

Where the defendant in a suit for infringement of a patent becomes bankrupt, the court of bankruptcy will not ordinarily interfere with the infringement suit.<sup>5</sup>

A claim for royalty for the use of a patent is one arising in contract and is provable to the date of bankruptcy.<sup>6</sup> Damages for the breach of such a contract may be allowed.<sup>7</sup> But these damages do not include ordinarily the future annual bonuses calculated to the end of the contract.<sup>8</sup>

### § 327. Debts barred by the statutes of limitations.

The courts of the United States recognize generally the statutes of limitations of the several states.<sup>1</sup> Courts of bankruptcy recognize such statutes of limitations.

<sup>2</sup> Root v. Railway Co., 105 U. S. 189, 214, 26 L. Ed. 975.

<sup>3</sup> Watson v. Holiday, 20 L. R. Chan. D. 780.

<sup>4</sup> *In re* Boston & Fairhaven Iron Works, 23 Fed. Rep. 880, reversing 29 Fed. Rep. 783; Root v. Railway Co., 105 U. S. 189, 214, 26 L. Ed. 975.

<sup>5</sup> *In re* Leeds & Catlin Co., 175 Fed. Rep. 309, 23 Am. B. R. 337; American Graphophone Co. v. Leeds & Catline Co., 174 Fed. Rep. 158, 23 Am. B. R. 337.

<sup>6</sup> B. A. 1898, Sec. 63a, clause 4; *In re* Bevier Wood Pavement Co., 156 Fed. Rep. 583, 19 Am. B. R. 462; *In re* Dr. Vorhees Awning Hood Co., 187 Fed. Rep. 611.

<sup>7</sup> *In re* Dr. Vorhees Awning Hood Co., 187 Fed. Rep. 611.

<sup>8</sup> *In re* Dr. Vorhees Awning Hood Co., 187 Fed. Rep. 611, 632, Judge Archibald said: "The license granted by the claimant to the bankrupt having fallen in, he is at liberty to repossess himself of it and again dispose of it. And if he could now get the bonuses stipulated for, so long as the patent has to run, in a lump, he would get paid twice over for the same thing, without having contributed anything reciprocally."

<sup>1</sup> Bauserman v. Blunt, 147 U. S. 652, 37 L. Ed. 316, and cases there collated.

A debt otherwise provable may be barred by a state statute of limitations so that the debt is not allowable, but is such a debt as will be released by a discharge.<sup>2</sup>

In order to be barred in bankruptcy a debt must be barred by the statute of the state in which the petition in bankruptcy is filed.<sup>3</sup> The reason for this is, that a statute of limitation affects the remedy and not the right.

If the debt is not barred at the time the petition is filed it is a provable debt, because bankruptcy stops the running of the statute.<sup>4</sup>

A claim may be barred by limitations contained in the bankrupt act, which provides that claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication;

<sup>2</sup> *Hargadine-McKittrick Dry Goods Co. v. Hudson* (C. C. A. 8th Cir.), 10 Am. B. R. 225, 122 Fed. Rep. 232, 58 C. C. A. 596; *In re Lafferty & Bro.*, 122 Fed. Rep. 558, 10 Am. B. R. 290; *In re Girvin*, 160 Fed. Rep. 197, 20 Am. B. R. 490.

In *Hargadine-McKittrick Dry Goods Co. v. Hudson*, *supra*, Judge Caldwell, speaking for the circuit court of appeals for the eighth circuit, said: "Debts are not the less provable, within the meaning of the bankrupt act, because the statute of limitations may be successfully pleaded against their allowance. As well say that a debt was not suable because the statute of limitations might be pleaded to an action upon it. The plaintiff's judgment was a provable debt, and the fact that a recovery upon it might be defeated by the plea of payment, or a plea of the statute of limitations, or any other plea in bar, did not take it out of the class of provable debts."

<sup>3</sup> *In re Resler*, 95 Fed. Rep. 804, 2 Am. B. R. 602; *In re Lipman*,

2 Am. B. R. 46, 94 Fed. Rep. 353; *Hargadine-McKittrick Dry Goods Co. v. Hudson* (C. C. A. 8th Cir.), 10 Am. B. R. 225, 122 Fed. Rep. 232, 58 C. C. A. 596; *In re Girvin*, 160 Fed. Rep. 197, 20 Am. B. R. 490; *In re Hardin*, No. 6048 Fed. Cas., 1 Hask. 163; *In re Kingsley*, No. 7819 Fed. Cas., 1 Low. 216; *In re Reed*, No. 11635 Fed. Cas., 6 Biss. 250; *In re Doty*, No. 4017 Fed. Cas., 16 N. B. R. 202; *In re Cornwall*, No. 3250 Fed. Cas., 9 Blatch. 114; *In re Noesen*, No. 10288 Fed. Cas., 6 Biss. 443.

*In re Ray*, No. 11589 Fed. Cas., 2 Ben. 53, it was held that the debt must be barred throughout the limits of the United States.

<sup>4</sup> *In re McBryde*, 99 Fed. Rep. 686, 3 Am. B. R. 729; *In re McKinney*, 15 Fed. Rep. 912; *In re Waties & Co.*, 39 Fed. Rep. 264; *Trustees v. Bosseix*, 3 Fed. Rep. 817, 4 Hughes, 387; *In re Eldridge*, No. 4331 Fed. Cas., 2 Hughes. 256; *In re Wright*, No. 18068 Fed. Cas., 6 Biss. 317; *In re Graves*, 9 Fed. Rep. 816. But see *contra*, *In re Shepard*, No. 12753

or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment.<sup>5</sup>

A creditor or the trustee may plead the statute of limitations in bar of a claim proved in bankruptcy.<sup>6</sup>

Fed. Cas., 1 N. B. R. 439; *Nicholas v. Murray*, No. 10223 Fed. Cas., 5 Saw. 320.

<sup>5</sup> B. A. 1898, Sec. 57*n*; see Sec. 331, *post*.

<sup>6</sup> *In re Wooten*, 118 Fed. Rep. 670, 9 Am. B. R. 247; *In re Lafferty & Bro.*, 122 Fed. Rep. 558, 10 Am. B. R. 290; *In re Kingsley*, No. 7819 Fed. Cas., 1 Low. 216.

## CHAPTER XX.

## PROOF AND ALLOWANCE OF CLAIMS.

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| <p>SEC.<br/>328. Necessity of proof.<br/>329. Who are entitled to prove debts.<br/>330. The assignee of a claim may prove it.<br/>331. Time limit for proving claims.<br/>332. Time limit for proving claim liquidated by litigation.<br/>333. Amending a claim after the one year period.<br/>334. The proof of a claim.<br/>335. Statement of consideration in proof of claim.<br/>336. Who may make the proof.<br/>337. Who are secured creditors.<br/>338. Rights of a secured creditor.<br/>339. Proof by a secured creditor.</p> | <p>SEC.<br/>340. How to ascertain the value of securities.<br/>341. Proving a claim as secured waives security.<br/>342. Proof by creditors who have received preferences.<br/>343. What is a surrender of a security or preference.<br/>344. Filing proofs of debts.<br/>345. Right to withdraw proof of debt—doctrine of election.<br/>346. Amendment of proof of claim.<br/>347. Contesting claims before allowance.<br/>348. Allowance or disallowance of claims.<br/>349. Re-examination of claims.<br/>350. How to review the final allowance or rejection of a claim.</p> |
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## § 328. Necessity of proof.

No creditor is entitled to participate in the distribution of a bankrupt's estate or to obtain a dividend upon any claim until such claim or debt has been proved and allowed.

The proof must be made in the manner prescribed by the statute and general orders.<sup>1</sup> It is immaterial what may be its form, whether it consists of a contract, account, promissory note, bond or judgment.<sup>2</sup> Secured and unsecured creditors stand upon the same footing as regards proof of their debts.<sup>3</sup> The proof of claim must also be filed or presented in some form

<sup>1</sup> B. A. 1898, Sec. 57; Gen. Ord. 21; Official Forms Nos. 31 to 37, see Forms 54 to 60, *post*; *In re Dunn Hardware & Furniture Co.*, 132 Fed. Rep. 719, 13 Am. B. R. 147.

<sup>2</sup> *In re Rosenberg*, 144 Fed. Rep. 442, 16 Am. B. R. 465.

<sup>3</sup> *Davis v. Anderson*, No. 3623 Fed. Cas., 6 N. B. R. 145, approved *In re Anderson*, 23 Fed. Rep. 500; *In re Davis*, No. 3618 Fed. Cas., 2 N. B. R. 391; *In re Hayward*, 130 Fed. Rep. 720, 12 Am. B. R. 264. But see rights of secured creditors, Sec. —, *post*.

in the bankruptcy proceedings within the time limited by section 57*n*.<sup>3\*</sup>

The fact that the debts are contained in the debtor's schedule is not proof sufficient to entitle a party to participate in the distribution of the estate. It may be stated fraudulently, or it may not exist, or there may be payments, or counter-claims, or set-offs. The reason for requiring proof is not merely to give the creditors a standing in court, but to protect the estate against fraudulent and excessive claims.

The claims of petitioners in involuntary proceedings must be proved and allowed like other claims.<sup>4</sup> The trustee and the other creditors have a right to question the debt in part or in whole upon proof subsequently required to be taken.<sup>5</sup> They have the right to demand that all the statements required by the statute shall be full and complete in making out a *prima facie* case of the validity of the claim and the good faith of the claimant.

### § 329. Who are entitled to prove debts.

Any creditor owning an unsecured claim against the bankrupt at the time the petition is filed is entitled to prove his

<sup>3\*</sup> *Bennett v. American Credit Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 624, 86 C. C. A. 614, 20 Am. B. R. 258; *In re French*, 181 Fed. Rep. 583; *In re Back Bay Automobile Co.*, 158 Fed. Rep. 679, 19 Am. B. R. 835.

<sup>4</sup> *Ayres v. Cone* (C. C. A. 8th Cir.), 138 Fed. Rep. 783, 77 C. C. A. 144, 14 Am. B. R. 746; *In re Harper*, 175 Fed. Rep. 412, 417, 23 Am. B. R. 918; *In re Cleveland Ins. Co.*, 22 Fed. Rep. 204.

In *Ayres v. Cone*, *supra*, the petitioning creditor had filed proof of claim. It was not suggested in that case that the petitioner was not required to prove his claim.

<sup>5</sup> *In re Harper*, 175 Fed. Rep. 412, 417, 23 Am. B. R. 918; *In re Cleveland Ins. Co.*, 22 Fed. Rep. 204.

See the dissenting opinion of Judge Sanborn in *Ayres v. Cone* (C. C. A. 8th Cir.), 138 Fed. Rep. 783, 77 C. C. A. 144, 14 Am. B. R. 746. The majority of the court held in that case that where an issue was made and tried as to the validity of the claim of a petitioning creditor, an adjudication was *res judicata* as to the trustee and all other creditors, so that the claim could not be contested when proved before the referee.

See also *In re Ulfedler Clothing Co.*, 98 Fed. Rep. 409, 3 Am. B. R. 425.

claim against the estate in bankruptcy.<sup>1</sup> Unsecured creditors only are entitled to prove against the general assets to be distributed.<sup>2</sup>

A secured creditor may surrender his security and prove his whole debt, or he may hold to his security and prove for the balance of the debt in excess of the security.<sup>3</sup> To this extent he is to be regarded as an unsecured creditor.

A father who has a debt may prove against the estate of his son.<sup>4</sup> Where a wife can contract debts under the laws of a state, she may prove against her husband's estate.<sup>5</sup> Judgment creditors whose liens are invalidated by bankruptcy proceedings are entitled to prove their claims as other creditors.<sup>6</sup> Where a creditor has recovered judgment against two co-defendants and has levied upon the property of one of them,

<sup>1</sup> *In re Worcester County* (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; *Gorman v. Wright* (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 69 C. C. A. 76, 14 Am. B. R. 135; *County Commissioners v. Hurley* (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94 C. C. A. 363, 22 Am. B. R. 209; *Swarts v. Fourth Nat. Bank* (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673; *In re Bailey*, 176 Fed. Rep. 990, 24 Am. B. R. 201.

<sup>2</sup> *Fenley v. Poor* (C. C. A. 6th Cir.), 121 Fed. Rep. 739, 58 C. C. A. 21, 10 Am. B. R. 377; *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362; *In re Little*, 110 Fed. Rep. 621, 6 Am. B. R. 681; *In re Meredith*, 144 Fed. Rep. 230, 16 Am. B. R. 331.

<sup>3</sup> B. A. 1898, Sec. 57h; *In re Meredith*, 144 Fed. Rep. 230, 16 Am. B. R. 331; *In re Medina Quarry Co.*, 179 Fed. Rep. 929, 936, 24 Am. B. R. 769; *In re Ball*,

123 Fed. Rep. 164, 10 Am. B. R. 564.

<sup>4</sup> *In re Rider*, 96 Fed. Rep. 811, 3 Am. B. R. 192.

<sup>5</sup> *Tucker v. Curtin* (C. C. A. 1st Cir.), 148 Fed. Rep. 929, 78 C. C. A. 557, 17 Am. B. R. 354; *In re Kyte*, 164 Fed. Rep. 302, 21 Am. B. R. 110; *In re Neiman*, 109 Fed. Rep. 113, 6 Am. B. R. 329; *In re Chapman*, 105 Fed. Rep. 901, 5 Am. B. R. 570; *In re Domenig*, 128 Fed. Rep. 146, 11 Am. B. R. 552; *James v. Gray* (C. C. A. 1st Cir.), 131 Fed. Rep. 401, 65 C. C. A. 385, 12 Am. B. R. 573; *In re Winkels*, 132 Fed. Rep. 590, 12 Am. B. R. 696; *In re Nickerson*, 116 Fed. Rep. 1003, 8 Am. B. R. 707; *In re Suckles*, 176 Fed. Rep. 828, 23 Am. B. R. 861; *In re West*, 17 Am. B. R. 393; *In re Foss*, 147 Fed. Rep. 790, 17 Am. B. R. 439.

*In re Kranich*, 174 Fed. Rep. 908, 23 Am. B. R. 550, a compromise by a trustee of a claim by the wife was sustained.

<sup>6</sup> *In re Richard*, 94 Fed. Rep. 633, 2 Am. B. R. 506.

and the other has been adjudged bankrupt, the judgment creditor may prove his whole claim against the bankrupt as an unsecured claim.<sup>7</sup> A customer of a stock broker, between whom and the broker there is a running account, may prove his claims against the broker's estate as any other creditor.<sup>8</sup>

A person who is secondarily liable for a debt of a bankrupt, as indorser or surety, may prove provided the principal creditor fails to prove his debt.<sup>9</sup> He is subrogated to no greater right to prove than his principal has.<sup>10</sup>

A creditor of a bankrupt, who after the bankruptcy has taken a new promise based on the original debt, is not thereby precluded from maintaining his proof against the estate in bankruptcy, and receiving dividends thereon, and at the same time proceeding against the bankrupt on the new obligation, so long as he receives but a single satisfaction of his debt.<sup>11</sup>

The trustee of one bankrupt estate may prove claims of the estate which is being administered in bankruptcy against any like estate in the same manner and upon the like terms as the claims of other creditors.<sup>12</sup> Administrators, executors, receivers and other persons who are assignees by mere operation of law may prove in the same manner as the parties whom they represent could have done.<sup>13</sup>

A mortgagee, who purchases the mortgaged property at a foreclosure sale, may prove a claim for the balance of his

<sup>7</sup> *In re Headley*, 97 Fed. Rep. 765, 3 Am. B. R. 272.

<sup>8</sup> *In re Gaylord*, 113 Fed. Rep. 131, 7 Am. B. R. 577; *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710.

<sup>9</sup> B. A. 1898, Sec. 57i.

<sup>10</sup> *Livingston v. Heineman* (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39; *In re Lyon* (C. C. A. 2d Cir.) 121 Fed. Rep. 723, 10 Am. B. R. 25; *Swarts v. Fourth Nat. Bank* (C. C. A. 8th Cir.), 117 Fed. Rep.

1, — C. C. A. —, 8 Am. B. R. 673; *Swarts v. Siegel* (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 54 C. C. A. 399, 8 Am. B. R. 689.

<sup>11</sup> *In re Sweetser*, 128 Fed. Rep. 165, affirmed (C. C. A. 1st Cir.), 130 Fed. Rep. 103, 64 C. C. A. 437.

<sup>12</sup> B. A. 1898, Sec. 57m.

<sup>13</sup> *In re Republic Ins. Co.*, No. 11705 Fed. Cas., 8 N. B. R. 197; *Ex parte Norwood* No. 10364 Fed. Cas., 3 Biss. 504; *In re Woods*, 133 Fed. Rep. 82, 13 Am. B. R. 240.



debt and be allowed the amount equitably due him.<sup>14</sup> The court may inquire into the actual value of the property in the absence of a legal rule in the state making the amount bid conclusive of the value of the property.<sup>15</sup>

Bondholders may prove bonds and coupons owned by them as debts of the bankrupt estate of the maker.<sup>16</sup>

The fact that the stockholders of two separate corporations are identical will not prevent one corporation from proving a claim against the other in the absence of fraud.<sup>17</sup>

A stockholder in a bankrupt corporation will not be permitted to prove a claim as long as he is indebted for his stock subscriptions.<sup>18</sup> The reason for this is that the capital stock of a corporation is a trust fund for the benefit of creditors.<sup>19</sup> A stockholder, who is liable to the bankrupt estate for unpaid stock which he holds, has no right to come in on that estate until the other creditors have been satisfied. But a stockholder who is not indebted to the corporation for his stock may prove his claim against the estate of the corporation like any other creditor.<sup>20</sup>

<sup>14</sup> *In re Davis* (C. C. A. 3d Cir.), 174 Fed. Rep. 556, 98 C. C. A. 338, 23 Am. B. R. 446; *In re Dix*, 176 Fed. Rep. 582, 23 Am. B. R. 889.

<sup>15</sup> *In re Davis* (C. C. A. 3d Cir.), 174 Fed. Rep. 556, 98 C. C. A. 338, 23 Am. B. R. 446; *In re Dix*, 176 Fed. Rep. 582, 23 Am. B. R. 889.

<sup>16</sup> *Mackay v. Randolph & Macon Coal Co.* (C. C. A. 8th Cir.), 178 Fed. Rep. 881, 102 C. C. A. 115, 24 Am. B. R. 719.

<sup>17</sup> *In re Watertown Paper Co.*, (C. C. A. 2d Cir.), 169 Fed. Rep. 252, 94 C. C. A. 528, 22 Am. B. R. 190.

<sup>18</sup> *In re Alleman Hdwe. Co.*, 172 Fed. Rep. 611, 22 Am. B. R. 871; reversed because the facts did not bring case within the rule, 181

Fed. Rep. 810, 104 C. C. A. 320, 25 Am. B. R. 321; *In re Wiener & Goodman Shoe Co.*, 96 Fed. Rep. 949, 3 Am. B. R. 200; *In re Duryea Power Co.*, 159 Fed. Rep. 783, 20 Am. B. R. 219.

<sup>19</sup> *Handley v. Stulz*, 139 U. S. 417, 427, 35 L. Ed. 227; *In re Alleman Hdwe. Co.*, 172 Fed. Rep. 611, 22 Am. B. R. 871.

*Sternbergh v. Duryea Power Co.* (C. C. A. 3d Cir.), 161 Fed. Rep. 540, 88 C. C. A. 482, 20 Am. B. R. 625.

<sup>20</sup> *In re Alleman Hardware Co.* (C. C. A. 3d Cir.), 181 Fed. Rep. 810, 814, 104 C. C. A. 320, 25 Am. B. R. 331, reversing 172 Fed. Rep. 611, 22 Am. B. R. 871, the court said: "But when, as here, the value of the consideration of the stock was fairly debatable, and the

The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable.<sup>21</sup>

Creditors who have received preferences may prove claims, but are not entitled to have them allowed unless such creditors shall surrender their preferences.<sup>22</sup>

The United States may prove its debts in the same manner as other creditors.<sup>23</sup> But the United States is not required to prove its claims in bankruptcy.<sup>24</sup> A state or municipality is not required to prove its claim for taxes as an ordinary creditor must do.<sup>25</sup>

### § 330. The assignee of a claim may prove it.

Where a claim has been assigned in good faith and for a valuable consideration, the assignee may prove it, whether the assignment was made before or after the petition is filed.<sup>1</sup>

corporation enjoyed, used and did its entire corporate business for several years on the property conveyed to it, and where the property can not be restored or the contract rescinded, and where no person here interested was in any way induced to act or was misled or wronged by the maintenance of that status, we think the corporation has no such right or claim against him as prevents his unquestioned debt from participating in this distribution."

<sup>21</sup> Gen. Ord. 21.

<sup>22</sup> B. A. 1898, Sec. 57g, as amended Feb. 5, 1903, 32 Stat. at L. 797. See also Sec. 342, *post*.

<sup>23</sup> *In re* Bousfield & Poole Manufacturing Co., No. 1704, Fed. Cas., 17 N. B. R. 153.

<sup>24</sup> *Lewis v. United States*, 92 U. S. 618, 23 L. Ed. 513; affirming

No. 15595 Fed. Cas., 13 N. B. R. 33; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275; *Harrison v. Sterry*, 5 Cranch, 289, 3 L. Ed. 104, R. R. Sec. 3466; *In re Vetterlein*, 20 Fed. Rep. 109; *United States v. Murphy*, 15 Fed. Rep. 589, and note; *In re Stoeve*, 127 Fed. Rep. 394, 11 Am. B. R. 345.

<sup>25</sup> *In re* Harvey, 122 Fed. Rep. 745, 10 Am. B. R. 567; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675.

<sup>1</sup> Gen. Ord. 21, par. 3. *In re* Worcester County (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; *Bennett v. American Credit Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 624, 86 C. C. A. 614, 20 Am. B. R. 258; *In re* Findlay (Ref.), 3 Am. B. R. 738.

The form of the assignment is immaterial. If it is sufficient to estop the original holder from asserting the debt, the assignee may prove.<sup>2</sup> The assignee must be the real owner of the claim.<sup>3</sup> A creditor will not be permitted to assign a part of his claim to others persons for the purpose of qualifying them as petitioners in a bankruptcy proceeding.<sup>4</sup> Where an individual or a committee purchases a large number of claims from different creditors it constitutes a single interest for the purpose of voting or counting creditors.<sup>5</sup>

When the assignment of a claim was made before the commencement of the proceedings, the proof may be made by the assignee and need not be supported or accompanied by the affidavit of the assignor.<sup>6</sup>

Claims, which have been assigned after the petition is filed and before proof, must be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required

<sup>2</sup> *In re Miner*, 117 Fed. Rep. 953, 9 Am. B. R. 100; *In re Sweetser*, 131 Fed. 567.

<sup>3</sup> *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; affirming 172 Fed. Rep. 744, 22 Am. B. R. 772; *In re Halsey Elec. Generator Co.*, 163 Fed. Rep. 118, 20 Am. B. R. 738.

<sup>4</sup> *In re Tribelhorn* (C. C. A. 2d Cir.), 137 Fed. Rep. 3, 69 C. C. A. 601, 14 Am. B. R. 491; *Leighton v. Kennedy* (C. C. A. 1st Cir.), 129 Fed. Rep. 737, 64 C. C. A. 265, 12 Am. B. R. 229; *Stroheim v. Perry & Whitney Co.* (C. C. A. 1st Cir.), 175 Fed. Rep. 52, 99 C. C. A. 68, 23 Am. B. R. 695; *In re Halsey Elec. Generator Co.*, 163 Fed. Rep. 118, 20 Am B. R. 738.

<sup>5</sup> *Moulton v. Coburn* (C. C. A.

1st Cir.), 131 Fed. Rep. 201, 66 C. A. 90, 12 Am. B. R. 553; *In re Kenney Co.*, 136 Fed. Rep. 451, 14 Am. B. R. 611; *In re Messengill*, 113 Fed. Rep. 366, 7 Am. B. R. 669; *Lowenstein v. McShane Mfg. Co.*, 130 Fed. Rep. 1007, 12 Am. B. R. 601.

<sup>6</sup> Gen. Ord. 21, par. 3. *In re Worcester County* (C. C. A. 1st Cir.), 102 Fed. Rep. 808, 42 C. C. A. 637, 4 Am. B. R. 496; *In re Miner*, 114 Fed. Rep. 998, 8 Am. B. R. 248; *In re Kenney Co.*, 136 Fed. Rep. 451, 14 Am. B. R. 611; *In re Murdock*, No. 9939 Fed. Cas., 1 Low. 362; *In re Frank*, No. 5050 Fed. Cas., 5 Ben. 164; *In re Strachan*, No. 13519 Fed. Cas., 3 Biss. 181; *Ex parte Davenport*, No. 5386 Fed. Cas., 1 Low. 384.

in proving secured claims.<sup>7</sup> The assignee must file satisfactory proof of the assignment of the claim proved and the referee is required to give notice by mail to the original claimant of the filing of such proof of assignment.<sup>8</sup> If no objection is made within ten days or within further time allowed by the referee, he makes an order subrogating the assignee to the original claimant.<sup>9</sup> If objection is made the referee proceeds to hear and determine the matter.<sup>10</sup>

Where a person has procured an assignment of a claim by fraud he will not be allowed to prove it.<sup>11</sup> An assignee is not entitled to have a claim allowed in his favor, which could not be proved and allowed in favor of his assignor.<sup>12</sup> An assignment passes title subject to equities. This rule does not apply to the transfer of negotiable instruments without notice, which pass title free of equities.

An assignee may assert the right of priority in payment of a debt, assigned before bankruptcy, where the right of priority is given by statute to the debt and not to the creditor.<sup>13</sup>

An assignment of a claim of a bankrupt against the United States, as a pledge or collateral security by the bankrupt, is null and void as against the other creditors.<sup>14</sup> The claim against the United States in such cases passes to the trustee in bankruptcy for the benefit of the estate.

### § 331. Time limit for proving claims.

The proof of a claim may be filed at any time after the commencement of the bankruptcy proceedings, and within one

<sup>7</sup> Gen. Ord. 21, par. 3. *In re* Findlay (Ref.), 3 Am. B. R. 738.

<sup>8</sup> Gen. Ord. 21, par. 3.

<sup>9</sup> Gen. Ord. 21, par. 3.

<sup>10</sup> Gen. Ord. 21, par. 3.

<sup>11</sup> *In re* State Ins. Co. 16 Fed. Rep. 756.

<sup>12</sup> *In re* Wiener & Goodman Shoe Co., 96 Fed. Rep. 949, 3 Am. B. R. 200.

<sup>13</sup> *Shropshire-Woodliffe & Co. v. Bush*, 204 U. S. 186, 51 L. Ed. 436,

17 Am. B. R. 77; *In re* Bennett (C. C. A. 6th Cir.), 153 Fed. Rep. 673, 82 C. C. A. 531, 18 Am. B. R. 320.

<sup>14</sup> R. S. Sec. 3477; *Nat. Bank of Commerce v. Downie*, 218 U. S. 345, 54 L. Ed. —, 25 Am. B. R. 199; *Guarantee Title & T. Co. v. First Nat. Bank* (C. C. A. 3d Cir.), 185 Fed. Rep. 373, 109 C. C. A. —, 26 Am. B. R. 85.

year after the adjudication.<sup>1</sup> A claim may be proved prior to the first creditors' meeting.<sup>2</sup>

Section 57*n* of the act forbids proving claims against a bankrupt estate subsequent to one year after the adjudication, unless they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, that the right of infants and insane persons without guardians, without notice of the proceedings may continue six months longer. The former acts contained no limitation with respect to the time for filing claims.

The court has no power or discretion to enlarge or extend the time within which claims may be proved.<sup>3</sup> It can not permit proof of a claim after the expiration of the year, even if the claimant did not know of the bankruptcy proceedings within the year,<sup>4</sup> or was misled because the bankrupt's schedules showed little or no assets,<sup>5</sup> or failed to file his claim in time "through accident and mistake,"<sup>6</sup> or where a case is reopened on the ground that it was closed before fully administered,<sup>7</sup> or in case a composition has been effected.<sup>8</sup>

<sup>1</sup> B. A. 1898, Sec. 57*n*.

<sup>2</sup> *In re* Patterson No. 10814 Fed. Cas., 1 Ben. 448.

<sup>3</sup> *In re* Peck (C. C. A. 2d Cir.), 168 Fed. Rep. 48, 93 C. C. A. 470, 21 Am. B. R. 707; *In re* Sanderson, 160 Fed. Rep. 278, 20 Am. B. A. 396; *In re* Rosenberg, 144 Fed. Rep. 442, 16 Am. B. R. 465; *In re* Meyer, 181 Fed. Rep. 904, 25 Am. B. R. 44; *In re* French, 181 Fed. Rep. 583, 25 Am. B. R. 77; *Bray v. Cobb*, 3 Am. B. R. 788, 100 Fed. 270; *In re* Shaffer, 4 Am. B. R. 728, 104 Fed. 982; *In re* Rhodes, 5 Am. B. R. 197, 105 Fed. 231; *In re* Leibowitz, 6 Am. B. R. 268, 108 Fed. Rep. 617; *In re* Moebius, 8 Am. B. R. 590, 116 Fed. 47.

But see *In re* Towne, 122 Fed. Rep. 313, 10 Am. B. R. 284.

<sup>4</sup> *In re* Muskoka Lumber Co., 127 Fed. Rep. 886, 11 Am. B. R. 761.

<sup>5</sup> *In re* Meyer, 181 Fed. Rep. 904, 25 Am. B. R. 44; *In re* Paine, 127 Fed. Rep. 246, 11 Am. B. R. 351; *In re* Peck, 161 Fed. Rep. 762, 20 Am. B. R. 629.

<sup>6</sup> *In re* Sanderson, 160 Fed. Rep. 278, 20 Am. B. R. 396.

<sup>7</sup> *In re* Meyer, 181 Fed. Rep. 904, 25 Am. B. R. 44; *In re* Shaffer, 104 Fed. Rep. 982, 5 Am. B. R. 146.

But see *In re* Pierson, 174 Fed. Rep. 160, 23 Am. B. R. 58.

<sup>8</sup> *In re* Brown, 123 Fed. Rep. 336, 10 Am. B. R. 588; *In re*

The limitation for filing claims begins to run from the adjudication. This means the date of the entry of a decree adjudging the debtor a bankrupt, "or if such decree is appealed from, the date when such decree is finally confirmed."<sup>9</sup> In case of an appeal the decree may be said to be "finally confirmed," when the mandate of the appellate court is presented to the district court and not the date of the decision of the appellate court.

Proof of claims is regularly filed with the clerk or referee. The presentation and delivery of a proof of claim to the trustee in bankruptcy within the year after the adjudication is sufficient.<sup>10</sup>

The limitation of section 57*n* applies only to claims sought to be asserted in the bankruptcy proceedings in order to share in the distribution of the estate as a general creditor.<sup>11</sup> It does not apply to claims entitled to priority under section 64.<sup>12</sup> A claim for taxes,<sup>13</sup> or for expenses for preserving the estate,<sup>14</sup> may be allowed though not proved within a year from the adjudication. A secured creditor is not limited by this provision in respect to enforcing his security.<sup>15</sup>

Failure to make proof within the year does not preclude a creditor from pleading his claim in diminution of, or to defeat

French, 181 Fed. Rep. 583, 25 Am. B. R. 77.

<sup>9</sup> B. A. 1898, Sec. 1, clause 2; *In re Lee*, 171 Fed. Rep. 266, 22 Am. B. R. 820.

<sup>10</sup> *Orcutt v. Green*, 204 U. S. 96, 51 L. Ed. 390, 17 Am. B. R. 72, reversing *In re Ingalls* (C. C. A. 2d Cir.), 137 Fed. Rep. 517, 70 C. C. A. 101, 12 Am. B. R. 512; *In re Kessler* (C. C. A. 2d Cir.), 184 Fed. Rep. 51, 107 C. C. A. 13, 25 Am. B. R. 512.

<sup>11</sup> *Norfolk & Western Ry. Co. v. Graham* (C. C. A. 4th Cir.), 145 Fed. Rep. 809, 76 C. C. A. 385, 16 Am. B. R. 610; *In re McIntyre* (C. C. A. 2d Cir.), 176 Fed. Rep.

552, 100 C. C. A. 140, 24 Am. B. R. 4; *In re Leavitt*, 11 Am. B. R. 411; *Nat. Bank of Commerce v. Williams* (C. C. A. 5th Cir.), 159 Fed. Rep. 615, 86 C. C. A. 605, 20 Am. B. R. 79.

<sup>12</sup> *In re Cleanfast Hosiery Co.* (Ref.), 4 Am. B. R. 702; *In re Leavitt*, 11 Am. B. R. 411.

<sup>13</sup> *In re Cleanfast Hosiery Co.* (Ref.), 4 Am. B. R. 702.

<sup>14</sup> *In re Leavitt*, 11 Am. B. R. 411.

<sup>15</sup> *National Bank of Commerce v. Williams* (C. C. A. 5th Cir.), 159 Fed. Rep. 615, 86 C. C. A. 605, 20 Am. B. R. 79.

the claim of the trustee, upon a debt due the bankrupt estate, when asserted in an independent action.<sup>16</sup>

This provision is not binding on the United States. It may prove a claim after the expiration of a year from the adjudication.<sup>17</sup>

**§ 332. Time limit for proving claims liquidated by litigation.**

Where claims are liquidated by litigation and the final judgment therein is rendered within thirty days before, or after the expiration of the one year period, they may be proved within sixty days after the rendition of such judgment.<sup>1</sup>

The plain object of this provision is to give a creditor an opportunity to prove his debt in case litigation is required to settle questions relating to it. The amount of the debt may be unliquidated, or the creditor may be charged with having received a preference which must be surrendered, or the validity of a lien or security claimed by him may be challenged. In such cases an exception is made to the statutory limit of time to allow the proof of a claim after the expiration of a year by a creditor, who during that time was engaged in litigation with the bankrupt's estate concerning its liability to him.

This provision limits the time for proving the debt in such cases to sixty days after the final judgment is entered, provided such judgment is entered after thirty days before the expiration of a year from the adjudication.<sup>2</sup> If the judgment

<sup>16</sup> *Norfolk & Western Ry. Co. v. Graham* (C. C. A. 4th Cir.), 145 Fed. Rep. 809, 76 C. C. A. 385, 16 Am. B. R. 610; *In re Mertens & Co.* (C. C. A. 2d Cir.), 147 Fed. 177, 77 C. C. A. 473, 16 Am. B. R. 825; *In re Havens*, 182 Fed. Rep. 367, 25 Am. B. R. 116.

<sup>17</sup> *In re Stoeve*, 127 Fed. Rep. 394, 11 Am. B. R. 345.

See also *Lewis v. United States*, 92 U. S. 622, 23 L. Ed. 513.

<sup>1</sup> B. A. 1898, Sec. 57n; *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43,

18 Am. B. R. 10; *In re Strobel*, 163 Fed. Rep. 787, 20 Am. B. R. 884; *In re Keyes*, 160 Fed. Rep. 763, 20 Am. B. R. 183; *In re Baker Notion Co.*, 180 Fed. Rep. 922, 24 Am. B. R. 808; *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *In re Standard Telephone & Elec. Co.*, 186 Fed. Rep. 586, 26 Am. B. R. 601.

<sup>2</sup> *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43, 18 Am. B. R. 10; *In re Keyes*, 160 Fed. Rep. 763, 20 Am.

is entered after the year period he still has sixty days within which to prove his claim.<sup>3</sup> If he fails to do so within that time his claim is barred.<sup>4</sup> If the judgment is entered more than thirty days before the expiration of the year period his claim is barred at the expiration of the year.<sup>5</sup>

The sixty days' limit begins to run from the date of the judgment determining the amount for which the estate is liable is entered.<sup>6</sup>

The exception providing for proving claims sixty days after judgment is limited to claims liquidated by litigation.<sup>7</sup> A claim may be liquidated by the court of bankruptcy<sup>8</sup> or other federal court, or by a state court.<sup>9</sup>

B. R. 183; *In re Lange Co.*, 170 Fed. Rep. 114, 22 Am. B. R. 414; *In re Standard Telephone & Elec. Co.*, 186 Fed. Rep. 586, 26 Am. B. R. 601; *In re Landis*, 156 Fed. Rep. 318, 19 Am. B. R. 420; *In re Clark*, 176 Fed. Rep. 955, 960, 24 Am. B. R. 388.

But see *In re Kemper*, 142 Fed. Rep. 210, 15 Am. B. R. 675; *In re Thompson's Sons*, 123 Fed. Rep. 174, 10 Am. B. R. 581; *In re Rhodes*, 105 Fed. Rep. 231, 5 Am. B. R. 197.

<sup>3</sup> *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43, 18 Am. B. R. 10; *In re Lange Co.*, 170 Fed. Rep. 114, 22 Am. B. R. 414; *In re Keyes*, 160 Fed. Rep. 763, 20 Am. B. R. 183; *In re Baird*, 154 Fed. Rep. 215, 18 Am. B. R. 655.

In *Page v. Rogers*, 211 U. S. 575, 581, 53 L. Ed. 332, 21 Am. B. R. 496, the supreme court *sua sponte* reversed the circuit court of appeals for the purpose of permitting proof of a claim which had been in litigation five and one-half years.

<sup>4</sup> *In re Clover Creamery Ass'n*

(C. C. A. 7th Cir.), 176 Fed. Rep. 907, 100 C. C. A. 377, 23 Am. B. R. 884.

<sup>5</sup> *In re Sampter* (C. C. A. 2d Cir.), 170 Fed. Rep. 938, 96 C. C. A. 98, 22 Am. B. R. 357, the adjudication was made July 29th, 1904. The judgment of foreclosure and sale was entered April 4th, 1905. A claim for deficiency was held barred after the expiration of the year.

<sup>6</sup> *In re Clover Creamery Co.* (C. C. A. 7th Cir.), 176 Fed. Rep. 907, 100 C. C. A. 377, 23 Am. B. R. 884.

<sup>7</sup> B. A. 1898 Sec. 57n.

<sup>8</sup> *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *Buckingham v. Estes* (C. C. A. 6th Cir.), 128 Fed. Rep. 584, 63 C. C. A. 20, 12 Am. B. R. 182; *In re Standard Telephone & Elec. Co.*, 186 Fed. Rep. 586, 26 Am. B. R. 601.

<sup>9</sup> *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43, 18 Am. B. R. 10; *In re Keyes*, 160 Fed. Rep. 763, 20 Am. B. R. 183.



A claim may be said to be "liquidated by litigation" within the meaning of this provision, where the questions litigated necessarily involved the determination of the net amount for which the estate is liable.<sup>10</sup> A creditor may prove his debt against the bankrupt estate within sixty days after a judgment in a suit to enforce a security which is held invalid,<sup>11</sup> or after a judgment compelling the surrender of property on the ground of a preference or voidable conveyance,<sup>12</sup> or a judgment in an attachment suit avoiding the lien,<sup>13</sup> or a judgment against a claimant of property in the possession of the bankrupt on the ground that title had passed by sale,<sup>14</sup> or a judgment liquidating an unliquidated claim under section 63b.

A claim may be proved in bankruptcy pending litigation leaving the proof to be amended after the litigation is ended.<sup>15</sup> But to prove during litigation a claim which can not be allowed unless the creditor fails in the litigation is but an empty formality, and should not be encouraged.

<sup>10</sup> *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43, 18 Am. B. R. 10; *In re Keyes*, 160 Fed. Rep. 763, 20 Am. B. R. 183; *In re Strobel*, 163 Fed. Rep. 787, 20 Am. B. R. 884; *In re Standard Telephone & Elec. Co.*, 186 Fed. Rep. 586, 26 Am. B. R. 601; *In re Baird*, 154 Fed. Rep. 215, 18 Am. B. R. 655.

<sup>11</sup> *In re Strobel*, 163 Fed. Rep. 787, 20 Am. B. R. 884; *In re Keyes*, 160 Fed. Rep. 763, 20 Am. B. R. 183; *In re Clark*, 176 Fed. Rep. 955, 24 Am. B. R. 388; *In re Standard Telephone & Elec. Co.*, 186 Fed. Rep. 586, 26 Am. B. R. 601; *In re Baird*, 154 Fed. Rep. 215, 18 Am. B. R. 655.

<sup>12</sup> *Page v. Rogers*, 211 U. S. 575, 581, 53 L. Ed. 332, 21 Am. B. R. 496; *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43, 18 Am. B. R. 10; *In re Coventry Evans Furniture*

*Co.*, 171 Fed. Rep. 673, 22 Am. B. R. 623; *In re Baker Notion Co.*, 180 Fed. Rep. 922, 24 Am. B. R. 808; *In re Clark*, 176 Fed. Rep. 955, 24 Am. B. R. 388; *In re Fagan*, 140 Fed. Rep. 758, 15 Am. B. R. 520.

<sup>13</sup> *In re Baird*, 154 Fed. Rep. 215, 18 Am. B. R. 655.

<sup>14</sup> *In re Landis*, 156 Fed. Rep. 318, 19 Am. B. R. 420.

<sup>15</sup> *Hutchinson v. Otis* (C. C. A. 1st Cir.), 115 Fed. Rep. 937, 941, 53 C. C. A. 419, 8 Am. B. R. 382, on appeal 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; *Buckingham v. Estes* (C. C. A. 6th Cir.), 128 Fed. Rep. 584, 63 C. C. A. 20, 12 Am. B. R. 182; *Powell v. Leavitt* (C. C. A. 1st Cir.), 150 Fed. Rep. 89, 80 C. C. A. 43, 18 Am. B. R. 10; *In re Baker Notion Co.*, 180 Fed. Rep. 922, 24 Am. B. R. 808.

### § 333. Amending a claim after the one year period.

If the proof of a claim which is filed within the required time is defective, it may be amended after the expiration of a year from the adjudication.<sup>1</sup>

The courts have been liberal in granting amendments to claims after the year period, where there is something in the nature of a claim on file to amend. It need not be a formal proof of claim. It has been held sufficient to permit of amendment, where the claim filed was not verified,<sup>2</sup> or where a letter and statement of account was sent to the trustee,<sup>3</sup> or where the assignment only was filed by an assignee of the claim,<sup>4</sup> or where application was made for sale of collateral signed and sworn to and setting out certain notes of the bankrupt,<sup>5</sup> or where a petition was filed to establish a resulting trust in some land in the name of the bankrupt and for an accounting of rents.<sup>6</sup>

An amendment may be allowed after the year period to assert a priority under a state statute,<sup>7</sup> or to offset the amount of a deposit in bank against notes of the bankrupt and prove for the balance,<sup>8</sup> or to itemize a gross amount for legal serv-

<sup>1</sup> *Hutchinson v. Otis*, 10 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; *Buckingham v. Estes* (C. C. A. 6th Cir.), 128 Fed. Rep. 584, 63 C. C. A. 20, 12 Am. B. R. 182; *In re Kessler* (C. C. A. 2d Cir.), 184 Fed. Rep. 51, 107 C. C. A. 13, 25 Am. B. R. 512; *In re Roeber* (C. C. A. 2d Cir.), 127 Fed. Rep. 122, 62 C. C. A. 122, 11 Am. B. R. 464.

But see *In re Moebius*, 116 Fed. Rep. 47, 8 Am. B. R. 590.

<sup>2</sup> *In re Roeber* (C. C. A. 2d Cir.), 127 Fed. Rep. 122, 62 C. C. A. 122, 11 Am. B. R. 464; *In re Stevens*, 107 Fed. Rep. 243, 5 Am. B. R. 806.

<sup>3</sup> *In re Kessler* (C. C. A. 2d Cir.), 184 Fed. Rep. 51, 107 C. C. A. 13, 25 Am. B. R. 512.

<sup>4</sup> *Bennett v. American Indemnity Co.* (C. C. A. 6th Cir.), 159 Fed. Rep. 624, 86 C. C. A. 614, 20 Am. B. R. 258.

<sup>5</sup> *In re Faulkner* (C. C. A. 8th Cir.), 161 Fed. Rep. 900, 88 C. C. A. 505, 20 Am. B. R. 542.

<sup>6</sup> *Buckingham v. Estes* (C. C. A. 6th Cir.), 128 Fed. Rep. 584, 63 C. C. A. 20, 12 Am. B. R. 182.

<sup>7</sup> *In re Ashland Steel Co.* (C. C. A. 6th Cir.), 168 Fed. Rep. 679, 94 C. C. A. 165, 21 Am. B. R. 834.

<sup>8</sup> *In re Myers*, 99 Fed. Rep. 691, 3 Am. B. R. 760.

ices,<sup>9</sup> or to change an original proof of a usurious note to a claim for money had and received.<sup>10</sup>

A proof of claim can not be amended after the year period by the addition of a new or different demand.<sup>11</sup> Where the proof of claim is withdrawn and a like claim for a different amount filed, it can not be treated as an amendment.<sup>12</sup> A claim proved against a firm as maker of a note can not be amended to add a claim against one of the partners who indorsed it.<sup>13</sup> A creditor claiming a mechanic's lien as a subcontractor will not be permitted to amend his claim, after the status of creditors has been fixed, into that of a contractor for the purpose of obtaining an advantage over other creditors.<sup>14</sup>

### § 334. The proof of a claim.

A claim or debt is proved by a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.<sup>1</sup> No other pleading is required.<sup>2</sup>

This statement is referred to in the general orders and forms as a deposition.<sup>3</sup> It seems to be in the nature of an

<sup>9</sup> Matter of Creasinger (Ref.), 17 Am. B. R. 538.

<sup>10</sup> *In re* Robinson, 136 Fed. Rep. 994, 14 Am. B. R. 626.

<sup>11</sup> *In re* McCallum & McCallum, 127 Fed. Rep. 768, 11 Am. B. R. 447; *In re* Mowery (Ref.), 22 Am. B. R. 239; *In re* Thompson's Sons, 123 Fed. Rep. 174, 10 Am. B. R. 581; *In re* Miners' Brewing Co., 162 Fed. Rep. 327, 20 Am. B. R. 717; *In re* Kessler, 176 Fed. Rep. 647, 23 Am. B. R. 391.

<sup>12</sup> *In re* Thompson's Sons, 123 Fed. Rep. 174, 10 Am. B. R. 581; *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806.

<sup>13</sup> *In re* McCallum & McCallum, 127 Fed. Rep. 768, 11 Am. B. R. 447.

But see *In re* Horne & Co. (Ref.), 23 Am. B. R. 590.

<sup>14</sup> *In re* Miners' Brewing Co., 162 Fed. Rep. 327, 20 Am. B. R. 717.

<sup>1</sup> B. A. 1898, Sec. 57a. Compare R. S. Sec. 5077.

<sup>2</sup> *In re* Carter, 138 Fed. Rep. 846, 15 Am. B. R. 126.

<sup>3</sup> Gen. Ord. 21. Official Forms Nos. 31 to 36, see Forms Nos. 54 to 59, *post*.

affidavit. The word "deposition" was used in the statute of 1867.<sup>4</sup>

The supreme court has prescribed a form of proof of an unsecured debt,<sup>5</sup> of proof of a secured debt,<sup>6</sup> of proof of a debt due a corporation,<sup>7</sup> of proof of a debt by a partnership,<sup>8</sup> of proof of a debt by an agent or attorney,<sup>9</sup> of proof of a secured debt by an agent.<sup>10</sup> These forms should be observed and used with such alterations as may be necessary to suit the circumstances of any particular case.<sup>11</sup>

A proof of a claim against a bankrupt estate should be entitled in the court and cause, but if this is omitted it is not fatal.<sup>12</sup> It should set forth the name and residence of the deponent. It should give one full Christian name of the creditor, as well as his surname.<sup>13</sup> It should state the amount of the debt which should not include the interest, but sufficient data so that the computation of interest may be made<sup>14</sup> that the debt was due at the time of filing the petition and is still due; that no part of it has been paid, or if payments have been made such fact should appear,<sup>15</sup> and that there are no set-offs or counterclaims, or, if any, such as there are should be stated. It should set forth the consideration for the debt.<sup>16</sup>

In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account must be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid.<sup>17</sup>

<sup>4</sup> R. S. Sec. 5077; *In re* Strauss, No. 13532 Fed. Cas., 2 N. B. R. 48; *In re* Merrick, No. 9463 Fed. Cas., 7 N. B. R. 459.

<sup>5</sup> Official Form No. 31, see Form No. 54, *post*.

<sup>6</sup> Official Form No. 32, see Form No. 55, *post*.

<sup>7</sup> Official Form No. 33, see Form No. 56, *post*.

<sup>8</sup> Official Form No. 34, see Form No. 57, *post*.

<sup>9</sup> Official Form No. 35, see Form No. 58, *post*.

<sup>10</sup> Official Form No. 36, see Form No. 59, *post*.

<sup>11</sup> Gen. Ord. 38. *In re* Kessler, 176 Fed. Rep. 647, 23 Am. B. R. 391.

<sup>12</sup> Gen. Ord. 21. *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

<sup>13</sup> *In re* Valentine, No. 16812 Fed. Cas., 4 Biss. 317.

<sup>14</sup> *In re* Port Huron Dry Dock Co., No. 11293 Fed. Cas., 14 N. B. R. 253.

<sup>15</sup> *In re* Girvin, 160 Fed. Rep. 197, 20 Am. B. R. 490.

<sup>16</sup> See Sec. 335, *post*.

<sup>17</sup> B. A. 1898, Sec. 68a.

Depositions to prove debts existing in open account must state when the debt became or will become due; and if it consists of items maturing at different dates the average due date must be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions must contain an averment that no note has been received for such account, nor any judgment rendered thereon.<sup>18</sup> It should be observed that the forms prescribed by the supreme court do not contain a clause that no note has been received for such account, nor any judgment rendered thereon. This should be added in cases where it is required by this rule.

The proof of a claim should also state that no security has been received for the debt, if such is the fact. If there have been securities received they should be described, and it should appear that there are no other securities than those mentioned. Where the debt is proved by an agent or attorney it must appear in the deposition that he is authorized to make it.

The proof against a firm should state the firm, describing it by the firm name and the individuals that compose it, and should definitely show whether the demand is a firm debt or a joint debt against individual partners.<sup>19</sup> Where a claim has been assigned the proof should set forth the date and facts of the transfer and the name of the original creditor.<sup>20</sup> Two distinct debts against different estates can not be included in one proof or statement.<sup>21</sup>

The proof of a claim should be signed by the claimant or his duly appointed agent. The statement must be made upon oath.<sup>22</sup> The oath may be administered by a referee, any officer authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken, or a diplomatic or consular

<sup>18</sup> Gen. Ord. 21, par. 1

<sup>19</sup> *In re* Walton, No. 17129 Fed. Cas., Deady, 510.

<sup>20</sup> *In re* Fortune, No. 3586 Fed. Cas., 1 Low. 384. See also Sec. 330, *ante*.

<sup>21</sup> *In re* Walton, No. 17129 Fed. Cas., Deady, 510.

<sup>22</sup> B. A. 1898, Sec. 57a; Matter of Reboulins Fils & Co. (Ref.), 19 Am. B. R. 215.

officer of the United States in any foreign country.<sup>23</sup> Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.<sup>23</sup> An oath to a claim is sufficiently authenticated by the official signature and seal of a notary public.<sup>24</sup>

Whenever a claim is founded upon an instrument in writing, such instrument, unless lost or destroyed, must be filed with the proof of claim.<sup>25</sup> If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction must be filed under oath with the claim.<sup>26</sup> After the claim is allowed or disallowed such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.<sup>27</sup> The exhibits attached to the proof of debt form one paper and are a part of the deposition. When a party applies for leave to withdraw such exhibits he must show what interest he has in it and the purpose for which he desires to use it.<sup>28</sup> The omission to attach a note to a proof of claim will be deemed waived if no objection is seasonably made.<sup>29</sup>

### § 335. Statement of consideration in proof of claim.

The statute requires the consideration of the debt to be set forth in the proof of claim.<sup>1</sup>

<sup>23</sup> B. A. 1898, Sec. 20; *In re Kimball*, 100 Fed. Rep. 777, 4 Am. B. R. 144, 2 N. B. R. 46, the attorney of the creditor acted as notary public.

<sup>24</sup> *In re Pancoast*, 129 Fed. Rep. 643, 12 Am. B. R. 275.

<sup>25</sup> B. A. 1898, Sec. 57b; *In re Blue Ridge Packing Co.*, 125 Fed. Rep. 619, 11 Am. B. R. 36.

<sup>26</sup> B. A. 1898, Sec. 57b; Official Form No. 37, see Form No. 60, *post*.

<sup>27</sup> B. A. 1898, Sec. 57b; *In re Loden*, 184 Fed. Rep. 965, 25 Am.

B. R. 917; *In re Emison*, No. 4459 Fed. Cas., 2 N. B. R. 595.

<sup>28</sup> *In re McNair*, No. 8908 Fed. Cas., 2 N. B. R. 343.

<sup>29</sup> *In re Carter*, 138 Fed. Rep. 846, 15 Am. B. R. 126.

<sup>1</sup> B. A. 1898, Sec. 57a; *In re Stevens*, 107 Fed. Rep. 243; 5 Am. B. R. 806; *In re Blue Ridge Packing Co.*, 125 Fed. Rep. 619, 11 Am. B. R. 36; *In re Morris*, 154 Fed. Rep. 211, 18 Am. B. R. 828; *In re Coventry Evans Furniture Co.*, 166 Fed. Rep. 516, 22 Am. B. R. 272; *In re Scott*, 93 Fed. Rep. 418, 1 Am. B. R. 553.

The object of this requirement is to prevent the proof of fraudulent and fictitious claims, as well as to show that the claim is founded upon a legal consideration which will support the demand, and to afford means for comparing the books of the bankrupt with the proof. The creditor should therefore give such a particular and definite statement of the consideration as will enable other creditors to trace out, discover and expose any fraud or illegality of the claim, if any exist. If the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiries as to the fairness and legality of the claim it does not fulfill the object for which it is required, and should be held insufficient.

The statement of the consideration should set forth in detail of what it consists. This may properly be done by an itemized statement attached as an exhibit to the proof of claim, proper reference being made in the statement to such exhibit. Proof of a debt is defective which simply states the consideration to be for "services, merchandise, etc.," "balance of wages," "balance of professional services," "for goods sold and delivered," "printing done for said bankrupt at its request heretofore, to-wit, in September, 1903, as per bill rendered," or reciting generally that there was a consideration for the debt.<sup>2</sup>

Where the claim is for goods sold and delivered the proof should state the amount of the goods, the quantity, the price and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period should be

<sup>2</sup> *In re* Coventry Evans Furniture Co., 166 Fed. Rep. 516, 22 Am. B. R. 272; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36; *In re* Scott, 93 Fed. Rep. 418, 1 Am. B. R. 553; *In re* Morris, 154 Fed. Rep. 211, 18 Am. B. R. 828.

*In re* Watertown Paper Co. (C. C. A. 2d Cir.), 169 Fed. Rep. 252, 94 C. C. A. 528, 22 Am. B.

R. 190, the consideration was stated as "wood pulp sold and delivered" and was held sufficient, when the claim was for the balance of a running account, a large part of which was for wood pulp sold and delivered and the account had been fully inquired into before the special master, and the amount was correctly stated.

stated.<sup>3</sup> This may be done by an itemized bill attached to the proof of claim with proper reference to it.

Where the consideration is for services performed, it should state specifically what was done. The statement that the consideration is "for legal services,"<sup>4</sup> or "for printing done for said bankrupt as per bill rendered,"<sup>5</sup> is insufficient.

The proof of a debt evidenced by a promissory note, to which the note is attached as an exhibit, is a sufficient compliance with the statute with respect to stating the consideration for the debt. A promissory note is *prima facie* evidence of consideration, and an instrument under seal always imports a consideration, but the allowance of the claim may be opposed on the ground that no consideration in fact passed.<sup>6</sup> It is proper to state the consideration for the note in the proof of claim.<sup>7</sup> If the consideration for a note is not stated and the

<sup>3</sup> *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36, the consideration was stated as "2500 jar tops at \$2.00 per thousand equals \$50.00. 1-3 blue, 1-3 white, 1-3 red." This was held "as complete as could be."

<sup>4</sup> *In re* Scott, 93 Fed. Rep. 418, 1 Am. B. R. 553; *In re* Creasinger, (Ref.), 17 Am. B. R. 538.

<sup>5</sup> *In re* Blue Ridge Packing Co., 125 Fed. Rep. 619, 11 Am. B. R. 36.

<sup>6</sup> *In re* Coventry Evans Furniture Co., 166 Fed. Rep. 516, 22 Am. B. R. 272; *In re* Castle Braid Co., 145 Fed. Rep. 224, 17 Am. B. R. 143; *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806; *In re* De Metz, No. 3781 Fed. Cas.; *In re* Elder, No. 4326 Fed. Cas., 1 Saw. 73; *In re* Stevens, 104 Fed. Rep. 325, 5 Am. B. R. 11.

<sup>7</sup> *In re* Castle Braid Co., 145 Fed. Rep. 224, 17 Am. B. R. 143, the proof showed that notes were

given for money loaned by the payee of the notes to the corporation at its special insistence and request.

*In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806, Judge Wheeler said: "The claim is founded upon notes. . . . And the consideration, so far as it moved, from securities held by, and payment so far as received by, the claimant, are set forth."

*In re* Coventry Evans Furniture Co., 166 Fed. Rep. 516, 523, 22 Am. B. R. 272, Judge Ray said: "If the consideration for the note in question here was other notes of the company, such notes should have been alleged, with the consideration therefor, so as to show they were not mere promises without consideration."

In *Baumhauer v. Austin* (C. C. A. 5th Cir.), 186 Fed. Rep. 260, 108 C. C. A. 306, 26 Am. B. R. 385, J. H. Baumhauer made proof of claim in due form against the es-



allegations in the proof are contradictory, the referee should inquire into its fairness and legality before allowing the claim.<sup>8</sup>

A proof of a debt evidenced by a judgment is *prima facie* evidence of a consideration. It can not be impeached collaterally, but a court of bankruptcy may inquire into the consideration upon which it is founded.<sup>9</sup>

The assignee of a chose in action must state the consideration that passed between the original parties.<sup>10</sup> But the holder of a promissory note, or other negotiable paper, who took it for value in good faith before the maturity thereof, need not state the consideration which he gave for it.<sup>10</sup>

Where the claim is for contribution by a partner, the amount paid by him for the debt on account of which a claim is made must be set forth.<sup>11</sup>

If a proof of a claim is defective in not properly stating the consideration, the defect may be cured by an amendment,<sup>12</sup> even after the expiration of the year within which claims may be proved.<sup>13</sup>

### § 336. Who may make the proof.

The proof of a debt against a bankrupt's estate should be made, if possible, by the creditor testifying of his own knowledge.<sup>1</sup>

tate of the bankrupt for the sum of \$15,220, stating in his affidavit: "That the consideration of said debt is as follows: Money loaned and advanced by the deponent at divers times to said W. C. Baumhauer, \* \* \* evidenced by a certain promissory note executed and delivered to this deponent by the said W. C. Baumhauer on, to-wit, the 16th day of April, 1908. \* \* \* Said note is hereto attached and filed herewith."

<sup>8</sup> *Orr v. Park* (C. C. A. 5th Cir.), 183 Fed. Rep. 683, 106 C. C. A. 33, 25 Am. B. R. 544.

<sup>9</sup> See Sec. 296, *ante*.

<sup>10</sup> *In re Lake Superior Ship Canal, R. R. & Iron Co.*, No. 7998 Fed. Cas., 10 N. B. R. 76.

<sup>11</sup> *In re Stephens*, No. 13365 Fed. Cas., 3 Biss. 187; see also B. A. 1898, Sec. 57i.

<sup>12</sup> *In re Stevens*, 104 Fed. Rep. 325, 5 Am. B. R. 11; *In re Morris*, 154 Fed. Rep. 211, 18 Am. B. R. 828.

<sup>13</sup> *In re Creasinger* (Ref.), 17 Am. B. R. 538.

<sup>1</sup> B. A. 1898, Sec. 57a.

The statute and the general orders prescribed by the supreme court contemplate proof by an agent or attorney of the creditor.<sup>2</sup> When the proof is made by an agent or attorney the reason of the deposition is not made by the claimant in person must be stated.<sup>3</sup> What reason is sufficient to excuse the creditor and to entitle an agent or attorney to make the proof is not stated in the act or general orders. The act of 1867 provided for proof by an agent in two cases only; *first*, when the claimant was absent from the United States, and, *second*, when he was prevented by some good reason from testifying.<sup>4</sup>

A debt due a partnership may be proved by one of the partners, but it must appear on oath that the deponent is a member of the partnership.<sup>5</sup> But a corporation which is a partner *de facto* in a bankrupt firm can not prove a claim against the estate for money advanced and goods sold to the firm, for the reason that the partnership agreement was *ultra vires*.<sup>6</sup>

A debt due a corporation may be proved by the treasurer or by the officer whose duties correspond most nearly to those of the treasurer.<sup>7</sup> This rule applies to municipal and political corporations.<sup>8</sup>

### § 337. Who are secured creditors.

The statute defines a "secured creditor" to be "a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this bankrupt act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."<sup>1</sup>

<sup>2</sup> B. A. 1898, Sec. 1, clause 9; Gen. Ord. 21.

<sup>3</sup> Gen. Ord. 21. Official Form No. 35, Form No. 58, *post*. Matter of Reboulins, Fils & Co. (Ref.), 19 Am. B. R. 215.

<sup>4</sup> R. S. Sec. 5078; *In re Whyte*, No. 17606 Fed. Cas., 9 N. B. R. 267; *In re Watrous*, No. 17270 Fed. Cas., 14 N. B. R. 258.

<sup>5</sup> Gen. Ord. 21. Official Form No. 34, Form No. 57, *post*.

<sup>6</sup> Wallenstein v. Irvin (C. C. A. 3d Cir.), 112 Fed. Rep. 124, 50 C. A. 129, 7 Am. B. R. 256.

<sup>7</sup> Gen. Ord. 21. Official Form No. 33, Form No. 56, *post*.

<sup>8</sup> *In re Corn Exchange Bank*, No. 3243 Fed. Cas., 15 N. B. R. 216.

<sup>1</sup> B. A. 1898, Sec. 1, clause 23

A creditor whose debt is secured by property of the bankrupt, which is exempt under the state law, is "a secured creditor."<sup>2</sup> Creditors holding notes containing a waiver of homestead and exemptions are considered secured creditors.<sup>3</sup> A creditor with an enforceable lien or claim against the exempt property will be allowed a dividend from the general assets on the deficiency only.<sup>4</sup> The exempt property of the bankrupt is of a nature to be assignable under the bankrupt act.<sup>5</sup> The right to an exemption may be abandoned and no application to have a homestead or exemptions set apart. In such cases the property may be sold and the proceeds distributed among the general creditors. A creditor is no less a secured creditor because the property covered by his mortgage has been set apart as exempt.<sup>6</sup>

A creditor, whose debt is secured by the property or sole obligation of a person other than the bankrupt, is not a "secured creditor" within the meaning of the bankrupt act.<sup>7</sup> He may prove for the full amount of his debt without regard to the security.<sup>8</sup> He is an unsecured creditor of the bankrupt. A

<sup>2</sup> *Fenley v. Poor* (C. C. A. 6th Cir.), 121 Fed. Rep. 739, 58 C. C. A. 21, 10 Am. B. R. 377; *In re Lantzenheimer*, 124 Fed. Rep. 716, 10 Am. B. R. 720; *In re Cale*, 182 Fed. Rep. 439, 25 Am. B. R. 367; *In re Little*, 110 Fed. Rep. 621, 6 Am. B. R. 681.

But see *In re Bailey*, 176 Fed. Rep. 990, 24 Am. B. R. 201.

<sup>3</sup> *In re Meredith*, 144 Fed. Rep. 230, 16 Am. B. R. 331; *In re Loden*, 184 Fed. Rep. 965, 25 Am. B. R. 917.

<sup>4</sup> *Fenley v. Poor* (C. C. A. 6th Cir.), 121 Fed. Rep. 739, 58 C. C. A. 21, 10 Am. B. R. 377; *In re Lantzenheimer*, 124 Fed. Rep. 716, 10 Am. B. R. 720; *In re Cale*, 182 Fed. Rep. 439, 25 Am. B. R. 367.

<sup>5</sup> *Fenley v. Poor* (C. C. A. 6th Cir.), 121 Fed. Rep. 739, 58 C. C. A. 21, 10 Am. B. R. 377.

But see *In re Bailey*, 176 Fed. Rep. 990, 24 Am. B. R. 201.

<sup>6</sup> *In re Little*, 110 Fed. Rep. 621, 6 Am. B. R. 681.

<sup>7</sup> *Gorman v. Wright* (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 69 C. C. A. 76, 14 Am. B. R. 135; *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362, affirmed, *sub nom.*, *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *In re Beaver Knitting Mills* (C. C. A. 2d Cir.), 154 Fed. Rep. 320, 83 C. C. A. 240, 18 Am. B. R. 528; *In re Graves*, 163 Fed. Rep. 358, 20 Am. B. R. 218.

<sup>8</sup> *In re Beaver Knitting Mills* (C. C. A. 2d Cir.), 154 Fed. Rep. 320, 83 C. C. A. 240, 18 Am. B. R. 528; *Gorman v. Wright* (C. C. A. 4th Cir.), 136 Fed. Rep. 164.

firm creditor is not bound to apply securities which are the property of a partner upon his claim against the firm.<sup>9</sup>

### § 338. Rights of a secured creditor.

Where a creditor has received security for his debts valid under the bankrupt act, three courses are open to him, provided the trustee does not elect to redeem by paying the debt or to take the property as assets of the bankrupt, subject to the security. They are:

*First.* The secured creditor may rely upon his lien and neither prove his debt in bankruptcy nor release his security. In such case the security is preserved, notwithstanding the bankruptcy of the debtor.<sup>1</sup>

*Second.* The secured creditor may rely upon his security and prove for such sum as may be owing above the value of his security.<sup>2</sup> The value of securities held by secured creditors is determined by converting the same into money, according to the terms of the agreement, pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, com-

69 C. C. A. 76, 14 Am. B. R. 135; *In re Graves*, 163 Fed. Rep. 358, 20 Am. B. R. 218.

In *County Commissioners v. Hurley* (C. C. A. 8th Cir.), Judge Sanborn said: "The obligee in a bond, or the holder of a claim, upon which several parties are personally liable, may prove his claim against the estates of those who become bankrupt and may at the same time pursue the others at law, and, notwithstanding partial payments after the bankruptcy by other obligors or their estates, he may recover dividends from each estate in bankruptcy upon the full amount of his claim at the time the petition in bankruptcy was filed therein until from all sources he has received full payment of his claim, but no longer."

<sup>9</sup> *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 352, affirmed, *sub nom.*, *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1.

<sup>1</sup> *Long v. Bullard*, 117 U. S. 617, 29 L. Ed. 1004; *Dudley v. Easton*, 104 U. S. 103, 26 L. Ed. 668; *McHenry v. La Societe Francaise*, 95 U. S. 58, 24 L. Ed. 370; *Porter v. Lazear*, 109 U. S. 84, 27 L. Ed. 865; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *In re Grissler* (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 69 C. C. A. 406, 13 Am. B. R. 508; *In re Stevens*, 173 Fed. Rep. 842, 23 Am. B. R. 239.

<sup>2</sup> B. A. 1898, Sec. 56b and Sec. 57e. Official Form No. 32, Form No. 55, *post*.

promise or litigation, as the court may direct, and the amount of such value credited upon such claims, and a dividend paid only on the unpaid balance.<sup>3</sup>

*Third.* A secured creditor may surrender his security and then prove his debt as an unsecured creditor.<sup>4</sup> In 1813 Lord Eldon said:<sup>5</sup> "The practice has been long established in bankruptcy not to suffer a creditor holding a security to prove, unless he will give up that security, or the value has been ascertained by the sale of it. The reason is obvious; till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is, and with this further consideration that, in the event of any doubt attaching upon his right to retain the security, he is enabled in a contest with the rest of the creditors to sustain his title in a situation of predominate advantage." The bankruptcy act of 1867<sup>6</sup> expressly provided for the application of the rule, as does the present English bankruptcy act.<sup>7</sup>

The trustee may, however, elect to take the property of the bankrupt subject to the valid liens of creditors.<sup>8</sup> In such case the court may, in its discretion, order the property sold, subject to the lien or free from the lien.<sup>9</sup> If it is sold subject to

<sup>3</sup> B. A. 1898, Sec. 57h; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *In re Stevens*, 173 Fed. Rep. 842, 23 Am. B. R. 239.

<sup>4</sup> *In re Grive*, 153 Fed. Rep. 597, 18 Am. B. R. 737; *In re Conner*, No. 3118 Fed. Cas., 1 Low. 532; *In re Kipp*, No. 7836 Fed. Cas., 4 N. B. R. 593; *In re Leland*, No. 8220 Fed. Cas., 7 Ben. 156; *In re Stephens*, No. 13365 Fed. Cas., 3 Biss. 187; *In re Evans*, No. 4552 Fed. Cas., 3 N. B. R. 261.

<sup>5</sup> *In Ex parte Smith*, 2 Rose, 64.

"In Cooke's Bankrupt Laws the rule in bankruptcy is attributed to legislative enactment, and is thus stated: 'The aim of the legislatures

in all the statutes concerning bankrupts being that the creditors should have an equal proportion of the bankrupt's effects, creditors of every degree must come in equally.'" Lord Coltenham, in *Mason v. Bogg*, 2 Myl. & Cr. 446.

<sup>6</sup> R. S. Sec. 5084.

<sup>7</sup> Act of 1883, 46 and 47 Vict. c. 52, Sec. 39, clauses 9 to 16.

<sup>8</sup> See Title to bankrupt's property, Sec. 371, *post*; *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136.

<sup>9</sup> *Houston v. City Bank*, 6 How. 486, 12 L. Ed. 526; *Fowler v. Hart*, 13 How. 373, 14 L. Ed. 186; *In re Sanborn*, 96 Fed. Rep. 551, 3 Am. B. R. 54; *In re Gerdes*, 102 Fed.

the lien the creditor still has his claim preserved against the new purchaser. If it is sold free of the lien he has his claim preserved against the proceeds of the sale for the amount of his debt. The trustee is authorized to convey property to the purchaser.<sup>10</sup>

A secured creditor may come into a court of bankruptcy and petition it to enforce his security against the bankrupt's estate, in case the trustee does not elect to sell the property either subject to or free from liens. But such creditor can not compel a court of bankruptcy to do this as a matter of right.<sup>11</sup> It is sometimes desirable and convenient to pursue this course and the court has ample power to enforce such security, preserving to the secured creditor all of his rights arising therefrom.<sup>12</sup>

Where a secured creditor has availed himself of the bankruptcy court and its process to collect his claim it is only right that he bear his share of the cost of such proceeding.<sup>13</sup> The referee and trustee are entitled to commissions on all moneys disbursed to such creditor by the trustee.<sup>14</sup>

### § 339. Proof by a secured creditor.

A secured creditor may prove a claim for the balance remaining after deducting the value of the security.<sup>1</sup> To that extent he is regarded as an unsecured creditor.

Rep. 318, 4 Am. B. R. 346; *In re* Styer, 3 Am. B. R. 424, 98 Fed. Rep. 290; *In re* Gerry, 112 Fed. Rep. 957, 7 Am. B. R. 461; *In re* Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117.

<sup>10</sup> B. A. 1898, Sec. 70c.

<sup>11</sup> *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; *In re* Keet, 128 Fed. Rep. 651, 11 Am. B. R. 117.

<sup>12</sup> See Sec. 340, *post*.

<sup>13</sup> *In re* Utt (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re* Alison Lumber Co., 137

Fed. Rep. 643, 14 Am. B. R. 78; *In re* Cogley, 107 Fed. Rep. 73, 5 Am. B. R. 731; *McNair v. McIntyre* (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638; *In re* Goldsmith, 118 Fed. Rep. 763, 9 Am. B. R. 419.

<sup>14</sup> B. A. 1898, Secs. 40 and 48 as amended by the act of Feb. 5, 1903, 32 Stat. at L. 797.

<sup>1</sup> B. A. 1898, Sec. 57e and h; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1, affirming *In re* Mertens (C. C. A. 2d Cir.), 144 Fed. Rep. 818,

Proof by a secured creditor is made on Official Form No. 32. In such deposition proof is made of the whole debt as in the case of an unsecured claim. To this proof is added a statement of all the securities held by the creditor for the debt. In describing these securities it is proper, but not essential, to state their estimated value. This would seem to be especially desirable when the proof is to be filed for the purpose of enabling the creditor to participate in the proceedings at the first creditors' meeting.<sup>2</sup> Such estimates do not determine the value of these securities.

The value of securities held by secured creditors are determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.<sup>3</sup>

Where a claim is secured by a mortgage or lien on property exempt under a state statute the secured creditor can prove only for the balance of his debt not secured and can not receive a dividend on his entire debt and then resort to his security to satisfy the unpaid balance.<sup>4</sup>

75 C. C. A. 548, 15 Am. B. R. 362; *In re Davis* (C. C. A. 3d Cir.), 174 Fed. Rep. 556, 98 C. C. A. 338, 23 Am. B. R. 446; *In re Ball*, 123 Fed. Rep. 164, 10 Am. B. R. 564.

<sup>2</sup> B. A. 1898, Sec. 57c.

<sup>3</sup> B. A. 1898, Sec. 57h; *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362; *In re Lantzenheimer*, 124 Fed. Rep. 716, 10 Am. B. R. 720; *In re Ball*, 123 Fed. Rep. 164, 10 Am. B. R. 564; *Fenley v. Poor* (C. C. A. 6th Cir.), 121 Fed. Rep. 739, 58 C. C. A. 21,

10 Am. B. R. 377; *In re Cale*, 182 Fed. Rep. 439, 25 Am. B. R. 367.

<sup>4</sup> *Fenley v. Poor* (C. C. A. 6th Cir.), 121 Fed. Rep. 739, 58 C. C. A. 21, 10 Am. B. R. 377; *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362; *In re Cale*, 182 Fed. Rep. 439, 25 Am. B. R. 367; *In re Little*, 110 Fed. Rep. 621, 6 Am. B. R. 681; *In re Lantzenheimer*, 124 Fed. Rep. 716, 10 Am. B. R. 720.

But see *In re Bailey*, 176 Fed. Rep. 990, 24 Am. B. R. 201.

The proof of a secured debt according to Form No. 32 does not invalidate the right of the creditor to the securities which he is found to hold.<sup>5</sup> One owing a debt secured by an insurance policy on the life of the bankrupt is entitled to prove the amount of the debt less the surrender value of the policy.<sup>6</sup> Where the security is the property of the bankrupt held by an indorser, or a person secondarily liable, it has been held not necessary that the creditor should prove as a secured creditor in order to retain his rights as against the indorser.<sup>7</sup> A person claiming a priority under section 64 need not prove his claim as a secured creditor.<sup>7\*</sup>

Where a creditor of the bankrupt is secured by pledge, mortgage or other security on property of a person other than the bankrupt, he may prove as an unsecured creditor for the full amount of his claim against the estate of the bankrupt.<sup>8</sup> He is not a secured creditor within the meaning of the bankrupt law.

Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he is subrogated to that extent to the rights of the creditor.<sup>9</sup>

<sup>5</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *In re Davison*, 179 Fed. Rep. 750, 24 Am. B. R. 460; *In re Peacock*, 178, 851, 24 Am. B. R. 159; *In re Mayer* (C. C. A. 2d Cir.), 157 Fed. Rep. 836, 85 C. C. A. 200, 19 Am. B. R. 356; *In re Bigelow*, No. 1396 Fed. Cas., 2 Ben. 480; *King v. Bowman*, 24 La. Ann. 506.

<sup>6</sup> *In re Newland*, No. 10170 Fed. Cas., 6 Ben. 342; Consult *In re Sauthoff*, No. 12379, Fed. Cas., 7 Biss. 167.

<sup>7</sup> *Merchants' Bank v. Comstock*, 55 N. Y. 24.

<sup>7\*</sup> *In re Jones*, 151 Fed. Rep. 108, 18 Am. B. R. 206.

<sup>8</sup> *Gorman v. Wright* (C. C. A. 4th Cir.), 136 Fed. Rep. 164, 69 C. C. A. 76, 14 Am. B. R. 135; *Haas-Baruch & Co. v. Portuondo*, 138 Fed. Rep. 949, 15 Am. B. R. 130; *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362, affirmed *sub nom.*, *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1.

<sup>9</sup> B. A. 1898, Sec. 57i; Gen. Ord. 21, par. 4.



### § 340. How to ascertain the value of securities.

When a secured creditor proves a claim for the excess of his debt over the security, the value of the security must be ascertained to determine the amount on which he is entitled to dividends from the general estate.

Section 57*h* provides two methods of ascertaining the value of the securities held by a secured creditor. *First*, it may be determined by converting the security into money according to the terms of the agreement pursuant to which such security was given.<sup>1</sup> *Second*, it may be determined by the secured creditor and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct.<sup>2</sup>

The value of the security is determined as of the date that it is converted into money and not its value at the date of bankruptcy.<sup>3</sup> The sum realized by a public or private sale of the property, in the absence of fraud, will ordinarily be accepted as the true value of it.<sup>4</sup> It has been held that where a secured

<sup>1</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1, affirming *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362; *In re Peacock*, 178 Fed. Rep. 851, 24 Am. B. R. 159.

<sup>2</sup> *In re Grive*, 153 Fed. Rep. 597, 18 Am. B. R. 737; *In re Davison*, 179 Fed. Rep. 750, 24 Am. B. R. 460; *In re Hayward*, 130 Fed. Rep. 720, 12 Am. B. R. 264.

<sup>3</sup> *In re Peacock*, 178 Fed. Rep. 851, 24 Am. B. R. 264, Judge Connor said: "It is but a reasonable interpretation of the contract of pledge that Vaughan & Barnes should sell the cotton whenever, in their judgment, the best interests of their pledgor and themselves demanded. To put any other construction upon it would be unreasonable, and would put it into the power of Peacock, or his trustee,

to compel the pledgee creditor to speculate on the market at Vaughan's expense and risk."

In *Steinhardt v. National Park Bank*, 122 N. Y. App. Div. 55, 19 Am. B. R. 72, it appeared that the value of the securities was equal to the indebtedness at the time the petition was filed. They were sold some eighteen months after the adjudication in bankruptcy and had then greatly depreciated in value owing to a change in the stock market, so that the amount realized thereon was insufficient to pay the balance due on the notes. The bank was allowed to set off the notes of the bankrupt in an action by the trustee to recover money from the bank.

<sup>4</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *In re Peacock*, 178 Fed. Rep. 851, 24 Am. B. R. 264.

creditor purchased the property at a foreclosure sale the sum paid is not conclusive as to the value of the security, but that a court of bankruptcy may inquire into the actual value of the property.<sup>5</sup>

Where the security is in the possession of the secured creditor as in the case of a pledge, he may proceed to ascertain its value pursuant to the terms of the agreement under which the security was given.<sup>6</sup> The adjudication of the debtor to be bankrupt does not affect the right of the secured creditor in this respect.<sup>7</sup> The proceedings must be conducted fairly and in such a way as to subserve not only the rights of the secured creditor, but the interest of all concerned. It is only when the security has not been disposed of by the creditor in accordance with his contract, that the court may direct what shall be done in the premises.<sup>8</sup> Of course, where there is

<sup>5</sup> *In re Davis* (C. C. A. 3d Cir.), 174 Fed. Rep. 556, 98 C. C. A. 338, 23 Am. B. R. 446; *In re Dix*, 176 Fed. Rep. 582, 23 Am. B. R. 889.

<sup>6</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1, affirming *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362; *In re Mayer* (C. C. A. 2d Cir.), 157 Fed. Rep. 836, 85 C. C. A. 200, 19 Am. B. R. 356; *In re Peacock*, 178 Fed. Rep. 851, 24 Am. B. R. 159.

*In re Mertens*, *supra*, Judge Wallace said: "The present act provides that the value of his security may be determined, among other methods, by converting it into money, pursuant to his contract rights, and thus if he has enforced it as the contract with the debtor allowed, he is permitted to prove the unsatisfied balance of his claim. Section 57, subdivision h, prescribes several modes of

valuation, and the one referred to is exclusive of the others and is superfluous and useless, unless it is intended to authorize the creditor without interference by the trustee or the court, to value his own security provided he turns it into money 'according to the terms of the contract pursuant to which, it was delivered to him.'"

<sup>7</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *In re Mayer* (C. C. A. 2d Cir.), 157 Fed. Rep. 836, 85 C. C. A. 200, 19 Am. B. R. 356; *In re Peacock*, 178 Fed. Rep. 851, 24 Am. B. R. 159; *Van Kirk v. Vermont Slate Co.*, 140 Fed. Rep. 38, 15 Am. B. R. 239.

<sup>8</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1.

*In re Davison*, 179 Fed. Rep. 750, 24 Am. B. R. 460, the secured filed a petition asking the court of bankruptcy to ascertain the value of a pledge.

fraud, or a proceeding contrary to the contract, the interposition of the court may be properly invoked.<sup>9</sup>

Where the property securing the debt comes into the custody of the court of bankruptcy as a part of the bankrupt estate, the validity and value of the security should be determined under the direction of the court.<sup>10</sup> The court may direct the secured creditors and the trustee to determine the value of the security by agreement, compromise, arbitration, or litigation as justice may require.<sup>11</sup>

Where the validity of the security is questioned by the trustee it is proper to determine this issue before the security is converted into money.<sup>12</sup>

### § 341. Proving a claim as unsecured waives security.

If a creditor fails to mention his security in his proof of claim he will, as a general rule, be deemed to have elected to prove as an unsecured creditor and to have waived his security.<sup>1</sup>

Proving a claim as unsecured does not waive the right to priority under section 64, although the creditor voted at a creditor's meeting.<sup>2</sup> It has been held that proving without mentioning the security does not operate to discharge a mortgage security; that while a creditor is prevented from setting

<sup>9</sup> *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *In re Peacock*, 178 Fed. Rep. 851, 24 Am. B. R. 159.

<sup>10</sup> *In re Quinn* (C. C. A. 8th Cir.), 165 Fed. Rep. 144, 91 C. C. A. 178, 21 Am. B. R. 264; *In re Cramond*, 145 Fed. Rep. 966, 17 Am. B. R. 22; *In re Grive*, 153 Fed. Rep. 597, 18 Am. B. R. 737.

<sup>11</sup> *In re Grive*, 153 Fed. Rep. 597, 18 Am. B. R. 737; *In re Davis* (C. C. A. 3d Cir.), 174 Fed. Rep. 556, 98 C. C. A. 338, 23 Am. B. R. 446.

<sup>12</sup> *In re Quinn* (C. C. A. 8th Cir.),

165 Fed. Rep. 144, 91 C. C. A. 178, 21 Am. B. R. 264.

<sup>1</sup> *In re Fisk & Robinson*, 185 Fed. Rep. 974, 26 Am. B. R. —; *In re Bloss*, No. 1562, Fed. Cas., 4 N. B. R. 147; *In re Brand*, No. 1809, Fed. Cas., 2 Hughes, 334; *In re Grainger*, No. 5864, Fed. Cas., 8 N. B. R. 30; *Heard v. Jones*, 15 N. B. R. 402; *Hatch v. Seely*, 13 N. B. R. 383; *Ex parte Downs*, 1 Rose, 96; *Ansonia Brass & Copper Co. v. Babbitt*, 74 N. Y. 395.

<sup>2</sup> *In re Ashland Steel Co.* (C. C. A. 6th Cir.), 168 Fed. Rep. 679, 94 C. C. A. 165, 21 Am. B. R. 834.

up the same against the trustee, no one but the trustee can avail himself of the fact.<sup>3</sup>

If a creditor receives dividends on a claim proved as unsecured, he waives his security whether the claim and security arise in the bankruptcy court or out of it.<sup>4</sup>

The courts have frequently permitted a creditor to amend his proof to change it from unsecured to secured,<sup>5</sup> even after the expiration of the year within which to prove claims. Unless mention is made of the security in the proof as originally filed or amended, the security is waived by proving as an unsecured creditor.

### § 342. Proof by creditors who have received preferences.

The statute provides that: "The claims of creditors who have received preferences, voidable under section 60, subdivision *b*, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section 67, subdivision *e*, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."<sup>1</sup>

Prior to the amendment of Feb. 5, 1903,<sup>2</sup> a preference received by a creditor must have been surrendered, whether it

<sup>3</sup> *Cook v. Farington*, 104 Mass. 212.

<sup>4</sup> *In re Fisk & Robinson*, 185 Fed. Rep. 974, 26 Am. B. R. —.

<sup>5</sup> *In re Fisk & Robinson*, 185 Fed. Rep. 974, 26 Am. B. R. —; *In re Falls City Shirt Mfg. Co.*, 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re Wilder*, 101 Fed. Rep. 104, 3 Am. B. R. 761n.

*In re Cathcart* (southern district of Ohio), mechanics' lienholders proved their claims as unsecured creditors and voted for and elected a trustee, who reduced the estate to money. Thereafter these lienholders perfected their liens and were permitted to amend

their proof of claims and assert their security and were awarded priority over mortgagees under a mortgage subordinate to the mechanics' lien. Judge Thompson affirmed this ruling of the referee August 21, 1900 (not reported).

<sup>1</sup> B. A. 1898, Sec. 57g, as amended Feb. 5, 1903, 32 Stat. at L. 797; *In re Privett*, 132 Fed. Rep. 592, 13 Am. B. R. 151; *In re Flynn*, 126 Fed. Rep. 422, 11 Am. B. R. 318; *In re Bloch* (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 74 C. C. A. 250, 15 Am. B. R. 748.

<sup>2</sup> Act of Feb. 5, 1903, 32 Stat. at L. 797.

could have been avoided or not, before the claim could be allowed.<sup>3</sup> The effect of the amendment is to require a surrender of a preference, conveyance, transfer or incumbrance only when it may be avoided by the trustee, in order to entitle the creditor to an allowance of his claim.<sup>4</sup> The test now is, can the trustee avoid such preference, conveyance, transfer or incumbrance, if so, it must be surrendered; if not, the creditor may retain what he has received and have his claim allowed for the balance of the debt. What constitutes a preference or lien, which may be avoided by a trustee, is considered in another place and need not be repeated here.<sup>5</sup> The amendment does not affect the surrender of preferences in proceedings begun prior to Feb. 5, 1903.<sup>6</sup>

Where a creditor has two separate and distinct debts, a preferential payment on one of them must be surrendered before the other can be allowed.<sup>7</sup> But where the payment extinguishes a debt it need not be surrendered as a condition precedent to the allowance of a subsequent independent debt.<sup>8</sup>

<sup>3</sup> *Pirie v. Chicago Title and Trust Co.*, 182 U. S. 438, 45 Am. B. R. 1171, 5 Am. B. R. 814; *In re Abraham Steers Lumber Co.* (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 50 C. C. A. 310, 7 Am. B. R. 332; *Dickson v. Wyman* (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 49 C. C. A. 574, 7 Am. B. R. 186; *McKey v. Lee* (C. C. A. 7th Cir.), 105 Fed. Rep. 923, 45 C. C. A. 127, 5 Am. B. R. 267.

That there was no four months' limit to preferences, which must be surrendered prior to the amendment of Feb. 5, 1903, see *In re Busby*, 124 Fed. Rep. 469, 10 Am. B. R. 650.

<sup>4</sup> *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447; *In re Bloch* (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 74 C. C. A. 250, 15 Am. B. R. 748.

<sup>5</sup> See Chapter XXVI; *In re Pettingill & Co.*, 135 Fed. Rep. 218.

<sup>6</sup> *In re Docker-Fisher Co.*, 123 Fed. Rep. 190, 10 Am. B. R. 584.

<sup>7</sup> *In re Meyer*, 115 Fed. Rep. 997, 8 Am. B. R. 598; *Livingston v. Heineman* (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39; *Swarts v. Fourth National Bank* (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673; *In re Lyon* (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 58 C. C. A. 143, 10 Am. B. R. 25; *In re Delling*, 124 Fed. Rep. 852, 10 Am. B. R. 688; *Dunn v. Gans* (C. C. A. 3d Cir.), 129 Fed. Rep. 750, 64 C. C. A. 278, 12 Am. B. R. 316.

<sup>8</sup> *In re Abraham Steers Lumber Co.* (C. C. A. 2d Cir.), 112 Fed. Rep. 406, 50 C. C. A. 310, 7 Am. B. R. 332, affirming 110 Fed. Rep. 738, 6 Am. B. R. 315; *In re Seay*,

Payments made on a running account, where new sales succeed payments and the net result is to increase the value of the estate, do not constitute preferences which must be surrendered before a claim for the balance due on the account may be allowed.<sup>9</sup> Where the last transaction is the payment on account it has been held that it must be surrendered as a preference before the balance is allowed.<sup>10</sup>

A creditor having a claim, on which he has received a preferential payment, should regularly prove his claim against the estate and the court will then determine the amount of his preference, if any, and require it to be surrendered before allowing his claim.<sup>11</sup> The "proof" of a claim must not be confused with the "allowance" of the claim. Those are two distinct acts or proceedings, and the allowance, absolute or conditional, may or may not result from and follow the proof of the claim.<sup>12</sup> This distinction has been lost sight of in many of the cases reported. Section 57g does not prohibit the proof of a claim by a preferred creditor, but merely the allowance of it before the creditor surrenders a recoverable preference.

113 Fed. Rep. 969, 7 Am. B. R. 700; *In re Bullock*, 116 Fed. Rep. 667, 8 Am. B. R. 646; *In re Wolf & Levy*, 122 Fed. Rep. 127, 10 Am. B. R. 153.

<sup>9</sup> *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773; *Yaple v. Dahl-Milliken Grocery Co.*, 193 U. S. 526, 48 L. Ed. 776, 11 Am. B. R. 596; *Dickson v. Wyman* (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 49 C. C. A. 574, 7 Am. B. R. 186; *In re Sagor* (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 57 C. C. A. 412, 9 Am. B. R. 361; *Gans v. Ellison* (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 52 C. C. A. 366, 8 Am. B. R. 153; *Kimball v. Rosenham* (C. C. A. 8th Cir.), 114 Fed. Rep. 85, 52 C. C. A. 33, 7 Am. B. R. 718.

<sup>10</sup> *In re Watkinson*, 146 Fed. Rep. 142, 17 Am. B. R. 56.

<sup>11</sup> *In re Hornstein*, 122 Fed. Rep. 266, 10 Am. B. R. 308.

<sup>12</sup> *In Hargadine-McKittrick Dry Goods Co. v. Hudson* (C. C. A. 8th Cir.), 122 Fed. Rep. 232, 58 C. C. A. 596, 10 Am. B. R. 225, the court said: "Debts are not the less provable, within the meaning of the bankrupt act, because the statute of limitations may be successfully pleaded against their allowance. As well say that a debt was not suable because the statute of limitations might be pleaded to an action upon it."

*In re Hornstein*, 122 Fed. Rep. 266, 10 Am. B. R. 308, Judge Ray uses this language. "It will be noted that the proof of a claim is one thing, and the allowance of such claim is quite another thing. Claims may be proved, but not allowed. They may be provable, but

**§ 343. What is a surrender of a security or preference.**

A secured creditor can not prove his secured claims until he has surrendered his security.<sup>1</sup> A creditor who has received a preference can not have his claims allowed until he has surrendered his preference.<sup>2</sup> The question, therefore, will be frequently presented, what constitutes a surrender and how is it to be made?

There can be no question of the intention of a creditor who files in the court or with the referee a written statement expressly surrendering his securities or preferences.

A referee ought not to reject a claim for failure to surrender a preference or property fraudulently transferred to him until he had fixed a reasonable time within which to make the surrender.<sup>3</sup>

The preferred creditor regularly surrenders his preference to the trustee. Property fraudulently transferred belongs to the bankrupt's estate. Preferential security is also to be

not allowable. They may be provable, and then allowed in part only, or on condition only. The statute does not say that the claims of creditors who have received preferences shall not be proved; but it does say that such claims shall not be allowed, unless or until the creditor surrenders his preference. By plain implication the proof of the claim is permitted. The claim of a creditor who has received a preference may be proved; but it can not be allowed, unless he shall surrender the preference. Strange, indeed, is that construction of this law, in the face of those provisions, which will prevent a creditor from coming into court and proving his claim, having the amount of the preference received by him, if any (and that may be a serious and necessary question for determina-

tion, both as to the fact of preference and its amount), determined by the court, and then having his proved claim allowed on surrendering the preference. Any creditor has the right to come into court for that very purpose. To hold otherwise will logically prevent a creditor who has in fact received a preference, by way of lien or otherwise, for only a small part of his claim, coming into court and proving his claim, and then having it allowed on surrendering the preference—a mode of procedure the statute expressly permits.”

<sup>1</sup> See Proof by Secured Creditor, Sec. 340, *ante* and Rights of Secured Creditors, Sec. 339, *ante*.

<sup>2</sup> B. A. 1898, Sec. 57g.

<sup>3</sup> *In re Oppenheimer*, 140 Fed. Rep. 51, 15 Am. B. R. 267.



released for the benefit of the creditors of the bankrupt. The trustee holds the title to all the bankrupt's property.

The statute does not determine the manner in which the surrender should be made. It is usually done by a formal transfer of property or release of security, either voluntarily or upon a judgment of recovery obtained by the trustee. An agreement that other creditors may share in the proceeds of a sale of property which constitutes a preference may be treated as a surrender.<sup>4</sup>

It was held by the courts of bankruptcy at first that the surrender must be voluntary, and that if the trustee is compelled to proceed to a judgment the creditor has not made a surrender, and is therefore not entitled to have his claim allowed.<sup>5</sup> When the question came before the supreme court it decided that a creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, may thereafter prove the debt so voidably preferred.<sup>6</sup>

#### § 344. Filing proofs of debts.

Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.<sup>1</sup>

They are regularly filed with the referee after a reference. Proofs of debt received by a trustee must be delivered to the referee to whom the cause is referred.<sup>2</sup> The debt will not be

<sup>4</sup> *In re* Detert, No. 3829 Fed. Cas., 11 N. B. R. 293.

<sup>5</sup> *In re* Greth, 112 Fed. Rep. 978, 7 Am. B. R. 598; *In re* Owings, 109 Fed. Rep. 623, 6 Am. B. R. 454.

See also *In re* Richard, 94 Fed. Rep. 633, 2 Am. B. R. 506; *In re* Keller, 109 Fed. Rep. 118, 6 Am. B. R. 334.

<sup>6</sup> *Keppel, Trustee, v. Tiffin Savings Bank*, 197 U. S. 356, 49 L.

Ed. 790, 13 Am. B. R. 552; *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *In re* Oppenheimer, 140 Fed. Rep. 51, 15 Am. B. R. 267; *In re* Lange Co., 170 Fed. Rep. 114, 22 Am. B. R. 414.

<sup>1</sup> B. A. 1898, Sec. 57c; Gen. Ord. 20.

<sup>2</sup> Gen. Ord. 20, par. 1. *Orcutt v. Green*, 204 U. S. 96, 51 L. Ed. 390, 17 Am. B. R. 72.



deemed proved and can not be allowed where the creditor retains possession of his deposition and does not file it with the referee or clerk.<sup>3</sup>

It is the duty of a referee to receive a proof which appears on its face to have been taken by a proper officer and to be correct in form and substance.<sup>4</sup> Upon receipt of such proof the clerk or referee must indorse thereon the day and hour of filing and a brief statement of its character.<sup>5</sup> No notice to the other creditors is required. Where a claim has been duly proved it should be allowed upon receipt by or upon presentation to the judge or referee, unless objection to its allowance shall be made by the parties in interest or its consideration be continued for cause by the court upon its own motion.<sup>6</sup>

The referee is entitled to a fee of 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the costs of administration.<sup>7</sup>

### § 345. Right to withdraw proof of debt—Doctrine of election.

A proof of debt, made under a mistake of fact or law, may be withdrawn, if no action has been based upon such proof which can not be recalled or compensated.<sup>1</sup>

The doctrine of election of remedies contemplates a choice between two or more remedies.<sup>2</sup> If a creditor can not or does

<sup>3</sup> *In re* Shepard, No. 12753, Fed. Cas., 1 N. B. R. 439; *In re* French, 181 Fed. Rep. 583, 25 Am. B. R. 77.

<sup>4</sup> B. A. 1898, Sec. 57*d*; *In re* Merrick, No. 9463 Fed. Cas., 7 N. B. R. 459.

<sup>5</sup> Gen. Ord. 2.

<sup>6</sup> B. A. 1898, Sec. 57*d*.

<sup>7</sup> B. A. 1898, Sec. 40, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>1</sup> *In re* Stewart, 178 Fed. Rep. 463, 24 Am. B. R. 474; *In re* Baxter, 12 Fed. Rep. 72; *In re* Strickland, 167 Fed. Rep. 867, 21 Am. B. R. 734; *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710.

<sup>2</sup> *In Standard Oil Co. v. Hawkins* (C. C. A. 7th Cir.), 74 Fed. Rep. 395, 20 C. C. A. 468, it was held that "When a party who has a choice of two remedies pursues one of them under the mistaken impression that the law affords him no other, and in ignorance of the existence of the other and more advantageous remedy, equity, in the absence of injury to others, or of facts creating an estoppel, may relieve him from the apparent election made under such mistake, and permit him to pursue the more advantageous remedy."

not make such a choice, he is not estopped by proving his claim to withdraw it and pursue another remedy. It has been held, in view of an express reservation in the proof of claim, that a creditor did not waive his right to recover shares of stock by proving his claim as a creditor in bankruptcy.<sup>3</sup> A creditor holding notes containing a waiver of homestead and exemption may withdraw his proof in order to prosecute his remedy in the state court against the exempt property,<sup>4</sup> or withdraw his proof of claim for the purpose of proceeding against a dormant partner of the bankrupt.<sup>5</sup> A creditor has been allowed to withdraw his proof for the purpose of removing a valid defense by the trustee in a pending suit.<sup>6</sup>

A creditor deprived of property by fraudulent acts of the bankrupt may withdraw his claim for goods sold and delivered after the discovery of fraud upon the examination of the bankrupt, and proceed to reclaim the property.<sup>7</sup> But where a creditor with knowledge of the facts proves his claim thereby confirming the sale, he is estopped to withdraw it and recover the goods.<sup>8</sup>

Where a creditor has proved his debt and taken part in the meetings of creditors and controlled the action of others in the choice of a trustee, or influenced the question of the bankrupt's discharge, he will not be permitted to make a change in his proof.<sup>9</sup> The receipt of dividends is no objection to a withdrawal of proof, because they can be restored to the trustee.<sup>10</sup>

<sup>3</sup> *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710.

<sup>4</sup> *In re Strickland*, 167 Fed. Rep. 867, 21 Am. B. R. 734.

<sup>5</sup> *In re Hubbard*, No. 6813, Fed. Cas., 1 Low. 190.

<sup>6</sup> *In re Baxter*, 12 Fed. Rep. 72.

<sup>7</sup> *In re Stewart*, 178 Fed. Rep. 463, 24 Am. B. R. 474.

<sup>8</sup> *Standard Varnish Wks. v. Haydock* (C. C. A. 6th Cir.), 143 Fed. Rep. 318, 74 C. C. A. 456, 16 Am. B. R. 286.

*In re Hildebrant*, 120 Fed. Rep. 992, 10 Am. B. R. 184, it was held

that vendor could not affirm the contract of sale as to part of the goods and claim the price and disaffirm as to another part and recover the goods in specie.

<sup>9</sup> *Standard Varnish Wks. v. Haydock* (C. C. A. 6th Cir.), 143 Fed. Rep. 318, 74 C. C. A. 456, 16 Am. B. R. 286; *New Bedford, etc., v. Fairhaven, etc.*, 9 Allen (Mass.), 175, 180; *In re Bloss*, No. 1562 Fed. Cas., 4 N. B. R. 147; *Ex parte Solomon*, 1 Glyn & J. 25.

<sup>10</sup> *In re Baxter*, 12 Fed. Rep. 72; *In re Parks*, No. 10754, Fed. Cas., 10 N. B. R. 82.

A proof of claim should not be withdrawn for the purpose of filing a new claim, but the party ought to be allowed and required to amend his proof on file.<sup>11</sup>

After a claim is allowed or disallowed a written instrument attached to the proof as an exhibit may be withdrawn by permission of the court on leaving a copy on file with the claim.<sup>12</sup>

### § 346. Amendment of the proof of claims.

If the proof of a claim is defective, the defect may be cured by amendment at any time prior to its allowance. The amendment may be permitted after the expiration of the one year period within which claims may be proved.<sup>1</sup>

The judge or the referee may allow proofs to be amended. The application is usually made to the referee.

The courts have been liberal in granting amendments to proof of claims.<sup>2</sup> A creditor may be permitted to amend his proof to correct a clerical omission or formal defect, as to supply a verification,<sup>3</sup> or to supply names and dates omitted.<sup>4</sup>

A creditor may be permitted to amend his proof to enlarge or diminish the amount of the debt,<sup>5</sup> or to change his proof

<sup>11</sup> *In re* Lowree, No. 8577 Fed. Cas., 1 Ben. 406; *In re* Emison, No. 4459 Fed. Cas., 2 N. B. R. 595; *In re* McIntosh, No. 8826 Fed. Cas., 2 N. B. R. 506.

<sup>12</sup> B. A. 1898, Sec. 57b; *In re* Loden, 184 Fed. Rep. 965, 25 Am. B. R. 917; *In re* Emison, No. 4459, Fed. Cas., 2 N. B. R. 595; *In re* McNair, No. 8908, Fed. Cas., 2 N. B. R. 343.

<sup>1</sup> As to amending a claim after the one year period, see section 333, *ante*.

<sup>2</sup> *Hutchinson v. Otis*, 190 U. S. 552, 47 L. Ed. 1179, 10 Am. B. R. 135; *Buckingham v. Estes* (C. C. A. 6th Cir.), 128 Fed. Rep. 584, 63 C. C. A. 20, 122 Am. B. R. 182; *In re* Kessler (C. C. A. 8th Cir.), 184 Fed. Rep. 51, 107 C. C. A. 13,

25 Am. B. R. 512; *In re* Roeber (C. C. A. 2d Cir.), 127 Fed. Rep. 122, 62 C. C. A. 112, 11 Am. B. R. 464; *In re* Wilder, 101 Fed. Rep. 104, 3 Am. B. R. 761n; *In re* Myers, 99 Fed. Rep. 691, 3 Am. B. R. 760; *In re* Faulkner (C. C. A. 8th Cir.), 161 Fed. Rep. 900, 88 C. C. A. 505, 20 Am. B. R. 542; *In re* Morris, 154 Fed. Rep. 211, 18 Am. B. R. 828.

<sup>3</sup> *In re* Roeber (C. C. A. 2d Cir.), 127 Fed. Rep. 122, 62 C. C. A. 112, 11 Am. B. R. 464; *In re* Stevens, 107 Fed. Rep. 243, 5 Am. B. R. 806.

<sup>4</sup> *In re* Myrick, No. 10000, Fed. Cas., 3 N. B. R. 156.

<sup>5</sup> *In re* Myers, 99 Fed. Rep. 691, 3 Am. B. R. 760; *In re* Montgomery, No. 7929, Fed. Cas., 3 Ben. 566.

from an unsecured to a secured debt,<sup>6</sup> or to assert a priority under a state statute,<sup>7</sup> or to change an original proof of a usurious note to a claim for money had and received,<sup>8</sup> or to correct a defective statement of the consideration for the debt.<sup>9</sup>

Where in other respects a creditor would be entitled to amend his proofs, the mere prior receipt of dividends is no objection, as they can be restored to the trustee.<sup>10</sup> Amendments have been frequently allowed on terms of repayment of dividends already received.<sup>11</sup>

Where a creditor by proof of his debt has taken part in the meetings of creditors and controlled the action of others in the choice of a trustee, or influenced the question of the bankrupt's discharge, he has been held precluded from any subsequent change in his proof.<sup>12</sup> But the simple fact that he participated in the election of the trustee, when there is no evidence that he gained any advantage thereby, or that the

<sup>6</sup> *In re Fisk & Robinson*, 185 Fed. Rep. 974, 26 Am. B. R. —; *In re Falls City Shirt Mfg. Co.*, 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re Wilder*, 101 Fed. Rep. 104, 3 Am. B. R. 761n.

*In re Cathcart* (southern district of Ohio), mechanics' lienholders proved their claims as unsecured creditors and voted for and elected a trustee, who reduced the estate to money. Thereafter these lienholders perfected their liens and were permitted to amend their proof of claims to assert their security and were awarded priority over mortgages under a mortgage subordinate to the mechanics' lien. Judge Thompson affirmed this ruling of the referee August 21, 1900 (not reported).

<sup>7</sup> *In re Ashland Steel Co.* (C. C. A. 6th Cir.), 168 Fed. Rep. 679, 94 C. C. A. 165, 21 Am. B. R. 834.

<sup>8</sup> *In re Robinson*, 136 Fed. Rep. 994, 14 Am. B. R. 626.

<sup>9</sup> *In re Morris*, 154 Fed. Rep. 211, 18 Am. B. R. 828; *In re Stevens*, 104 Fed. Rep. 325, 5 Am. B. R. 11; *In re Creasinger* (Ref.), Cas., 10 N. B. R. 82.

<sup>10</sup> *Ex parte Baxter*, 12 Fed. Rep. 72; *In re Parkes*, No. 10754 Fed. Cas., 10 N. B. R. 82.

<sup>11</sup> *In re Parkes*, No. 10754 Fed. Cas., 10 N. B. R. 82; *In re Baxter*, 12 Fed. Rep. 72; *Ex parte Capot*, 1 Atk. 218; *Ex parte Bielby*, 12 Ves. 70; *Ex parte Waring*, 19 Ves. 345, quoted in full in *Powles v. Hargreaves*, 3 DeGex, A. M. & G. 445; *Ex parte Bolton*, 2 Rose, 389; *In re Barned's Banking Co.*, 10 L. R. Chan. Ap. 198, 5 H. L. 157.

<sup>12</sup> *New Bedford, etc., v. Fairham, etc.*, 9 Allen (Mass.), 175, 180; *Ex parte Solomon*, 1 Glyn. & J. 25; *Stewart v. Isidor*, 5 Abb. Pr. (N. S.) (N. Y.) 68, 1 N. B. R. 485; *In re Bloss*, No. 1562 Fed. Cas., 4 N. B. R. 147.

other creditors have been in anywise prejudicial in consequence of it, or that he was influenced by any fraudulent intent, will not preclude a claimant from making his proof of debt.<sup>13</sup>

Mere formal amendment may be made in the original proofs. Where a change is made by adding a statement of new matter or facts the proof must be resworn after such change.<sup>14</sup> Where the amendment sought to be made relates to a new and different claim from any of those embraced in the existing proof of debt the proper course is for the creditor to prove his newly discovered debt independently.<sup>15</sup>

### § 347. Contesting claims before allowance.

Objections to a claim may be put in by parties in interest before the claim is allowed.<sup>1</sup>

In practice claims are regularly proved at the first creditors' meeting. The creditors have had ten days' notice of this meeting within which to investigate. The statute contemplates making objections promptly. It provides for the allowance of claims duly proved "upon receipt by or representation to the court, unless objection to their allowances shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."<sup>2</sup> Objections are regularly put in at the time the claim is filed.

By "parties in interest" is meant persons who have an interest in the *res* which is to be administered. A trustee is a party in interest.<sup>3</sup> Any defense to the claim is as available to

<sup>13</sup> *In re* McConnell, No. 8712 Fed. Cas., 9 N. B. R. 387; *King v. Bowman*, 24 La. Ann. 506.

<sup>14</sup> *In re* Walther, No. 17126 Fed. Cas., s. c. 14 N. B. R. 273.

<sup>15</sup> *In re* Montgomery, No. 9731 Fed. Cas., 3 N. B. R. 430.

<sup>1</sup> B. A. 1898, Secs. 57*d* and 57*f*; *Orr v. Park* (C. C. A. 5th Cir.), 183 Fed. Rep. 683, 106 C. C. A. 33, 25 Am. B. R. 544; *In re* Syracuse

*Paper & Pulp Co.*, 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re* Dunlap Carpet Co., 171 Fed. Rep. 632, 22 Am. B. R. 788.

<sup>2</sup> B. A. 1898, Sec. 57*d*.

<sup>3</sup> *Atkins v. Wilcox* (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 44 C. C. A. 626, 5 Am. B. R. 313; *In re* Hatzen, 161 Fed. Rep. 895, 20 Am. B. R. 470.

the trustee as to the debtor himself.<sup>4</sup> An unsecured creditor may object to the proof of claim by another unsecured creditor.<sup>5</sup> The bankrupt may interpose objections.<sup>6</sup> Debtors of the bankrupt are not parties in interest.<sup>7</sup> A trustee can not contest the validity of a creditor's claim on petition for his removal as trustee.<sup>8</sup>

The statute and rules are silent as to the form of objections to claims against the bankrupt estate. The manner of making such objections is largely committed to the discretion of the referee.<sup>9</sup> The objection may be stated orally, although it is better practice to put it in writing.<sup>10</sup> It need not be under oath.<sup>11</sup>

Where an objection is put into a claim, it is the duty of the referee to hear and determine the issue at once, if possible, and if not, as soon as he can conveniently do so.<sup>12</sup> The inquiry may be "continued for cause by the court upon its own motion," or upon the application of the objector,<sup>13</sup> but the

<sup>4</sup> *In re Stern* (C. C. A. 8th Cir.), 144 Fed. Rep. 956, 76 C. C. A. 10, 16 Am. B. R. 510; *Merchants & Mn'rs Bank v. Galbraith* (C. C. A. 6th Cir.), 157 Fed. Rep. 208, 84 C. C. A. 656, 19 Am. B. R. 319.

<sup>5</sup> *In re Hatzen*, 161 Fed. Rep. 895, 20 Am. B. R. 470.

<sup>6</sup> *In re Ankeny*, 100 Fed. Rep. 614, 4 Am. B. R. 72; *In re Ferrer* (Porto Rico), 22 Am. B. R. 785.

<sup>7</sup> *In re Sully & Co.* (C. C. A. 2d Cir.), 152 Fed. Rep. 619, 81 C. C. A. 609, 18 Am. B. R. 123.

<sup>8</sup> *In re Roanoke Furnace Co.*, 152 Fed. Rep. 846, 18 Am. B. R. 661.

<sup>9</sup> *Orr v. Park* (C. C. A. 5th Cir.), 183 Fed. Rep. 683, 106 C. C. A. 33, 25 Am. B. R. 544; *In re Royce Dry Goods Co.*, 133 Fed. Rep. 100, 13 Am. B. R. 257; *In re Cannon*, 133 Fed. Rep. 837, 14 Am. B. R. 114.

<sup>10</sup> *Orr v. Park* (C. C. A. 5th Cir.), 183 Fed. Rep. 683, 106 C. C. A. 33, 25 Am. B. R. 544; *In re Royce Dry Goods Co.*, 133 Fed. Rep. 100, 13 Am. B. R. 257; *In re Cannon*, 133 Fed. Rep. 837, 14 Am. B. R. 114; *Embry v. Bennett* (C. C. A. 6th Cir.), 162 Fed. Rep. 139, 89 C. C. A. 163, 20 Am. B. R. 651.

<sup>11</sup> *In re Wooten*, 118 Fed. Rep. 670, 9 Am. B. R. 247; *In re Castle Braid Co.*, 145 Fed. Rep. 224, 229, 17 Am. B. R. 143.

But see *Evening Standard Pub. Co.*, 164 Fed. Rep. 517, 21 Am. B. R. 156.

<sup>12</sup> B. A. 1898, Sec. 57f.

<sup>13</sup> B. A. 1898, Sec. 57d; *In re Morris*, 154 Fed. Rep. 211, 18 Am. B. R. 828; *In re Kaufman*, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re Evening Standard Pub. Co.*, 164 Fed. Rep. 517, 21 Am. B. R. 156; *In re Syracuse Paper & Pulp*

referee is not bound to continue the inquiry unless cause be shown for the delay.<sup>14</sup>

Witnesses may be examined orally or by deposition, or other evidence introduced. Section 7 of the act makes it the duty of the bankrupt to examine the correctness of proofs of claims filed against his estate and to disclose the fact when any person tries to prove a false claim against his estate. The bankrupt may be called as a witness. The creditor proving the claim may be examined as a witness.<sup>15</sup> Testimony taken at a creditors' meeting, of which the creditor had no notice and was not present, is not admissible against him in such a proceeding.<sup>16</sup>

The objector, though not required to disprove the claim, must produce evidence whose probative force shall be equal to or greater than the evidence offered in the first instance by the claimant, because the formal proof is evidence even when put in issue.<sup>17</sup> The burden of proof remains on the creditor to establish his debt or claim. If the *prima facie* case is met by evidence by the objector the claim must be disallowed.<sup>18</sup>

It has been held that where a respondent denied the alleged indebtedness to a petitioning creditor and evidence is offered

Co., 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re* Nice & Schreiber, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re* Sumner, 110 Fed. Rep. 224, 4 Am. B. R. 123; *In re* Dreeben, 101 Fed. Rep. 110, 4 Am. B. R. 146; *In re* Kaldenberg, 105 Fed. Rep. 232, 5 Am. B. R. 6.

<sup>14</sup> *In re* Syracuse Paper & Pulp Co., 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re* Evening Standard Pub. Co., 164 Fed. Rep. 517, 21 Am. B. R. 156.

<sup>15</sup> *In re* Castle Braid Co., 145 Fed. Rep. 224, 17 Am. B. R. 143

<sup>16</sup> *In re* Hersey, 171 Fed. Rep. 1004, 22 Am. B. R. 863.

<sup>17</sup> *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584, 15 Am. B. R. 326, affirming *In re* Dresser (C. C.

A. 2d Cir.), 135 Fed. Rep. 495, 68 C. C. A. 207, 13 Am. B. R. 747; *In re* Sumner, 4 Am. B. R. 123, 101 Fed. Rep. 244; *In re* Shaw, 6 Am. B. R. 499, 109 Fed. 780; *In re* Cannon, 14 Am. B. R. 114, 133 Fed. 837; *In re* Carter, 15 Am. B. R. 126, 138 Fed. 846; *In re* Doty, 5 Am. B. R. 58; *In re* Castle Braid Co., 145 Fed. Rep. 224, 17 Am. B. R. 143; *In re* Baumhauer, 179 Fed. Rep. 966, 24 Am. B. R. 750; *Baumhauer v. Austin* (C. C. A. 5th Cir.), 186 Fed. Rep. 260, 108 C. C. A. 306, 26 Am. B. R. 385; *In re* Wilde's Sons, 133 Fed. Rep. 562, 13 Am. B. R. 217; *In re* Montgomery, 185 Fed. Rep. 955, 25 Am. B. R. 431;

<sup>18</sup> *In re* Hill, 186 Fed. Rep. 214, 26 Am. B. R. 133.



and the court finds the allegations of the petition true and makes an adjudication, the same question can not be tried upon the petitioning creditor making proof of his claim.<sup>19</sup> It is doubtful whether creditors not parties to that proceeding, but who subsequently became parties, are estopped to question the validity of a claim of a petitioning creditor or whether an adjudication operates as *res judicata* of any other question than was then put in issue.<sup>20</sup>

### § 348. Allowance or disallowance of claims.

Claims are regularly allowed or disallowed by the referee.

A formal proof of the debt makes out a *prima facie* case which entitles the claimant to have his debt allowed, unless objection is interposed by a party in interest.<sup>1</sup> A claim to

<sup>19</sup> *Ayres v. Cone* (C. C. A. 8th Cir.), 138 Fed. Rep. 778, 71 C. C. A. 144, 14 Am. B. R. 739.

<sup>20</sup> *In re Harper*, 175 Fed. Rep. 412, 23 Am. B. R. 918; *In re Ulfelder Clothing Co.*, 98 Fed. Rep. 409, 3 Am. B. R. 425. Dissenting opinion of Judge Sanborn in *Ayres v. Cone* (C. C. A. 8th Cir.), 138 Fed. Rep. 778, 1 C. C. A. 144, 14 Am. B. R. 739.

*In re Cleveland Insurance Co.*, 22 Fed. Rep. 204, Mr. Justice Matthews observed: "It can not be admitted that the finding that the petitioning creditor has a valid provable claim to the amount of \$250, which is all that is necessary as a predicate for the adjudication upon the alleged act of bankruptcy, is conclusive upon the assignee and creditors, so as to dispense with proof of the debt of the petitioning creditor upon the distribution of the estate. It is conclusive so far as necessary to uphold the adjudication of bankruptcy, but no further. It may still be ques-

tioned, in part or in whole, upon the proof subsequently required and taken, so that it might consistently happen that a claim which has been found to exist, for the purpose of adjudging bankruptcy against the defendant, might afterwards be held not to exist for the purpose of participating in the distribution of the estate. The assignee and the creditors can not be bound as to their own interests by the acts or default of the bankrupt, resulting in a judgment to which they were not and could not be parties, except so far as that judgment determines the *status* of the bankrupt."

<sup>1</sup> B. A. 1898, Sec. 57*d*; *Whitney v. Dresser*, 200 U. S. 532, 50 L. Ed. 584, 15 Am. B. R. 326, affirming *In re Dresser* (C. C. A. 2d Cir.) 135 Fed. Rep. 495, 68 C. C. A. 207, 13 Am. B. R. 757; *Baumhauer v. Austin* (C. C. A. 5th Cir.), 186 Fed. Rep. 206, 108 C. C. A. 306, 26 Am. B. R. 385; *In re Sumner*, 101 Fed. Rep. 244, 4 Am. B. R. 123;



which no objection is made and no cause appears for postponing the allowance, is regularly allowed when it is filed with the referee. He should indorse upon the claim "filed and allowed" together with the date and hour of filing.<sup>2</sup>

If the proof of claim is defective the referee should not allow it. He may permit the proof to be filed with leave to amend.

Where an objection to the allowance of a claim is put in by a party in interest, the referee should hear and determine the issue upon evidence introduced by both parties.<sup>3</sup> The allowance or disallowance of a claim is a judicial act on the part of the referee. Great weight is given to the findings of the referee on a question of fact, but it is not conclusive on the judge on a petition for review.<sup>4</sup>

A debt must be provable under section 63 of the act to be allowed. A provable debt may be the subject of a valid objection which will bar the claim in whole or reduce it in amount. Familiar examples of such defenses are the statute of limitations,<sup>5</sup> the receipt of a preference by the claimant,<sup>6</sup> fraud or illegality,<sup>7</sup> usury,<sup>8</sup> and there are many defenses effecting the validity and amount of claims.

The defense that a foreign corporation has failed to comply with the statutory requirements of the state law before doing

*In re Shaw*, 109 Fed. Rep. 780, 6 Am. B. R. 499; *In re Castle Braid Co.*, 145 Fed. Rep. 224, 17 Am. B. R. 143; *In re Carter*, 138 Fed. Rep. 846, 15 Am. B. R. 126; *In re Cannon*, 133 Fed. Rep. 837, 4 Am. B. R. 114; *In re Wilde's Sons*, 133 Fed. Rep. 562, 13 Am. B. R. 217.

<sup>2</sup> Gen. Ord. No. 2.

<sup>3</sup> See Sec. 347, *ante*.

<sup>4</sup> See Sec. 94, *ante*; *Baumhauer v. Austin* (C. C. A. 5th Cir.), 186 Fed. Rep. 260, 108 C. C. A. 306, 26 Am. B. R. 385; *Ohio Valley Bank v. Mack* (C. C. A. 6th Cir.), 163 Fed. Rep. 155, 89 C. C. A. 605, 20 Am. B. R. 40; *In re Hatzen*, 161 Fed. Rep. 895, 20 Am. B. R. 470; *In re*

*Douglass & Sons Co.*, 114 Fed. Rep. 772, 8 Am. B. R. 113.

<sup>5</sup> See Sec. 327, *ante*.

<sup>6</sup> See Sec. 342, *ante*.

<sup>7</sup> *In re Friedman*, 164 Fed. Rep. 131, 21 Am. B. R. 213; *Pratt v. Columbia Bank*, 157 Fed. Rep. 137, 18 Am. B. R. 406; *In re Montgomery*, 185 Fed. Rep. 955, 25 Am. B. R. 431; *In re Hill*, 186 Fed. Rep. 214, 26 Am. B. R. 133.

<sup>8</sup> *In re Stern* (C. C. A. 8th Cir.), 144 Fed. Rep. 956, 76 C. C. A. 10, 16 Am. B. R. 510; *In re Robinson*, 136 Fed. Rep. 430, 14 Am. B. R. 626; *In re Wilde's Sons Co.*, 133 Fed. Rep. 562, 13 Am. B. R. 217.

business within the state has been held a bar to a claim by it.<sup>9</sup> The defense of *ultra vires* is no bar to a debt valid under the state law, but is a bar if it is invalid under the state law.<sup>20</sup>

Claims of relatives and stockholders of the bankrupt may be allowed, but that fact is a circumstance which justifies a more rigid scrutiny than would be the case if no such relation existed.<sup>11</sup>

Where the referee is in doubt about a claim it has been held that in proper cases a provisional allowance or disallowance may be made for the purpose of determining the creditor's right to vote at a creditors' meeting.<sup>18</sup>

At the close of the first creditors' meeting the referee should file in his record a list of creditors who have proved their debts at the first meeting, together with their residences and the amount of each creditor's debt.<sup>14</sup> A similar list is subsequently made upon which to base dividends.<sup>15</sup>

<sup>9</sup> *In re Montello Brick Wks.*, 174 Fed. Rep. 498, 23 Am. B. R. 375; *Colonial Trust Co. v. Montello Brick Wks.* (C. C. A. 3d Cir.), 172 Fed. Rep. 310, 97 C. C. A. 144, 23 Am. B. R. 380, affirming 163 Fed. Rep. 621, 20 Am. B. R. 855.

<sup>10</sup> *Wallerstein v. Ervin* (C. C. A. 3d Cir.), 112 Fed. Rep. 124, 50 C. C. A. 129, 7 Am. B. R. 256; *In re Waterloo Organ Co.* (C. C. A. 2d Cir.), 134 Fed. Rep. 341, 67 C. C. A. 255, 13 Am. B. R. 466; *In re Waterloo Organ Co.* (C. C. A. 2d Cir.), 134 Fed. Rep. 345, 67 C. C. A. 237, 13 Am. B. R. 477; *In re New York Car Wheel Co.*, 141 Fed. Rep. 430, 15 Am. B. R. 571; *In re Akron Twine & Cordage Co.* (Ref.), 11 Am. B. R. 321; *American Wood Working Mach. Co. v. Norment* (C. C. A. 4th Cir.), 157 Fed. Rep. 801, 85 C. C. A. 165, 19 Am. B. R. 679; *In re Roanoke Furnace Co.*, 166 Fed. Rep. 944, 21 Am. B. R. 597; *Mapes v. German Bank* (C. C. A.

8th Cir.), 176 Fed. Rep. 89, 23 Am. B. R. 713.

<sup>11</sup> *Ohio Valley Bank v. Mack* (C. C. A. 6th Cir.), 163 Fed. Rep. 155, 89 C. C. A. 605, 20 Am. B. R. 40; *In re Macauley*, 158 Fed. Rep. 322, 18 Am. B. R. 459; *In re Bennett Shoe Co.*, 162 Fed. Rep. 691, 20 Am. B. R. 704; *In re Girvin*, 160 Fed. Rep. 197, 20 Am. B. R. 490; *In re Suckle*, 176 Fed. Rep. 828, 23 Am. B. R. 861; *In re Rider*, 96 Fed. Rep. 811, 3 Am. B. R. 192; *In re Wooten*, 118 Fed. Rep. 670, 9 Am. B. R. 247.

<sup>18</sup> *In re Milne, Turnbull & Co.*, 159 Fed. Rep. 280, 20 Am. B. R. 245; *In re Malino*, 118 Fed. Rep. 368, 8 Am. B. R. 205.

But see *In re Columbia Iron Works*, 142 Fed. Rep. 234, 242, 14 Am. B. R. 526.

<sup>14</sup> Official Form No. 19, see Form No. 38, *post*.

<sup>15</sup> Official Form No. 40, see Form No. 98, *post*.

Where a claim has been disallowed by a referee on claimant's proof and on petition to review, the judge reverses his ruling, the matter should be remanded to enable the trustee to produce proof tending to controvert the claim and not direct the allowance of the claim.<sup>16</sup> If the trustee had put in his proof before the referee, the judge may direct the allowance of the claim.

### § 349. Re-examination of claims.

Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.<sup>1</sup>

When the trustee or any creditor shall desire the re-examination of any claim allowed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such examination.<sup>2</sup> Where a trustee has been appointed he should file the petition for re-examination of a creditor's claim and not another creditor.<sup>3</sup> If the trustee refuses to move for the reconsideration of a claim which has been allowed, when he ought to do so, he may be compelled to act or to permit objecting creditors to act in his name.<sup>4</sup> Where no trustee has been appointed the bankrupt may move for a re-examination and expunction of a claim proved and allowed against his estate.<sup>5</sup>

<sup>16</sup> *In re* Livingston Co. (C. C. A. 2d Cir.), 144 Fed. Rep. 971, 75 C. C. A. 282, 16 Am. B. R. 385.

<sup>1</sup> B. A. 1898, Sec. 57k.

<sup>2</sup> Gen. Ord. 21, par. 6. *In re* Russell, 105 Fed. Rep. 501, 5 Am. B. R. 566.

<sup>3</sup> *In re* Lewensohn (C. C. A. 2d Cir.), 121 Fed. Rep. 538, 57 C. C. A. 600, 9 Am. B. R. 368; *In re* Sully (C. C. A. 2d Cir.), 152 Fed. Rep. 619, 81 C. C. A. 609, 18 Am. B. R. 123.

<sup>4</sup> *In re* Stern (C. C. A. 8th Cir.), 144 Fed. Rep. 956, 76 C. C. A. 10, 16 Am. B. R. 510; *Chatfield v. O'Dwyer*, 4 Am. B. R. 313, 101 Fed. Rep. 797; *In re* Lewensohn (C. C. A. 2d Cir.), 9 Am. B. R. 368, 121 Fed. Rep. 538, 57 C. C. A. 600; *In re* Baird (D. C.), 7 Am. B. R. 448, 112 Fed. 960; *In re* Ferrer (Porto Rico), 22 Am. B. R. 785.

<sup>5</sup> *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72.

The referee thereupon makes an order fixing a time for hearing the petition, of which due notice must be given by mail addressed to the creditor.<sup>6</sup> If the creditor is unable to attend at that time he should take steps to procure a postponement. Where he fails to appear the claim may be expunged or diminished by default.<sup>7</sup> In case it shall be made to appear that any creditor whose debt is contested can not personally attend to be examined in the district where the proceedings are pending without hardship to him, owing to the distance of his residence, or other similar reason, the court will provide by order for the taking of his examination before a referee of the district in which he resides.<sup>8</sup>

A trustee has been held to be barred by laches to petition for a re-examination of a claim once allowed.<sup>9</sup>

The referee may, upon application of the trustee or any creditor, require any designated person who is a competent witness under the laws of the state in which the proceedings are pending to appear before him to be examined.<sup>10</sup> But no person shall be required to attend as a witness before a referee at a place outside of the state of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.<sup>11</sup> The creditor is not entitled to witness fees for attendance.<sup>12</sup> Witnesses are

<sup>6</sup> Gen. Ord. 21, par. 6. *In re Stoeve*, 105 Fed. Rep. 355, 5 Am. B. R. 250.

<sup>7</sup> *In re Lount*, No. 8543, Fed. Cas., 11 N. B. R. 315.

*In re Docker-Foster Co.*, 123 Fed. Rep. 190, 10 Am. B. R. 584, the court said: "The petition is not before me and I am, therefore, unable to say whether its averments on the subject of insolvency are sufficiently precise and definite to be taken as true, or whether they require proof to be offered by the petitioner. This matter can be determined by

the referee and his ruling reviewed, if necessary."

<sup>8</sup> *In re Kyler*, No. 7956, Fed. Cas., 2 Ben. 414; *In re Carley*, 106 Fed. Rep. 862, 5 Am. B. R. 554.

<sup>9</sup> *In re Hinckel Brew. Co.*, 123 Fed. Rep. 942, 10 Am. B. R. 484; *In re Hamilton Furniture Co.*, 116 Fed. Rep. 115, 8 Am. B. R. 588.

<sup>10</sup> B. A. 1898, Sec. 21 and Sec. 41a.

<sup>11</sup> B. A. 1898, Sec. 41a. As to who must advance such fees, see Gen. Ord. 10.

<sup>12</sup> *In re Paddock*, No. 10658 Fed. Cas., 6 N. B. R. 396.

summoned by a subpoena issued out of court under the seal thereof and tested by the clerk.<sup>13</sup> Blanks, with the signature of the clerk and seal of the court, may be furnished to referees.<sup>13</sup> The subpoena may be served upon a witness living without the district, but within one hundred miles of place of testifying.<sup>14</sup> A person who disobeys the subpoena may be punished for contempt.<sup>15</sup>

At the time appointed the hearing is had for the purpose of examining the creditor and any witness that may be called by either party.<sup>16</sup> The testimony before a referee is usually taken orally. The examination of witnesses may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law.<sup>17</sup> A witness is not entitled to be attended or represented by counsel during his examination.<sup>18</sup>

The referee is required, upon application of any party in interest, to preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance.<sup>19</sup>

The evidence taken before a referee is usually taken down in writing by him or under his direction in the form of narrative, unless he determines the examination shall be taken by question and answer.<sup>20</sup> Upon the application of the trustee the referee may authorize the employment of a stenographer at the expense of the estate at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.<sup>21</sup> When a deposition is completed it should be read over to the

<sup>13</sup> Gen. Ord. 3. Official Form No. 30, see Form No. 49, *post*.

<sup>14</sup> R. S. Sec. 876; B. A. 1898, Sec. 41a; *In re* Woodward, No. 18000, Fed. Cas., 8 Ben. 112.

<sup>15</sup> B. A. 1898, Sec. 41 and Sec. 2, clause 16. See Contempt, Chap. XXXIV.

<sup>16</sup> Gen. Ord. 21, par. 6.

<sup>17</sup> Gen. Ord. 22.

<sup>18</sup> *In re* Comstock, No. 3080, Fed. Cas., 3 Saw. 517.

<sup>19</sup> B. A. 1898, Sec. 39 clause 9.

<sup>20</sup> Gen. Ord. 22.

<sup>21</sup> B. A. 1898, Sec. 38, clause 5.

witness and signed by him in the presence of the referee.<sup>22</sup> The referee must note upon the deposition any question objected to, with his decision thereon; and the court may deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.<sup>23</sup>

Depositions may be taken when witnesses are beyond the reach of process. The right to take depositions is determined and enjoyed according to the United States laws relating to the taking of depositions, except as otherwise provided by the statute. Notice of taking depositions must be filed with the referee and also served upon the claimant.<sup>24</sup>

Where a creditor appears he need only offer himself for examination, for the burden of proof is upon the trustee or the other creditors who are contesting his proof.<sup>25</sup> The claimant is entitled to call witnesses and produce counter proofs in support of his claim.

Upon the consideration of the evidence the referee makes his order. The claim may be reallocated or rejected in whole or in part, and the referee may order the claim to stand allowed or to be expunged or diminished accordingly.<sup>26</sup>

It has been held that the provision relating to the examination of claims does not apply to claims for expenses of administration, such as charges and expenses of a receiver.<sup>27</sup> The burden of proof is upon the creditor asking the re-examination to establish the facts which he alleges.<sup>28</sup> An objection to a petition for re-examination on the ground that it lacks par-

<sup>22</sup> Gen. Ord. 22.

<sup>23</sup> B. A. 1898, Sec. 21b; R. S. Secs. 863 to 867; *Ex parte* Fisk, 113 U. S. 713, 28 L. Ed. 1117.

<sup>24</sup> B. A. 1898, Sec. 21c.

As to right of referee to limit time for taking deposition, see *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541.

<sup>25</sup> *In re* Robinson, No. 11938 Fed. Cas., 8 Ben. 406; *In re* Lount, No. 8543, Fed. Cas., 11 N. B. R.

315; *In re* Howard, 100 Fed. Rep. 630, 4 Am. B. R. 69.

<sup>26</sup> B. A. 1898, Sec. 57k; Gen. Ord. 21, par. 6. Official Form Nos. 38 and 39, see Forms Nos. 70 and 71, *post*.

<sup>27</sup> *In re* Reliance Storage and Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49.

<sup>28</sup> *In re* Howard, 100 Fed. Rep. 630, 4 Am. B. R. 69.

ticularity should be raised by a motion to make more definite and certain.<sup>29</sup> An inequitable claim has been expunged.<sup>30</sup>

Where the creditor by collusion with the bankrupt has fraudulently enlarged his claim, both the true and fictitious claims should be disallowed because fraud vitiates the whole debt.<sup>31</sup> A claim which has been purchased with the bankrupt's money will be expunged,<sup>32</sup> but a friend of the bankrupt may purchase with his own money in good faith all the claims against the bankrupt with the intention of putting an end to bankruptcy proceedings. If he fails in such attempt he may prove the debt so purchased and assigned to him.<sup>33</sup> The claims of creditors who have received preferences should be disallowed where such creditors have not surrendered their preferences.<sup>34</sup> Where a secured creditor's debt is expunged he does not surrender his security.<sup>35</sup>

Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.<sup>36</sup> The court may diminish or expunge a claim, unless the creditor pay back to the trustee the value of property which it has converted without right.<sup>37</sup>

<sup>29</sup> *In re* Ankeny, 100 Fed. Rep. 614, 4 Am. B. R. 72, 2 N. B. N. 148.

<sup>30</sup> *In re* Knox, 98 Fed. Rep. 585, 3 Am. B. R. 371; see also *In re* Flick, 105 Fed. Rep. 503, 5 Am. B. R. 465.

<sup>31</sup> *In re* Elder, No. 4326, Fed. Cas., 1 Saw. 73; *Marrett v. Atterbury*, No. 9102, Fed. Cas., 3 Dill. 444; *In re* State Ins. Co., 16 Fed. Rep. 756; *In re* Stephens, No. 13365, Fed. Cas., 3 Biss. 187.

<sup>32</sup> *In re* Lathrop, No. 8103, Fed. Cas., 3 Ben. 490.

<sup>33</sup> *In re* Pease, No. 10880, Fed. Cas., 6 N. B. R. 173; *In re* Stra-

chan, No. 13519, Fed. Cas., s. c. 3 Biss. 181.

<sup>34</sup> B. A. 1898, Sec. 57g; *Pirie v. Chicago Title and Trust Co.*, 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; *In re* Busby, 124 Fed. Rep. 469, 16 Am. B. R. 650; *McKey v. Lee* (C. C. A. 7th Cir.), 105 Fed. Rep. 923, 5 Am. B. R. 267.

<sup>35</sup> *Dallas v. Flues*, No. 3544, Fed. Cas., 19 Pitts. Leg. J. 173.

<sup>36</sup> B. A. 1898, Sec. 57l.

<sup>37</sup> *In re* Paterson Co. (C. C. A. 8th Cir.), 186 Fed. Rep. 629, 108 C. C. A. 493, 27 Am. B. R. —, the court said: "The order assailed is limited to the diminishing or ex-

**§ 350. How to review the final allowance or rejection of a claim.**

If the trustee or the creditor is dissatisfied with the ruling of the referee, he should take proper steps to have it reviewed by the judge.

Any creditor whose claim is rejected in whole or in part, or a trustee who is dissatisfied with the allowance of a claim, may file with the referee a petition that the order may be reviewed by the judge.<sup>1</sup> The petition should be entitled in the cause and set forth the error complained of.<sup>1</sup> It is the duty of the referee forthwith to certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.<sup>2</sup> When completed the certificate is signed by the referee and transmitted to the court.

If the judge is not satisfied with the evidence certified by the referee, he may allow further evidence to be taken before him or refer the cause to the referee for further proofs. He may hear arguments of counsel upon the question certified. The practice is for him to give his opinion upon the point and direct an order or judgment to be entered upon the journal of the court. If the question is certified improperly the court may decline to give an opinion.<sup>3</sup>

The judgment of the court allowing or rejecting a debt or claim of five hundred dollars or over, may be reviewed in an appellate court upon an appeal taken as in equity cases.<sup>4</sup> Such appeal must be taken within ten days after the judgment has been rendered.<sup>4</sup>

punging of the claim unless the moneys due the estate on account of the seizure of the vehicles by the Paterson Company is paid. That order is justified by the bankruptcy law and by the facts of the case, and the petition to revise must be dismissed."

<sup>1</sup> Gen. Ord. 27.

As to the practice on petition to

review an order or ruling of a referee, see Sec. 93, *et seq.*, *ante*.

<sup>2</sup> Gen. Ord. 27. Official Form No. 56, see Form No. 136, *post*.

<sup>3</sup> *In re Wright*, No. 18069, Fed. Cas., 1 N. B. R. 393; *In re Sturgeon*, No. 13564, Fed. Cas., 1 N. B. R. 498.

<sup>4</sup> B. A. 1898, Sec. 25a. See Sec. 825, *post*.



## CHAPTER XXI.

## TRUSTEES.

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**§ 351. Appointment by creditors.**

The office of trustee is created by statute.<sup>1</sup> Trustees are officers of the court of bankruptcy.<sup>2</sup> A trustee under the present act corresponds to the assignee under the act of 1867.

One trustee or three trustees of the bankrupt estate may be appointed by the creditors whose claims have been allowed at the time the election is held.<sup>3</sup> The statute does not authorize two trustees for an estate.<sup>4</sup>

A trustee elected for a firm is also the trustee of the individual partners and there is no authority for the election of separate trustees for the partners.<sup>5</sup>

Trustees are regularly appointed at the first meeting of creditors after an adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or

<sup>1</sup> B. A. 1898, Sec. 33.

<sup>2</sup> McLean v. Mayo, 113 Fed. Rep. 106, 7 Am. B. R. 115; United States v. Dewey, 39 Fed. Rep. 251; *In re* Howard, 130 Fed. Rep. 1004, 12 Am. B. R. 462.

<sup>3</sup> B. A. 1898, Sec. 44; *In re* Eagles, 99 Fed. Rep. 695, 3 Am. B. R. 733; *In re* Milne, Turnbull & Co.,

159 Fed. Rep. 280, 20 Am. B. R. 248; *In re* Malino, 118 Fed. Rep. 368, 8 Am. B. R. 205; *In re* Evening Standard Pub. Co., 164 Fed. Rep. 517, 21 Am. B. R. 156.

<sup>4</sup> *In re* Wm. F. Fisher Co., 135 Fed. Rep. 223, 14 Am. B. R. 366.

<sup>5</sup> *In re* Coe, 154 Fed. Rep. 162, 18 Am. B. R. 715. See Sec. 267, *post*.

after a composition has been set aside, or a discharge revoked, or if there is a vacancy in the office of trustee.<sup>6</sup> The manner of conducting the election of a trustee in any case is the same as at the first meeting of the creditors which is considered in another place.<sup>7</sup>

The appointment by the creditors is subject to be approved or disapproved by the referee or by the judge.<sup>8</sup> The election of a trustee, however, ought not to be lightly set aside. He should be confirmed unless there is good reason to believe that he is disqualified, or that the election was controlled in the interest of the bankrupt, or by some influence opposed to the interests of the creditors, so as to imperil the fair and efficient administration of the estate.<sup>9</sup> The choice of the creditors should not be disapproved on complaint of the bankrupt except in extreme cases.<sup>10</sup>

The referee may disapprove an election of a trustee when improper means are employed in soliciting votes, or where the voters were not entitled to vote,<sup>11</sup> or where the trustee was

<sup>6</sup> B. A. 1898, Sec. 44.

<sup>7</sup> See Sec. 285, *ante*.

<sup>8</sup> Gen. Ord. 13. *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155, affirming 104 Fed. Rep. 292, 4 Am. B. R. 782; *In re* Van De Mark, 175 Fed. Rep. 287, 23 Am. B. R. 760; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re* Rekerdres, 108 Fed. Rep. 206, 5 Am. B. R. 818.

Compare R. S. Sec. 5034.

<sup>9</sup> *In re* Syracuse Paper & Pulp Co., 164 Fed. Rep. 275, 21 Am. B. R. 174; *In re* Blue Ridge Packing Co., 125 Fed. Rep. 620, 11 Am. B. R. 36; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re* Mangan, 133 Fed. Rep. 1000, 13 Am. B. R. 303; *In re* Mackellar, 116 Fed. Rep. 547, 8 Am. B. R. 669; *In re* Eastlack, 145 Fed. Rep. 68, 16 Am. B. R. 529.

<sup>10</sup> *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re* Mangan, 133 Fed. Rep. 1000, 13 Am. B. R. 303; *In re* McKellar, 116 Fed. Rep. 547, 8 Am. B. R. 669; *In re* Lloyd, 148 Fed. Rep. 92, 17 Am. B. R. 96.

<sup>11</sup> *In re* Day & Co. (C. C. A. 2d Cir.), 178 Fed. Rep. 545, 101 C. C. A. 461, 24 Am. B. R. 252, affirming 174 Fed. Rep. 164, 23 Am. B. R. 56; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re* Henschel, 109 Fed. Rep. 861, 6 Am. B. R. 305; *In re* Rekerdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* Dayville Woolen Co., 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Morton, 118 Fed. Rep. 908, 9 Am. B. R. 508; *In re* Eastlack, 145 Fed. Rep. 68, 16 Am. B. R. 529.

elected through the influence or in the interests of the bankrupt,<sup>12</sup> or where creditors entitled to vote are not permitted to do so,<sup>13</sup> or if the trustee elected is disqualified to act.

Where the referee refuses to confirm the trustee elected by the creditors, no trustee is appointed and a new election should be held.<sup>14</sup> It has been held that a referee has no power to set aside the election, but can merely refuse to confirm it and report his refusal to the judge who alone may remove the trustee elected.<sup>15</sup> The power of the referee to approve or disapprove of the selection of the trustee is authorized by General Order 13 and has been long recognized in practice. The power of the judge to remove under General Order 13 has reference to a trustee duly elected and confirmed.

The referee has no power to remove a trustee once elected and confirmed.<sup>16</sup> General Order 13 expressly provides for the removal of the trustee by the judge.

### § 352. Appointment by the court.

If the creditors fail to elect a trustee or trustees, the judge or referee should appoint.<sup>1</sup>

<sup>12</sup> Gen. Ord. 13. *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155; *In re* Henschel, 109 Fed. Rep. 861, 6 Am. B. R. 305; *In re* Rekerdres, 108 Fed. Rep. 206, 5 Am. B. R. 811; *In re* Dayville Woolen Co. 114 Fed. Rep. 674, 8 Am. B. R. 85; *In re* Morton, 118 Fed. Rep. 908, 9 Am. B. R. 508; *In re* Van De Mark, 175 Fed. Rep. 287, 23 Am. B. R. 760; *In re* Kaufman, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re* Hanson, 156 Fed. Rep. 717, 19 Am. B. R. 235.

But see *In re* Eastlack, 145 Fed. Rep. 68, 16 Am. B. R. 529; *In re* Syracuse Paper & Pulp Co., 164 Fed. Rep. 275, 21 Am. B. R. 174.

<sup>13</sup> *In re* Evening Standard Pub-

lishing Co., 164 Fed. Rep. 517, 21 Am. B. R. 156.

<sup>14</sup> *In re* Van De Mark, 175 Fed. Rep. 287, 23 Am. B. R. 760; *In re* Mackellar, 116 Fed. Rep. 547, 8 Am. B. R. 669; *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520.

<sup>15</sup> *In re* Hare, 119 Fed. Rep. 246, 9 Am. B. R. 520.

<sup>16</sup> Gen. Ord. 13.

<sup>1</sup> B. A. 1898, Sec. 44 and Sec. 1, clause 7; Official Form No. 23; see Form No. 42, *post*. *In re* Brooke, 100 Fed. Rep. 432, 4 Am. B. R. 40; *In re* Morris, 154 Fed. Rep. 211, 18 Am. B. R. 828; *In re* Kuffler, 97 Fed. Rep. 187, 3 Am. B. R. 162; *In re* Lewensohn, 98 Fed. Rep. 576, 3 Am. B. R. 299.

The judge or referee should exercise the power of appointment only after the creditors have had full opportunity to elect a trustee and have failed to do so.<sup>2</sup> The statute contemplates a selection of the trustee by the creditors if possible for them to make a choice. The referee should not act until it clearly appears that the creditors can not or will not elect a trustee.<sup>3</sup> Where there is a deadlock, not likely to be broken, the referee may make the appointment.<sup>4</sup>

Where the creditors elect two trustees instead of three, the referee should call another meeting of the creditors and not himself appoint the third trustee.<sup>5</sup> Where an estate has been reopened, the court should not appoint a trustee until the creditors have failed to do so.<sup>6</sup>

If the court acts without waiting for the creditors to act or fail to act, the appointment can not be collaterally attacked.<sup>7</sup>

A trustee should ordinarily be appointed, although no creditor appears to prove a debt, or although there are apparently no assets.<sup>8</sup> But if the schedule of a voluntary bankrupt dis-

In *Clark v. Pidcock* (C. C. A. 3d Cir.), 129 Fed. Rep. 745, 64 C. C. A. 273, 12 Am. B. R. 309, a trustee was appointed by the court more than a year after the first creditors' meeting.

<sup>2</sup> *In re Van De Mark*, 175 Fed. Rep. 287, 23 Am. B. R. 760; *In re Hare*, 119 Fed. Rep. 246, 9 Am. B. R. 520; *In re Mackellar*, 116 Fed. Rep. 547, 8 Am. B. R. 669; *In re Lewensohn*, 98 Fed. Rep. 576, 3 Am. B. R. 299; *In re Mangan*, 133 Fed. Rep. 1000, 13 Am. B. R. 303.

<sup>3</sup> *In re Nice & Schreiber*, 123 Fed. Rep. 987, 10 Am. B. R. 639; *In re Mackellar*, 116 Fed. Rep. 547, 8 Am. B. R. 669; *In re Kaufman*, 179 Fed. Rep. 552, 24 Am. B. R. 117; *In re Van De Mark*, 175 Fed. Rep. 287, 23 Am. B. R. 760; *In re Milne, Turnbull & Co.*, 159 Fed. Rep. 280, 20 Am. B. R. 248.

<sup>4</sup> *In re Morris*, 154 Fed. Rep. 211, 18 Am. B. R. 828; *In re Kenney*, 136 Fed. Rep. 451, 11 Am. B. R. 611; *In re Richards*, 103 Fed. Rep. 849, 4 Am. B. R. 631; *In re Kuffler*, 97 Fed. Rep. 187, 3 Am. B. R. 162.

<sup>5</sup> *In re Wm. F. Fisher Co.*, 135 Fed. Rep. 223, 14 Am. B. R. 366.

<sup>6</sup> *In re Newton* (C. C. A. 8th Cir.), 107 Fed. Rep. 429, 46 C. C. A. 399, 6 Am. B. R. 52.

See also *Fowler v. Jenks*, 90 Minn. 74, 11 Am. B. R. 255.

<sup>7</sup> *Scofield v. United States* (C. C. A. 6th Cir.), 174 Fed. Rep. 1, 98 C. C. A. 39, 23 Am. B. R. 259; *Fowler v. Jenks*, 90 Minn. 74, 11 Am. B. R. 255.

<sup>8</sup> *In re Cogswell*, No. 2959, Fed. Cas., 1 Ben. 388; *Anonymous*, No. 457, Fed. Cas., 1 N. B. R. 122.

closes no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable.<sup>9</sup> If any assets are disclosed a trustee should be appointed by the court, even though no creditors appeared at the first meeting.<sup>10</sup>

The court can not appoint an official trustee or any general trustee to act in classes of cases.<sup>11</sup>

### § 353. Who may be a trustee.

Any individual who is competent to perform the duties and resides or has an office in the judicial district, or a corporation authorized by its charter or by law to act in such capacity, and having an office in the judicial district, may be a trustee.<sup>1</sup>

An alien may be appointed trustee of a bankrupt estate.<sup>2</sup> A general creditor of a bankrupt or his attorney is competent.<sup>3</sup> A receiver or an assignee for the benefit of creditors by appointment in the state court is frequently appointed trustees in bankruptcy of the same estate.<sup>4</sup>

<sup>9</sup> Gen. Ord. 15. *In re Levy*, 101 Fed. Rep. 247, 4 Am. B. R. 108.

<sup>10</sup> *In re Smith*, 93 Fed. Rep. 791, 2 Am. B. R. 190, property was subsequently discovered, not having been scheduled. It was claimed to be exempt. In *Clark v. Pidcock* (C. C. A. 3d Cir.), 129 Fed. Rep. 745, 64 C. C. A. 273, 12 Am. B. R. 309.

As to the difficulties possible when no trustee is appointed, see *In re Toothacker*, 128 Fed. Rep. 187, 12 Am. B. R. 100, 101; *Rand v. Iowa Cent. Ry. Co.*, 96 App. Div. (N. Y.), 413, 12 Am. B. R. 164.

<sup>11</sup> Gen. Ord. 14.

<sup>1</sup> B. A. 1898, Sec. 45.

<sup>2</sup> *In re Coe*, 154 Fed. Rep. 162, 18 Am. B. R. 715.

<sup>3</sup> *In re Barrett*, No. 1043, Fed. Cas., 2 Hughes, 444; *In re Clairmont*, No. 2781, Fed. Cas., 1 N. B. R. 276; *In re Lewensohn*, 98 Fed. Rep. 576, 3 Am. B. R. 299, 2 N. B. R. 315; *In re Lazoris*, 120 Fed. Rep. 716, 10 Am. B. R. 31; *In re Blue Ridge Packing Co.*, 125 Fed. Rep. 619, 11 Am. B. R. 36.

<sup>4</sup> *In re Mangan*, 133 Fed. Rep. 1000, 13 Am. B. R. 303; *In re Byerly*, 128 Fed. Rep. 637, 12 Am. B. R. 186; *In re Blue Ridge Packing Co.*, 125 Fed. Rep. 619, 11 Am. B. R. 36.

A relative, attorney, stockholder, director, or confidential clerk of the bankrupt is not eligible to serve as trustee.<sup>5</sup> The reason is that it may become the duty of the trustee to actively antagonize the bankrupt by efforts to discover secreted assets, or to set aside conveyances as fraudulent, or to recover preferences. In order that there may be no suspicion of partiality or sense of obligation on the part of the trustee toward the bankrupt, the courts have uniformly disapproved the selection of a trustee whose appointment was obtained through the active influence of the bankrupt.<sup>6</sup>

A preferred creditor should not act as trustee, because he may be called upon to contest his own claim.<sup>7</sup> A bankrupt who has not been discharged should not be appointed trustee of another bankrupt estate.<sup>8</sup>

The trustee must have an office or residence within the judicial district.<sup>9</sup> If a nonresident trustee has an office in the district it is sufficient.<sup>10</sup>

<sup>5</sup> *In re* Gordon Supply Co., 129 Fed. Rep. 622, 12 Am. B. R. 94; *In re* Powell, No. 11354, Fed. Cas., 2 N. B. R. 45; *In re* Zinn, No. 18216, Fed. Cas., 4 N. B. R. 370; *In re* Whetmore, No. 17466, Fed. Cas., 16 N. B. R. 514; *In re* Mallory, No. 8990, Fed. Cas., 4 N. B. R. 153.

<sup>6</sup> *In re* Hanson, 156 Fed. Rep. 717, 19 Am. B. R. 235; *In re* Henschel, 109 Fed. Rep. 861, 6 Am. B. R. 305; *In re* Van De Mark, 175 Fed. Rep. 287, 23 Am. B. R. 760; *In re* McGill (C. C. A. 6th Cir.), 106 Fed. Rep. 57, 45 C. C. A. 218, 5 Am. B. R. 155.

<sup>7</sup> *In re* Anson Mercantile Co., 185 Fed. Rep. 993, 26 Am. B. R. —, the court said: "When it is revealed, as here, that the person appointed receives his appointment

in part at least as a result of the active efforts of his corporate employer, in which he is a shareholder, and that his employer is a creditor, a creditor holding security for a part of its debt, and when it is further revealed that his employer is charged with having received preferences, in my opinion we may not only gravely question, but must negative, the providence and propriety of such an appointment."

Under the act of 1867, a preferred creditor was not eligible to be an assignee. R. S. Sec. 5035.

<sup>8</sup> *In re* Smith (Ref.), 1 Am. B. R. 37.

<sup>9</sup> B. A. 1898, Sec. 45.

<sup>10</sup> *In re* Seider, 163 Fed. Rep. 139, 20 Am. B. R. 709; *In re* Jacobs & Roth, 154 Fed. Rep. 988, 18 Am. B. R. 723.

**§ 354. Notice of election.**

It is the duty of the referee immediately upon the appointment and approval of the trustee to notify him in person or by mail of his appointment.<sup>1</sup>

The notice must require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.<sup>2</sup> When the trustee accepts the trust he must qualify by giving a bond to the United States within ten days after his appointment, or within such further time, not to exceed five days, as the court may permit.<sup>3</sup>

A person elected a trustee can not be compelled to accept the office.<sup>4</sup> If he declines to accept the trust a vacancy occurs, which must be filled at the next meeting of the creditors.<sup>4</sup>

**§ 355. Bonds of trustees.**

Before entering upon the performance of his duty a trustee within ten days after his appointment, or within such further time, not to exceed five days, as the court may permit, shall enter into bond to the United States, conditioned for the faithful performance of his duties.<sup>1</sup>

The amount of the bond is fixed by the creditors.<sup>2</sup> If they fail to fix the amount of the bond the court shall do so.<sup>3</sup> Joint trustees may give joint or several bonds.<sup>4</sup> A separate bond must be given in each case.<sup>5</sup> If the trustee fails to give bond within the time prescribed, he is deemed to have declined the appointment, and there is a vacancy in his office.<sup>6</sup>

There must be at least two sureties upon each bond, who shall qualify in a sum equal at least to the amount of the bond.<sup>7</sup>

<sup>1</sup> Gen. Ord. 16.

<sup>2</sup> B. A. 1898, Sec. 50*b*; Official Form No. 25, see Form No. 44, *post*.

<sup>3</sup> *In re* Levy, 101 Fed. Rep. 247, 4 Am. B. R. 108.

<sup>4</sup> B. A. 1898, Sec. 44.

<sup>5</sup> B. A. 1898, Sec. 50*b*.

<sup>2</sup> B. A. 1898, Sec. 50*c*.

<sup>3</sup> B. A. 1898, Sec. 50*c*.

<sup>4</sup> B. A. 1898, Sec. 50*j*.

<sup>5</sup> *In re* McFadden, No. 8785, Fed. Cas., 3 N. B. R. 104.

<sup>6</sup> B. A. 1898, Sec. 50*k*.

<sup>7</sup> B. A. 1898, Sec. 50*e, f*.

The court must require evidence as to the actual value of the property of sureties.<sup>8</sup> Corporations organized for the purpose of becoming sureties on bonds are authorized by law to do so, and may be accepted as sureties.<sup>9</sup> The court, judge or referee must require evidence as to the actual value of the property of the sureties.<sup>10</sup> The sureties are approved by the judge or referee.<sup>10</sup>

Such bonds should be filed of record in the office of the clerk of the court, and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.<sup>11</sup> Such suits must be brought within two years after the estate has been closed.<sup>12</sup> A pending suit is not abated by the death or removal of a trustee.<sup>13</sup>

A trustee's bond does not become void on a first recovery, but continues in force for two years after the estate is closed, unless the amount thereof is previously exhausted. The surety's liability covers the immediate result of embezzlement, but not the premium on the new bond of a trustee.<sup>13\*</sup>

Trustees are not liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.<sup>14</sup>

### **§ 356. The trustee represents the creditors and the bankrupt.**

A trustee in bankruptcy is an officer of the court.<sup>1</sup> He is chosen by vote of the creditors.<sup>2</sup> He stands to creditors in a fiduciary relation. He holds the estate in trust primarily

<sup>8</sup> B. A. 1898, Sec. 50*d*.

<sup>9</sup> B. A. 1898, Sec. 50*g*; *In re* Max Kalter (Ref.), 2 Am. B. R. 590.

<sup>10</sup> B. A. 1898, Sec. 50*b* and *d*, Official Form No. 26, see Form No. 45, *post*.

<sup>11</sup> B. A. 1898, Sec. 50*h*; *Scofield v. U. S.* (C. C. A. 6th Cir.), 174 Fed. Rep. 1, 98 C. C. A. 39, 23 Am. B. R. 259.

<sup>12</sup> B. A. 1898, Sec. 50*m*.

<sup>13</sup> B. A. 1898, Sec. 46.

<sup>13\*</sup> *In re* Kajita, 13 Am. B. R. 19.

<sup>14</sup> B. A. 1898, Sec. 50*i*.

<sup>1</sup> B. A. 1898, Sec. 33; *In re* Wrisley (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 66 C. C. A. 450, 13 Am. B. R. 193; *In re* Howard, 130 Fed. Rep. 1004, 12 Am. B. R. 462; *McLean v. Mayo*, 113 Fed. Rep. 106, 7 Am. B. R. 115; *United States v. Dewey*, 39 Fed. Rep. 215.

<sup>2</sup> See Sec. 351, *ante*.



for creditors; secondarily, if there be a surplus, for the benefit of the bankrupt.<sup>3</sup>

A trustee in bankruptcy represents the general or unsecured creditors, and his duties relate generally to their interests.<sup>4</sup> He represents creditors of the bankrupt at the time the petition is filed and not prior creditors.<sup>5</sup> He represents all of the unsecured creditors and not any class or group of them. The court will not permit him to be governed by any creditor or group of creditors, but will direct him to report at a meeting of all the creditors and be governed by them.<sup>6</sup>

The trustee is not in any respect the agent or representative of the secured creditors, who have not proved their claims.<sup>7</sup> He has nothing to do with the disputes of the secured creditors among themselves, unless it becomes necessary for him to interfere in order to settle their rights in the general estate, or to determine whether there is an excess of property over what is required for the purposes of the security.<sup>8</sup>

He can not enforce contracts between creditors, except so far as they may directly or indirectly affect the fund he has got in his hands for distribution under the law.<sup>9</sup> Neither is it any part of his duty to protect the dower rights of the wife of the bankrupt against the consequences of her own acts before the bankruptcy or to inquire whether the bankrupt or his wife can claim homestead rights as against encumbrances whose title is superior to his own, or to sell exempt property to pay a creditor who has a lien on it.<sup>10</sup>

<sup>3</sup> *In re* Wrisley (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 66 C. C. A. 450, 13 Am. B. R. 193.

<sup>4</sup> *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668.

<sup>5</sup> *Batchelder & Lincoln Co. v. Whitmore* (C. C. A. 1st Cir.), 122 Fed. Rep. 355, 58 C. C. A. 517, 10 Am. B. R. 641; *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1108.

<sup>6</sup> *In re* Arnett, 112 Fed. Rep. 770, 7 Am. B. R. 522; *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14

Am. B. R. 526; *In re* Rusch, 105 Fed. Rep. 607, 5 Am. B. R. 565.

<sup>7</sup> *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668.

<sup>8</sup> *McHenry v. La Societe Francaise*, 95 U. S. 58, 24 L. Ed. 370; *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668.

<sup>9</sup> *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668.

<sup>10</sup> *Ingram v. Wilson* (C. C. A. 8th Cir.), 125 Fed. Rep. 913, 60 C. C. A. 618, 11 Am. B. R. 192; *In re*

A trustee represents the bankrupt, as well as his unsecured creditors, for the purpose of collecting assets.<sup>11</sup> In matters between creditors and the bankrupt it is his duty to care for the interest of the creditors and not that of the bankrupt. He may be called upon to secure property concealed by the bankrupt. He may oppose the discharge of the bankrupt if authorized to do so at the meeting of the creditors.<sup>12</sup> In case of a composition he should not aid the bankrupt.<sup>13</sup> It may be said generally that the trustee does not represent the bankrupt in respect to his personal rights but only to enforce the rights of the bankrupt for the benefit of the estate.

### § 357. Duties of trustees.

The trustee is an administrative officer of the court.<sup>1</sup> He does not act judicially.<sup>2</sup>

It is his duty, speaking generally, to take the property of the bankrupt, reduce it to money and distribute the proceeds among the creditors under the direction of the court.

Immediately upon entering his duties the trustee should prepare a complete inventory of all the property of the bankrupt that comes into his possession.<sup>3</sup> In practice the trustee

Little, 110 Fed. Rep. 621, 6 Am. B. R. 681; *In re Wells*, 105 Fed. Rep. 762, 5 Am. B. R. 308.

<sup>11</sup> See Sec. 358, *post*.

<sup>12</sup> B. A. 1898, Sec. 14b, as amended by the act of June 25, 1910, 37 Stat. at L. 838; *In re Levey*, 133 Fed. Rep. 572, 13 Am. B. R. 312, he was permitted to do so before the amendment.

<sup>13</sup> *In re Wrisley* (C. C. A. 7th Cir.), 133 Fed. Rep. 388, 66 C. C. A. 450, 13 Am. B. R. 193, the court, speaking of a composition, said: "In all matters between creditors and bankrupt he should stand indifferent. His sole care should be to make the most out of the estate, and that primarily in the interest

of the creditors. When he goes beyond that, and seeks to aid the bankrupt at the expense of the creditors, and by concealment or by false representations induces creditors to act contrary to their interest, he violates his duty, and should be removed from the trust to which he has been false."

<sup>1</sup> *McLean v. Mayo*, 113 Fed. Rep. 106, 7 Am. B. R. 115; *United States v. Dewey*, 39 Fed. Rep. 251; *In re Howard*, 130 Fed. Rep. 1004, 12 Am. B. R. 462.

<sup>2</sup> *In re Stern* (C. C. A. 8th Cir.), 144 Fed. Rep. 956, 76 C. C. A. 10, 16 Am. B. R. 510.

<sup>3</sup> Gen. Ord. 17.

usually files as his inventory the report of the appraisers appointed to appraise the real and personal property of the bankrupt.<sup>4</sup>

He must make a report to the court within twenty days after receiving the notice of his appointment of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report.<sup>5</sup> The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party.<sup>6</sup>

The trustee must, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing.<sup>7</sup>

In case the trustee neglects to file any report or statement which it is made his duty to file or make by the act or by any general order in bankruptcy within five days after the same shall be due, it is the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office.<sup>8</sup> The referee must cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk.<sup>8</sup>

He must also furnish such information concerning the estate of which he is trustee, and his administration, as may be requested by the parties in interest.<sup>9</sup> If he secretes or destroys

<sup>4</sup> B. A. 1898, Sec. 70*b*; Official Form No. 13, Form No. 37, *post*; *In re* Gordon Sup. & Mfg. Co., 133 Fed. Rep. 798, 13 Am B. R. 352.

<sup>5</sup> Gen. Ord. 17. Form of trustee's return, see Official Form No. 47, Form No. 91, *post*; *In re* Campbell, 124 Fed. Rep. 417, 10 Am. B.

R. 723; *In re* Rice, 164 Fed. Rep. 589, 21 Am. B. R. 202.

<sup>6</sup> Gen. Ord. 17.

<sup>7</sup> B. A. 1898, Sec. 47*c*, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>8</sup> Gen. Ord. 17.

<sup>9</sup> B. A. 1898, Sec. 47, clause 5, and Sec. 49.

any documents belonging to a bankrupt's estate which came into his charge as trustee, he is liable to imprisonment.<sup>10</sup>

The trustee may, under the direction of the court, submit to arbitration any controversies arising in the settlement of the estate.<sup>11</sup> He may also, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.<sup>12</sup>

As the representative of the estate, he is bound to exercise his judgment and to act for the best interests of all concerned, but subject to the supervising power of the referee and the district judge. The court will not ordinarily give the trustee direction as to whether he should employ an attorney. He must exercise his own discretion.<sup>13</sup> The trustee, and not the creditors, regularly selects his attorney,<sup>14</sup> but he will not be allowed to employ the same counsel that represents interests in conflict with other interests represented by the trustee.<sup>15</sup> A trustee is not required to litigate every question brought to his notice by a creditor, nor can he in every case require indemnity for costs from the creditor. He must act reasonably and in doubtful cases apply to the court, or the creditors for directions.<sup>16</sup>

The trustee must pay upon an order by the court all legal taxes due and owing by the bankrupt to the United States,

<sup>10</sup> B. A. 1898, Sec. 29a. He may be prosecuted in a circuit court or a court of bankruptcy; B. A. 1898, Sec. 23c, and Sec. 2, clause 4.

<sup>11</sup> B. A. 1898, Sec. 26a; Gen. Ord. 33.

<sup>12</sup> B. A. 1898, Sec. 27a; Gen. Ord. 33.

<sup>13</sup> *In re Abram*, 103 Fed. Rep. 272, 4 Am. B. R. 575; see also *McLean v. Mayo*, 113 Fed. Rep. 106, 7 Am. B. R. 115; *In re Baber*, 119 Fed. Rep. 520, 9 Am. B. R. 406.

<sup>14</sup> *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

But see *In re Little River Lumber Co.*, 101 Fed. Rep. 552, 3 Am. B. R. 682.

<sup>15</sup> *In re Rusch*, 105 Fed. Rep. 607, 5 Am. B. R. 565; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

<sup>16</sup> *In re Baird*, 112 Fed. Rep. 960, 7 Am. B. R. 448; *In re Stern* (C. C. A. 8th Cir.), 144 Fed. Rep. 956, 76 C. C. A. 10, 16 Am. B. R. 510; *In re Arnett*, 112 Fed. Rep. 770, 7 Am. B. R. 520; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

state, county, district or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officer for such payment he shall be credited with the amount thereof. In case any question arises as to the amount or the legality of such taxes, the same shall be heard and determined by the court.<sup>17</sup>

The trustee must pay dividends within ten days after they are declared by the referee.<sup>18</sup> But he is entitled to recover from the creditor the amount of a dividend received upon a claim which has been reconsidered and rejected. He can recover the whole dividend if the claim is rejected in whole, or the proportional part thereof if rejected only in part.<sup>19</sup> The trustee is required to pay into court all dividends which remain unclaimed for six months after the final dividend has been declared.<sup>20</sup>

When three trustees have been appointed, the concurrence of at least two of them will be necessary to the validity of any act concerning the administration of the estate.<sup>21</sup>

### § 358. Duty to collect and distribute assets.

It is the duty of the trustee to collect and reduce to money the property of the estate under the direction of the court, and close up the estate as expeditiously as may be.<sup>1</sup>

<sup>17</sup> B. A. 1898, Sec. 64a; *In re Tilden*, 91 Fed. Rep. 500, 1 Am. B. R. 300; *New Jersey v. Anderson*, 203 U. S. 483, 51 L. Ed. 284, 17 Am. B. R. 63.

<sup>18</sup> B. A. 1898, Sec. 47, clause 9.

<sup>19</sup> B. A. 1898, Sec. 57l.

<sup>20</sup> B. A. 1898, Sec. 66a.

<sup>21</sup> B. A. 1898, Sec. 47b.

*In re Wm. F. Fisher & Co.*, 135 Fed. Rep. 223, 14 Am. B. R. 366, it was held that where the creditors of a bankrupt appointed two trustees at their first meeting, who applied for a sale of the bankrupt's assets, pending which a third trustee was elected, who qualified, and joined the petition for sale, the

fact that the petition was presented by two trustees only in the first instance was no objection thereto, since, if title to the bankrupt's estate was not vested in the two trustees on their appointment and qualification it became vested in the three on the appointment and qualification of the third.

<sup>1</sup> B. A. 1898, Sec. 47a, clause 2.

*In re Reinboth* (C. C. A. 2d Cir.), 157 Fed. Rep. 672, 85 C. C. A. 340, 19 Am. B. R. 15, Judge Noyes, speaking for the circuit court of appeals, said. "Trustees in bankruptcy, like executors and administrators, are bound to use due dili-

The trustee represents the bankrupt and his unsecured creditors for this purpose.<sup>2</sup>

The trustee is vested by operation of law with the title to all of the property of the bankrupt, which is subject to distribution among his creditors.<sup>3</sup> This includes property transferred by the bankrupt in fraud of creditors and property which prior to the filing of the petition might have been levied upon and sold by judicial process against the bankrupt,<sup>4</sup> and property concealed or secreted by the bankrupt.<sup>5</sup> As to all property in the custody or coming into custody of the bankruptcy court he is vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and as to all property in the custody of the bankruptcy court he is vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.<sup>6</sup>

Whatever the bankrupt may do to make his property available for the general creditors the trustee may do. The trustee represents the bankrupt as regards any rights of action to recover assets, and under section 11 he may be "permitted to prosecute as trustee any suit commenced by the bankrupt

gence to get in the assets of the estate—to secure possession of the tangible property and collect the debts. If they fail in their duty, they may be charged in their accounts with the value of the assets thereby lost. If they take no steps to secure property or collect debts, of which they have knowledge, they are presumptively negligent."

<sup>2</sup> *In re Kessler* (C. C. A. 2d Cir.), 186 Fed. Rep. 127, 108 C. C. A. 239, 26 Am. B. R. —; *In re Price*, 92 Fed. Rep. 987, 989, 1 Am. B. R. 606; *Oliver v. Hilgers*, 88 Minn. 35, 11 Am. B. R. 178.

In *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523, Mr. Justice Hunt,

speaking of the act of 1867, said: "An assignee appointed under the bankrupt laws of the United States represents both the corporation and its creditors."

<sup>3</sup> B. A. 1898, Sec. 70.

<sup>4</sup> B. A. 1898, Sec. 70a; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761.

<sup>5</sup> *In re Baum* (C. C. A. 8th Cir.), 169 Fed. Rep. 410, 94 C. C. A. 632, 22 Am. B. R. 295.

<sup>6</sup> B. A. 1898, Sec. 47a, clause 2, as amended June 25, 1910, 37 Stat. at L. 838.

prior to the adjudication." Where the trustee represents the bankrupt he acquires no higher rights than the bankrupt had.<sup>7</sup>

The right of a trustee before the amendment of 1910,<sup>8</sup> to recover property transferred by the bankrupt in fraud of creditors, or to defend against invalid mortgages or other liens claimed to exist on the property of the bankrupt, was not limited to the right of the bankrupt to do so.<sup>9</sup> As representative of the estate it was his duty to make the most out of the estate in the interest of the general creditors. The trustee might institute a suit in a state or federal court having jurisdiction, or intervene in a pending suit, for the purpose of recovering such property, or to challenge the validity of a mortgage or other lien.<sup>10</sup> He was entitled to preserve a lien of one creditor, which was invalidated by the bankrupt act, for the benefit of the estate.<sup>11</sup> In such cases the trustee represents the general or unsecured creditors and their rights. The amendment of 1910<sup>12</sup> confers on the trustee greater rights and powers in this respect than he had before its enactment, especially to challenge secret liens, valid under the state law.

The trustee is authorized, upon a petition filed by himself or a creditor, to recover for the benefit of the estate any excess of fees paid to an attorney in contemplation of bankruptcy

<sup>7</sup> *Sternbergh v. Duryea Power Co.* (C. C. A. 3d Cir.), 161 Fed. Rep. 540, 88 C. C. A. 482, 20 Am. B. R. 625; *First Nat. Bank v. Pennsylvania Trust Co.* (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 60 C. C. A. 100, 10 Am. B. R. 782; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 33.

<sup>8</sup> B. A. 1898, Sec. 47a, clause 2, as amended June 25, 1910, 37 Stat. at L. 838.

<sup>9</sup> *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *In re*

*Kessler* (C. C. A. 3d Cir.), 186 Fed. Rep. 127, 108 C. C. A. 239, 26 Am. B. R. —.

<sup>10</sup> *Miller v. New Orleans Acid & Fertilizer Co.*, 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 414; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

<sup>11</sup> B. A. 1898, Sec. 67b; *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

<sup>12</sup> B. A. 1898, Sec. 47a, clause 2, as amended June 25, 1910, 37 Stat. at L. 838.

over and above a reasonable fee to be determined by the court.<sup>13</sup>

A trustee can not enforce a right which neither the bankrupt nor any lien creditors can enforce.<sup>14</sup> The trustee of a bankrupt corporation can not assert the invalidity of a mortgage which stockholders alone can complain of, because the trustee does not represent stockholders of a bankrupt.<sup>15</sup>

When a trustee has collected the assets of a bankrupt estate, it is his duty to distribute the property in the manner prescribed by the act and general orders.<sup>16</sup>

### § 359. Funds to be kept in a depository.

The statute authorizes the court of bankruptcy to designate by order banking institutions as depositories for the money of bankrupt estates and to require of them bonds for the safekeeping and forthcoming thereof.<sup>1</sup>

The trustee is required to deposit any money belonging to the bankrupt estate in one of these designated depositories.<sup>2</sup> The provisions of the statutes and general orders relating to the deposit and withdrawal of funds are mandatory and should not be departed from except by the consent of all parties interested.<sup>3</sup> A similar practice prevailed under the act of 1867 founded upon a rule of court.<sup>4</sup>

<sup>13</sup> B. A. 1898, Sec. 60b, Sec. 107, *ante*.

<sup>14</sup> Sec. 47a, clause 2, as amended June 25, 1910, 36 Stat. at L. 838. *In re V. & M. Lumber Co.*, 182 Fed. Rep. 231.

*In re V. & M. Lumber Co.*, 182.

<sup>16</sup> See Methods of Settlement and Distribution, Chap. —, *post*.

<sup>1</sup> B. A. 1898, Sec. 61a; *Huttig Mfg. Co. v. Edwards* (C. C. A. 8th Cir.), 160 Fed. Rep. 619, 87 C. C. A. 521, 20 Am. B. R. 349.

<sup>2</sup> B. A. 1898, Sec. 47a, clause 3; *Huttig Mfg. Co. v. Edwards* (C. C. A. 8th Cir.), 160 Fed. Rep. 619, 87 C. C. A. 251, 20 Am. B. R. 349;

*In re Hoyt*, 119 Fed. Rep. 987, 9 Am. B. R. 574; *In re Hoyt & Mitchell*, 127 Fed. Rep. 968, 11 Am. B. R. 784; *In re Cobb*, 112 Fed. Rep. 655, 7 Am. B. R. 202; *In re Carr*, 117 Fed. Rep. 572, 9 Am. B. R. 58.

<sup>3</sup> *Huttig Mfg. Co. v. Edwards* (C. C. A. 8th Cir.), 160 Fed. Rep. 619, 87 C. C. A. 521, 20 Am. B. R. 349; *In re Hoyt*, 119 Fed. Rep. 987, 9 Am. B. R. 574; *In re Hoyt & Mitchell*, 127 Fed. Rep. 968, 11 Am. B. R. 784.

<sup>4</sup> Gen. Ord. No. 28, under act of 1867. *In re Kyle*, 181 Fed. Rep. 617; *In re Burt*, 27 Fed. Rep. 548; *In re Thorp*, No. 14002, Fed. Cas., 2 Ware, 294.



The trustee may not deposit the funds of the estate in any bank except a designated depository.<sup>5</sup> The money should be deposited to the credit of the trustee, as such, designating the estate in bankruptcy.<sup>6</sup> The account may be in the name of "A. B., Trustee of the Estate of C. D., in Bankruptcy."

The method of withdrawal is prescribed by General Order 29. In practice the money is usually drawn by check of the trustee countersigned by the referee. It should state the date, the sum, and the account for which it is drawn.<sup>7</sup> The trustee is required to enter in a book, kept for that purpose, the substance of the check, the date, the sum drawn for, and the account for which it is drawn.<sup>8</sup> All checks and drafts must be entered in the order of time in which they are drawn, and numbered in the case of each estate.<sup>9</sup>

The court of bankruptcy has no power to direct the temporary investment of the money belonging to the estate, or to authorize a sum to be deposited in any bank upon interest, without the consent of all parties in interest.<sup>10</sup>

When a depository has ceased to conduct its business and its property has been taken possession of by an officer authorized to liquidate its affairs, the court of bankruptcy has no power to summarily order the bankruptcy funds deposited with it to be paid over to the trustee.<sup>11</sup>

<sup>5</sup> *Huttig Mfg. Co. v. Edwards* (C. C. A. 8th Cir.), 160 Fed. Rep. 619, 87 C. C. A. 521, 20 Am. B. R. 349.

<sup>6</sup> *In re Carr*, 117 Fed. Rep. 572, 9 Am. B. R. 58.

<sup>7</sup> Gen. Ord. No. 29.

<sup>8</sup> Gen. Ord. No. 29.

<sup>9</sup> Gen. Ord. No. 29.

<sup>10</sup> In *Huttig Mfg. Co. v. Edwards* (C. C. A. 8th Cir.), 160 Fed. Rep. 619, 87 C. C. A. 521, 20 Am. B. R. 349, after citing the provisions of the act and General Order No. 29, the court said: "These provisions of the act and the general order are mandatory in form, and were

designed to insure the safety of the funds rather than an increment by way of interest while they were idle. The funds were those of litigants and the risk which always attends the making of profit should not be incurred unless the right is clear. Doubtless consent by all parties interested would justify a departure from the prescribed rule. Rev. St., 5504 (U. S. Comp. St. 1901, p. 3710). But such consent was not obtained."

<sup>11</sup> *Matter of Bologh*, 185 Fed. Rep. 825, 25 Am. B. R. 726.

### § 360. Reports and accounts of trustees.

A trustee is required to keep regular accounts showing the amounts received and from what sources, and all amounts expended and on what accounts.<sup>1</sup> He is required to keep separate accounts of the firm property and of the property belonging to the individual partners in partnership cases.<sup>2</sup>

The first report filed by the trustee is a complete inventory of all the property of the bankrupt which comes into his possession.<sup>3</sup>

The trustee is required to make a report to the court within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the 47th section of the act, with the estimated value of each article.<sup>4</sup>

The trustee must report to the court in writing the conditions of the estate, and the amount of money on hand, and such other details as may be required by the courts, within the first month after his appointment, and every two months thereafter, unless otherwise ordered by the court.<sup>5</sup> The bi-monthly reports of a trustee should not be ordinarily dispensed with. The court and creditors are entitled to know just what the trustee is doing and this is the way provided by law to accomplish this end.

All accounts of the trustee are referred as of course to the referee for audit unless otherwise specially ordered by the court.<sup>6</sup> To these accounts objections may be put in by parties in interest and a hearing had before the referee.<sup>7</sup> Exceptions by a creditor to the report of a trustee setting apart

<sup>1</sup> B. A. 1898, Sec. 98, Sec. 47, clause 6.

<sup>2</sup> B. A. 1898, Sec. 5d.

<sup>3</sup> Gen. Ord. No. 17.

<sup>4</sup> Gen. Ord. No. 17.

<sup>5</sup> B. A. 1898, Sec. 47, clause 10.

<sup>6</sup> Gen. Ord. No. 17.

<sup>7</sup> *In re Reinboth* (C. C. A. 2d Cir.), 157 Fed. Rep. 672, 85 C. C.

A. 340, 19 Am. B. R. 15; *In re Hoyt & Mitchell*, 127 Fed. Rep. 968, 11 Am. B. R. 784; *In re Bayley*, 177 Fed. Rep. 522, 22 Am. B. R. 249; *In re Heebner*, 132 Fed. Rep. 1003, 13 Am. B. R. 256; *In re Campbell*, 124, Fed. Rep. 417, 10 Am. B. R.

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exemptions to the bankrupt must be made within twenty days.<sup>8</sup> This limitation does not apply to objections by the bankrupt.<sup>9</sup> No time is prescribed in other cases, but the exceptions must be promptly taken and before the report is confirmed.<sup>10</sup>

The form of objecting to trustees' accounts is not prescribed by the statute or rules. The objection may be stated orally, although it is better practice to put it in writing. It need not be verified. The referee may hear evidence and argument of counsel.<sup>11</sup> It is the duty of the referee to examine the accounts of the trustee if no objection is made to them by creditors.<sup>12</sup>

The final report and accounts must be filed with the court (usually the referee) fifteen days before the date fixed for the final meeting of the creditors.<sup>13</sup> This report should contain a detailed statement of the administration of the estate, including all money received and dividends or other sums paid out.<sup>14</sup> The creditors have ten days' notice of this meeting and also of the filing of the accounts of the trustee, and the time when and the place where they will be examined and passed upon.<sup>15</sup> The creditors have an opportunity to examine the accounts in the meantime. Exceptions may be made at that meeting.<sup>16</sup> If objections are made the referee should hear them and determine the merits as soon as he can conveniently do so. The creditors may by vote dispense with the reading and exhibition of the trustee's accounts and vouchers where they have been on file for a reasonable time.<sup>17</sup>

<sup>8</sup> Gen. Ord. No. 17. *In re* Amos (Ref.), 19 Am. B. R. 804; *In re* Cotton & Preston (Ref.), 23 Am. B. R. 586.

<sup>9</sup> *In re* White, 103 Fed. Rep. 774, 4 Am. B. R. 613.

<sup>10</sup> *In re* Heebner, 132 Fed. Rep. 1003, 13 Am. B. R. 256; *In re* Reliance Storage & Warehouse Co., 100 Fed. Rep. 619, 4 Am. B. R. 49.

<sup>11</sup> *In re* Bayley, 177 Fed. Rep. 522, 22 Am. B. R. 249; *In re* Hoyt & Mitchell, 127 Fed. Rep. 968, 11 Am. B. R. 784; *In re* Reinbooth (C. C. A. 2d Cir.), 157 Fed. Rep. 672, 85 C. C. A. 340, 19 Am. B. R. 15.

<sup>12</sup> *In re* Baginski, Mitchell Co. (Ref.), 2 Am. B. R. 243.

<sup>13</sup> B. A. 1898, Sec. 47, clause 8.

<sup>14</sup> B. A. 1898, Sec. 47, clause 7.

<sup>15</sup> B. A. 1898, Sec. 58a, clauses 3 and 6.

<sup>16</sup> *In* Brown v. Persons (C. C. A. 3d Cir.), 122 Fed. Rep. 212, 58 C. C. A. 658, 10 Am. B. R. 416, an order of confirmation was vacated and objections, filed on the same day but after the meeting had adjourned, were entertained.

<sup>17</sup> *In re* Merchants Ins. Co., No. 9442 Fed. Cas., 6 Biss. 252.

If the trustee neglects to file any report or statement, which it is the duty to file or make by the act or any general order, within five days after the same shall be due, it is the duty of the referee to make an order requiring the trustee to show cause before the judge at a time specified in the order why he should not be removed from office.<sup>18</sup> A copy of this order must be served upon the trustee at least seven days before the time fixed for the hearing and proof of service filed with the clerk.<sup>19</sup> Further proceedings are had before the judge.

### § 361. Accounts and papers open to inspection.

The accounts and papers of the trustee are open to the inspection of officers and parties in interest.<sup>3</sup>

Creditors are entitled to examine all the books and papers relating to the estate in the possession of the trustee.<sup>4</sup> A creditor is entitled to inspect the accounts and papers of the trustee even though he had not proved his claim at the time<sup>5</sup> or was asserting a claim to recover property from the trustee,<sup>6</sup> or is a creditor against whom the trustee contemplates bringing a suit to recover alleged preferences.<sup>7</sup> But this right has been denied a creditor not acting in good faith.<sup>8</sup>

State officers should be permitted to examine and use accounts and papers of the trustee in connection with a criminal prosecution.<sup>9</sup>

The right of inspection of accounts and papers is limited to "parties in interest." A debtor is not entitled to such inspection.<sup>10</sup>

<sup>18</sup> Gen. Ord. No. 17.

<sup>19</sup> Gen. Ord. No. 17.

<sup>3</sup> B. A. 1898, Sec. 49.

<sup>4</sup> *In re Samuelsohn*, 174 Fed. Rep. 911, 23 Am. B. R. 528; *In re Sauer*, 122 Fed. Rep. 101, 10 Am. B. R. 353; *In re Sully*, 142 Fed. Rep. 895, 15 Am. B. R. 32.

<sup>5</sup> *In re Samuelsohn*, 174 Fed. Rep. 911, 23 Am. B. R. 528.

<sup>6</sup> *In re Sauer*, 122 Fed. Rep. 101, 10 Am. B. R. 353.

<sup>7</sup> *In re Samuelsohn*, 174 Fed. Rep. 911, 23 Am. B. R. 528.

<sup>8</sup> *In re Sully*, 142 Fed. Rep. 895, 15 Am. B. R. 321.

<sup>9</sup> *In re Tracy*, 177 Fed. Rep. 532, 23 Am. B. R. 438.

<sup>10</sup> *In re Sully* (C. C. A. 2d Cir.), 152 Fed. Rep. 619, 81 C. C. A. 609, 18 Am. B. R. 123 and 142 Fed. Rep. 895, 15 Am. B. R. 321.

### § 362. Personal liability of trustees.

A trustee is not liable to make good a loss to the estate occurring while performing his duties as such officer in the absence of fraud or gross negligence.<sup>1</sup>

He will not ordinarily be charged for losses in business which he is conducting for the estate.<sup>2</sup> The creditors should watch their interests and if the business is being run at a loss take steps to stop it.

A trustee will be protected in the payment to a referee of excessive commissions erroneously allowed by the referee.<sup>3</sup>

On the other hand a trustee may be charged by the bankruptcy court in settling his accounts for losses and damages which result from gross neglect of duty.<sup>4</sup> Where a trustee held over with notice to quit, he was held personally liable for rent but was reimbursed from the estate for the amount for which he was liable to the landlord, because he acted in good faith and for the benefit of the estate.<sup>5</sup>

A trustee may be liable in tort for wrongful acts, where he goes entirely beyond his duty as such officer and is guilty of conduct which is actionable in its character.<sup>6</sup> A suit to recover damages in such case may be brought in a state court.<sup>7</sup>

<sup>1</sup> *In re* Schoenfield (C. C. A. 3d Cir.), 183 Fed. Rep. 219, 105 C. C. A. 481, 25 Am. B. R. 743; *In re* Bayley, 177 Fed. Rep. 522, 22 Am. B. R. 249; *Berman v. Smith*, 171 Fed. Rep. 735, 22 Am. B. R. 662; *In re* Hunter, 151 Fed. Rep. 904, 18 Am. B. R. 477.

<sup>2</sup> *In re* Bayley, 177 Fed. Rep. 522, 22 Am. B. R. 249; *In re* Isaacson (C. C. A. 2d Cir.), 174 Fed. Rep. 406, 98 C. C. A. 614, 23 Am. B. R. 98; *In re* Consumers Coffee Co., 162 Fed. Rep. 786, 20 Am. B. R. 835; *In re* Erie Lumber Co., 150 Fed. Rep. 817, 830, 17 Am. B. R. 689.

<sup>3</sup> *Bray v. Johnson* (C. C. A. 4th Cir.), 166 Fed. Rep. 57, 91 C. C. A. 643, 21 Am. B. R. 383.

<sup>4</sup> *In re* Cadenas & Co., 178 Fed. Rep. 158, 24 Am. B. R. 135; *In re* Hoyt, 119 Fed. Rep. 987, 9 Am. B. R. 574; *In re* Hoyt & Mitchell, 127 Fed. Rep. 968, 11 Am. B. R. 784; *In re* Hunter, 151 Fed. Rep. 904, 18 Am. B. R. 477.

<sup>5</sup> *In re* Hunter, 151 Fed. Rep. 904, 18 Am. B. R. 477.

<sup>6</sup> *Berman v. Smith*, 171 Fed. Rep. 735, 22 Am. B. R. 662.

<sup>7</sup> *Berman v. Smith*, 171 Fed. Rep. 735, 22 Am. B. R. 662.

### § 363. Removal of trustees.

A trustee may be removed for cause, upon a hearing after notice to him, by the judge, but not by the referee.<sup>1</sup>

A trustee may be permitted to resign. In such cases the judge should enter an order accepting his resignation and discharging him from his trust.

What constitutes sufficient cause for the removal of a trustee depends very largely upon the circumstances of each particular case. He may probably be removed if he proves to be incompetent or neglects his proper duties,<sup>2</sup> or if his relationship to the bankrupt is such as to prevent a fair administration of the trust,<sup>3</sup> or if he shows partiality to one class of creditors.<sup>4</sup> The power of removal is discretionary with the court.<sup>5</sup>

The application is made in the form of a petition.<sup>6</sup> A creditor who has filed proof of claim may file petition for removal.<sup>7</sup>

The petition should be entitled in the court and cause and addressed to the judge. It should state the name of the petitioning creditor, and that it is for the interest of the estate of the bankrupt that the trustee be removed, and then set

<sup>1</sup> B. A. 1898, Sec. 2, clause 17; Gen. Ord. No. 13. *In re Berree & Wolf*, 185 Fed. Rep. 224, 26 Am. B. R. —.

<sup>2</sup> Gen. Ord. 17. *In re Morse*, No. 9852 Fed. Cas., 7 N. B. R. 56; *Ex parte Perkins*, No. 10982, Fed. Cas., 5 Biss. 254; *In re Prouty*, 24 Fed. Rep. 554.

Erroneous legal advice, where the errors are so gross and frequent as to the evidence of the incompetency of his legal adviser, may be cause for ordering him to employ other counsel, but not necessarily for removing the trustee. See *In re Blodgett*, No. 1552 Fed. Cas., 5 N. B. R. 472.

<sup>3</sup> *In re Wrisley* (C. C. A. 2d Cir.), 133 Fed. Rep. 388, 66 C. C. A. 450, 13 Am. B. R. 193; *In re Leverton*,

155 Fed. Rep. 931, 19 Am. B. R. 434; *In re Powell*, No. 11354 Fed. Cas., 2 N. B. R. 45; *In re Zinn*, No. 18216 Fed. Cas., 4 N. B. R. 370; *In re Whetmore*, No. 17466, Fed. Cas., 16 N. B. R. 514; *In re Mallory*, No. 8990 Fed. Cas., 4 N. B. R. 153.

<sup>4</sup> *Ex parte Perkins*, No. 10982 Fed. Cas., 5 Biss. 254; *In re Columbia Iron Works*, 142 Fed. Rep. 234, 14 Am. B. R. 526.

<sup>5</sup> *In re Blodgett*, No. 1552 Fed. Cas., 5 N. B. R. 472; *In re Adler*, No. 82 Fed. Cas., 2 Woods, 571; *In re Mallory*, No. 8990, Fed. Cas., 4 N. B. R. 153; *In re Sacchi*, No. 12201 Fed. Cas., 6 N. B. R. 398.

<sup>6</sup> Official Form No. 52, see Form No. 150, *post*.

<sup>7</sup> *In re Roanoke Furnace Co.*, 152 Fed. Rep. 846, 18 Am. B. R. 661.

forth the causes for which the removal is requested and pray that notice may be served upon the trustee to show cause why an order should not be made removing him. The petition is filed in the clerk's office. A notice in the nature of a rule to show cause is issued by the clerk in the form prescribed<sup>8</sup> and served upon the trustee.

Upon the day named in the notice the trustee must appear and answer the allegations of the petition. He is not entitled to contest the claim of the creditor asking his removal.<sup>8\*</sup> If he fails to appear he may be committed for contempt. A hearing is had, as upon a rule to show cause, either upon affidavits or testimony in open court, and counsel for the creditors and for the trustee are heard. The court thereupon makes an order of removal if a proper case is made.<sup>9</sup> The removal of a trustee rests in the sound discretion of the court. It should be exercised to remove a trustee only when sufficient cause is shown rendering such removal necessary for the best interests of the estate. The order for removal is entered upon the journal of the court. When a party is removed for cause the court may compel him to pay all costs of the proceedings,<sup>10</sup> or direct in a proper case that the costs be paid out of the estate.<sup>11</sup>

When a trustee has been removed by order of the court, the creditors of the bankrupt estate should, at their first meeting after such order has been entered, appoint a new trustee.<sup>12</sup> The referee regularly serves notice at once for a meeting to be held for that purpose.<sup>13</sup> The creditors must have at least ten days' notice by mail to their respective addresses as they

<sup>8</sup> Official Form No. 53, see Form No. 151, *post*; B. A. 1898, Sec. 2, clause 17.

Gen. Ord. 17 requires seven days' notice in case of a removal for neglecting to file reports.

<sup>8\*</sup> *In re* Roanoke Furnace Co., 152 Fed. Rep. 846, 18 Am. B. R. 661.

<sup>9</sup> Official Form No. 54, see Form No. 152, *post*.

<sup>10</sup> B. A. 1898, Sec. 1, clause 18;

*In re* Leverton, 155 Fed. Rep. 931, 19 Am. B. R. 434; *In re* Morse, No. 9852 Fed. Cas., 7 N. B. R. 56; Official Form No. 54; see Form No. 152, *post*.

<sup>11</sup> B. A. 1898, Sec. 1, clause 18; *In re* Mallory, No. 8990 Fed. Cas., 4 N. B. R. 153; Official Form No. 54, see Form No. 152, *post*.

<sup>12</sup> B. A. 1898, Sec. 44.

<sup>13</sup> Official Form No. 55, see Form No. 101, *post*; Gen. Ord. 25.

appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of such meeting.<sup>14</sup> The new trustee is elected in the same manner as the first one.<sup>15</sup> The same memorandum of election should be made as in the case of the first election.<sup>16</sup>

Vacancies caused by death, or after an estate has been reopened, or after a composition has been set aside, or a discharge revoked, are filled in the same manner as when caused by an order of removal. They are appointed by the creditors at a regular meeting. If the creditors do not appoint a new trustee or trustees at such meeting the judge or the referee must do so.<sup>17</sup>

The death or removal of a trustee does not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.<sup>18</sup>

There is no provision in the act for the resignation of a trustee, but the judge may accept the resignation of a trustee and discharge him from his trust.<sup>19</sup>

### § 364. Compensation of trustees.

The compensation of trustees is fixed by section 48 of the act. This section has been amended twice since the original act was passed.<sup>1</sup>

The compensation of trustees for their services payable after they are rendered is as follows:<sup>2</sup>

<sup>14</sup> B. A. 1898, Sec. 58a.

<sup>15</sup> See how to conduct a creditors' meeting, Sec. 106.

<sup>16</sup> Official Form No. 22, see Form No. 41, *post*.

<sup>17</sup> B. A. 1898, Sec. 44.

<sup>18</sup> B. A. 1898, Sec. 46.

<sup>19</sup> *In re Fidler & Son*, 172 Fed. Rep. 632, 23 Am. B. R. 16. See R. S. Sec. 5038.

<sup>1</sup> Act of February 5, 1903, 32 Stat. at L. 797 and act of June 25, 1910, 36 Stat. at L. 840.

<sup>2</sup> B. A. 1898, Sec. 48, as amended by the act of June 25, 1910, 36 Stat. at L. 840; *In re Russell Card Co.*, 174 Fed. Rep. 202, 23 Am. B. R. 300.



A fee of \$5.00 deposited with the clerk at the time the petition is filed in each case, except when a fee is not allowed from a voluntary bankrupt.

Such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the court, not to exceed

6% on the first \$500.00 or less.

4% from \$500.00 to \$1,500.00.

2% from \$1,500.00 to \$10,000.00, and

1% on moneys in excess of \$10,000.00.

$\frac{1}{2}\%$  on the amount to be paid the creditors on a composition, in case of the confirmation of a composition after the trustee has qualified.

These commissions are authorized by the amendment of 1910,<sup>3</sup> and are the same as were fixed by the amendment of 1903.<sup>4</sup> They differ in amount from that fixed by section 48 as originally enacted.<sup>5</sup>

A trustee may be allowed less than the full commission authorized by this section. It will be observed that the statute fixes the limit of the commissions and that the amount to be allowed in any case is subject to the sound judicial discretion of the court within these limits.<sup>6</sup> The court may withhold all compensation from a trustee who has been removed for cause,<sup>7</sup> or where a trustee has been negligent in the performance of his duty.<sup>8</sup> The object is to compensate the trustee for services actually performed in administering the estate and no more.

<sup>3</sup> Act of June 25, 1910, 36 Stat. at L. 840.

<sup>4</sup> Act of February 5, 1903, 32 Stat. at L. 797.

<sup>5</sup> The commissions fixed by Sec. 48 as originally enacted were limited to "three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars."

<sup>6</sup> *In re Schoenfeld* (C. C. A. 3d Cir.), 183 Fed. Rep. 219, 105 C. C. A. 481, 25 Am. B. R. 748.

<sup>7</sup> *In re Leverton*, 155 Fed. Rep. 931, 19 Am. B. R. 434; *In re Fidler & Son*, 172 Fed. Rep. 632, 23 Am. B. R. 16.

<sup>8</sup> *In re Schoenfeld* (C. C. A. 3d Cir.), 183 Fed. Rep. 219, 105 C. C. A. 481, 25 Am. B. R. 748.

The trustee may be allowed additional compensation for conducting the business of the bankrupt.<sup>9</sup> He is also entitled to receive 50 cents for each copy of the decree of adjudication filed in the office, where conveyances of real estate are recorded, together with the filing fee, to be paid as a part of the costs of administration.<sup>10</sup>

In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.<sup>11</sup>

The compensation allowed to trustees by the act is in full compensation for the services performed by them. A trustee, who is an attorney, is not entitled to additional compensation for professional services rendered the estate.<sup>12</sup> The act provides that neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed by this act.<sup>13</sup> A contract to pay extra compensation can not be enforced, because it is against public policy.<sup>13\*</sup>

In any case in which the fees of the trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can ob-

<sup>9</sup> See Sec. 366, *post*.

<sup>10</sup> B. A. 1898, Sec. 47c.

<sup>11</sup> B. A. 1898, Sec. 48b.

<sup>12</sup> *In re* Screws, 147 Fed. Rep. 989, 17 Am. B. R. 269; *In re* McKenna, 137 Fed. Rep. 611, 15 Am. B. R. 4; *In re* Felson, 139 Fed. Rep. 281, 15 Am. B. R. 185; *In re* Carolina Cooperage Co., 96 Fed. Rep. 950, 3 Am. B. R. 154; *In re* Halbert & Co.,

134 Fed. Rep. 236, 13 Am. B. R. 399.

<sup>13</sup> Section 72 added by the act of Feb. 5, 1903, 32 Stat. at L. 797; *In re* George Halbert Co., 134 Fed. Rep. 236, 13 Am. B. R. 399.

<sup>13\*</sup> *De Vries v. Orem* (Md. Ct. of Appeals), 65 Atlantic Rep. 430, 17 Am. B. R. 876.

tain the money with which to pay those fees, order him to pay them within a time specified, and if he fails to do so, may order his petition to be dismissed.<sup>14</sup>

**§ 365. Commissions may be allowed on all property administered.**

A trustee may be allowed a commission "on all moneys disbursed or turned over to any person, including lienholders."<sup>1</sup>

Prior to the amendment of 1903, the courts generally held that the trustee was not entitled to a commission on money paid to secured creditors, but was limited to "commissions on sums to be paid as dividends" to unsecured creditors.<sup>2</sup> This rule was changed by the act of 1903 which provided for commission "on all moneys disbursed."<sup>3</sup> This was held to authorize a commission on moneys derived from the sale of property subject to liens.<sup>4</sup> That this construction is the true one is settled by the act of 1910 which inserts in section 48 the words "or turned over to any person, including lienholders."<sup>5</sup>

<sup>14</sup> Gen. Ord. 35, par. 4.

<sup>1</sup> Sec. 364, *ante*; B. A. 1898, Sec. 48, as mentioned by the act of June 25, 1910, 36 Stat. at L. 840, and the act of February 5, 1903, 32 Stat. at L. 797.

<sup>2</sup> *In re Anders Push Button Tel. Co.*, 136 Fed. Rep. 995, 14 Am. B. R. 643; *In re Fort Wayne Electric Corp.*, 94 Fed. Rep. 109, 1 Am. B. R. 706; *In re Utt* (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383, 2 N. B. N. 386; *In re Fielding*, 96 Fed. Rep. 800, 3 Am. B. R. 135; *In re Epstein*, 109 Fed. Rep. 878, 6 Am. B. R. 191; *In re Hinckel Brewing Co.*, 124 Fed. Rep. 702, 10 Am. B. R. 692; *In re Mammoth Pine Lumber Co.*, 116 Fed. Rep. 731, 8 Am. B. R. 651.

But see *In re Barber*, 97 Fed. Rep. 547, 3 Am. B. R. 306.

<sup>3</sup> Act of February 5, 1903, 32 Stat. at L. 797, amending Sec. 48.

<sup>4</sup> *In re Cramond*, 145 Fed. Rep. 966, 17 Am. B. R. 22; *In re Sanford Furniture Mfg. Co.*, 126 Fed. Rep. 888, 11 Am. B. R. 414; *In re Muhlhauser* (Ref.), 9 Am. B. R. 80; *In re Baughman*, 163 Fed. Rep. 669, 20 Am. B. R. 811; *In re Torchia*, 185 Fed. Rep. 576, 26 Am. B. R. 188.

<sup>5</sup> Section 9 of the act of June 25, 1910, 36 Stat. at L. 840.

*In re Torchia*, 185 Fed. Rep. 576, 26 Am. B. R. 188, Judge Orr said: "If the bankrupt act of 1898 be not clear in its provisions with respect to compensation to trustees where the assets to be administered have been derived from the sale of property subject to liens, it has been made specially so by the amendment

The statute contemplates that a commission may be allowed the trustee on all the assets of the bankrupt actually administered by him. It is immaterial whether money is disbursed in specie or property is turned over by the trustee. He is entitled to his commission on the value of the property.<sup>6</sup> When property subject to liens is sold by the consent of the lienholders, the trustee is entitled to a commission on the purchase price, even when the lienholder is the purchaser.<sup>7</sup> The court may allow commissions on money paid to persons entitled to priority, to compensate the trustee for his services in connection with the claim.

Commissions are limited to property of the bankrupt which is administered by the trustee. Where a lienholder is permitted to enforce his lien outside the court of bankruptcy, the trustee is not entitled to a commission. He is not entitled to a commission on property of a person other than the bankrupt in his possession and which is recovered by the owner.<sup>8</sup>

A trustee is not entitled to a commission on property set apart to the bankrupt as exempt. Exempt property can not be said to be assets of the bankrupt administered by the trustee.<sup>9</sup> The bankrupt is entitled to the full amount of his exemption under section 6, which provides that "this act shall not affect the allowance to bankrupts of the exemptions."

of June 25, 1910 (chapter 412, 36 Stat. 840), which provides, in section 9, that trustees shall receive 'commissions on all moneys disbursed or turned over to any person including lienholders.' I can not escape the conclusion that the provision last quoted is declaratory of the law as it was."

<sup>6</sup> *In re Morse Iron & Dry Dock Co.*, 154 Fed. Rep. 214, 18 Am. B. R. 846; *In re Sanford Furniture Mfg. Co.*, 126 Fed. Rep. 888, 11 Am. B. R. 414.

<sup>7</sup> *In re Sanford Furniture Mfg. Co.*, 126 Fed. Rep. 888, 11 Am. B. R. 414.

<sup>8</sup> *Smith v. Au Gres* (C. C. A. 6th Cir.), 150 Fed. Rep. 257, 80 C. C. A. 145, 17 Am. B. R. 745.

<sup>9</sup> *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; *In re Camp*, 91 Fed. Rep. 745, 1 Am. B. R. 165; *In re Castleberry*, 143 Fed. Rep. 1018, 16 Am. B. R. 159.

Section 70a vests title in the trustee to property "except what is exempt."

**§ 366. Extra compensation for conducting the business.**

The original act authorized the business of bankrupts to be conducted for limited periods by trustees, but made no provision for additional compensation for such services.<sup>1</sup>

The act of 1903 provided for an allowance of "additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services." There was considerable diversity of opinion as to the proper construction of this provision. It was held that the carrying on of the business was not a part of the general services of the trustees contemplated by section 48*a*, and that the compensation provided by that section did not apply, but related to the collecting of bills and disbursing of property in the ordinary administration in bankruptcy.<sup>2</sup> On the other hand it was held that the trustee was not entitled to extra compensation for such services, but was expressly prohibited from receiving it by section 48 and section 72.<sup>3</sup>

The act of 1910 amended section 2, clause 5, to allow additional compensation for such services "as provided in section 48 of this act" and amended section 48 by adding subsection *e* which fixed the commissions that may be allowed as additional compensation to trustees for carrying on business.<sup>4</sup> The court can not fix the amount of compensation for running the business until the services have been rendered.<sup>5</sup>

Section 48*c* of the act<sup>6</sup> provides that where the business is conducted by a trustee as provided in clause 5 of section 2

<sup>1</sup> B. A. 1898, Sec. 2, clause 5; *In re Epstein*, 109 Fed. Rep. 878, 6 Am. B. R. 191.

<sup>2</sup> *In re Shiebler & Co.* (C. C. A. 2d Cir.), 174 Fed. Rep. 336, 98 C. A. 208, 23 Am. B. R. 162; *In re Dimm & Co.*, 146 Fed. Rep. 402, 17 Am. B. R. 119; *In re Hart & Co.* (Hawaii), 17 Am. B. R. 480; *In re Pequod Brewing Co.* (Dexter Ref.), 18 Am. B. R. 352.

<sup>3</sup> *In re Coventry Evans Furniture Co.*, 171 Fed. Rep. 673, 22 Am. B. R. 623; *In re Kirkpatrick* (C. C. A.

6th Cir.), 148 Fed. Rep. 811, 77 C. A. 501, 17 Am. B. R. 594; *In re Cambridge Lumber Co.*, 136 Fed. Rep. 983, 14 Am. B. R. 168; *In re Richards*, 127 Fed. Rep. 772, 11 Am. B. R. 581; *In re Sully*, 133 Fed. Rep. 997, 13 Am. B. R. 22.

<sup>4</sup> Section 1 and Sec. 9 of the act of June 25, 1910, 36 Stat. at L. 840.

<sup>5</sup> *In re Russell Card Co.*, 174 Fed. Rep. 202, 23 Am. B. R. 300.

<sup>6</sup> Section 9 of the act of June 25, 1910, 36 Stat. at L. 840, adds subdivision *e* to Sec. 48.

of the act, the court may allow him additional compensation for such services by the way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by him. Before the allowance of compensation notice of the application therefor, specifying the amount asked, must be given to creditors in the manner indicated in section 58 of the act. The commissions are not to exceed: <sup>7</sup>

6% on the first \$500.00 or less.

4% from \$500.00 to \$1,500.00.

2% from \$1,500.00 to \$10,000.00, and

1% on moneys in excess of \$10,000.00.

$\frac{1}{2}\%$  on the amount to be paid the creditors on a composition.

The sum upon which these commissions are to be computed is the moneys disbursed by the trustee in the business conducted by him.<sup>8</sup> This may include money paid out for salaries and material necessary to the conduct of such business.<sup>9</sup>

### § 367. Expenses of trustees.

A trustee is entitled to be reimbursed from the estate for actual and necessary expenses incurred in the administration of the estate.<sup>1</sup>

The trustee is required to report his expense accounts in detail under oath and it must be approved by the court before payment.<sup>2</sup> Disbursements by a trustee for expenses should be itemized and are usually contained in his regular verified reports, and are examined, allowed, or disallowed on the coming in of such reports for confirmation. If the trustee has included

<sup>7</sup> B. A. 1898, Sec. 48*e*, as amended by the act of June 25, 1910, 36 Stat. at L. 840.

<sup>8</sup> *In re Hart & Co.* (Hawaii), 17 Am. B. R. 480; *In re Pequod Brewing Co.* (Dexter Ref.), 18 Am. B. R. 352.

<sup>9</sup> *In re Hart & Co.* (Hawaii), 17 Am. B. R. 480.

<sup>1</sup> B. A. 1898, Sec. 62; Gen. Ord. No. 35, par. 3.

<sup>2</sup> B. A. 1898, Sec. 62.

items of expense which are not properly chargeable to the estate the court will disallow such items.<sup>3</sup>

No general rule can be stated with respect to what may be properly included in the expense account of a trustee. It depends upon the particular facts and circumstances of each case. The expenses of a trustee may include disbursements by him for the preservation of the property, as for rent,<sup>4</sup> watchmen or caretakers, insurance and the like.<sup>5</sup> They may include necessary expenses of administering the estate as expenses of appraising the property of the bankrupt,<sup>6</sup> advertising, printing, serving notices and process, traveling expenses,<sup>7</sup> expenses of an auction,<sup>8</sup> fees and expenses of an attorney for the trustee.<sup>9</sup>

The referee is authorized to require from the bankrupt, or other person in whose behalf the duty is to be performed, indemnity for the expense of publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony before incurring such expense.<sup>10</sup> Money advanced for this purpose may be repaid such person out of the estate as a part of the costs of administering the same.<sup>11</sup>

<sup>3</sup> *In re Leverton*, 155 Fed. Rep. 931, 19 Am. B. R. 434; *In re Fidler & Son*, 172 Fed. Rep. 632, 23 Am. B. R. 16.

<sup>4</sup> See Sec. 301, *ante*; *In re Hinkel Brewing Co.*, 123 Fed. Rep. 242, 10 Am. B. R. 484; *In re Hunter*, 151 Fed. Rep. 904, 18 Am. B. R. 477; *In re Grignard Lith. Co.*, 155 Fed. Rep. 699, 19 Am. B. R. 101.

<sup>5</sup> *In re Leverton*, 155 Fed. Rep. 931, 19 Am. B. R. 434.

<sup>6</sup> *In re Gordon Supply Mfg. Co.*, 133 Fed. Rep. 798, 13 Am. B. R. 352; *In re Fidler & Son*, 172 Fed. Rep. 632, 23 Am. B. R. 16.

<sup>7</sup> See *In re Leverton*, 155 Fed. Rep. 931, 19 Am. B. R. 434.

<sup>8</sup> *In re Dimm & Co.*, 146 Fed. Rep. 402, 17 Am. B. R. 119.

*In re Pegues*, No. 10907 Fed. Cas., 3 N. B. R. 80, the court said: "The law contemplates that the assignee shall himself sell the property of the estate. There may be cases in which it will be proper to employ an auctioneer, but the necessity for so doing should be first shown to the court and leave obtained." See also *In re Sweet*, No. 13688 Fed. Cas., 9 N. B. R. 48.

<sup>9</sup> See Sec. 110, *ante*.

<sup>10</sup> Gen. Ord. No. 10.

<sup>11</sup> Gen. Ord. No. 10.

## CHAPTER XXII.

## THE ESTATE OF A BANKRUPT.

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|---|--|
| <b>SEC.</b>   | <b>SEC.</b>  |
| 368. Title to property of a bankrupt before trustee is appointed. | 383. Transfers void as to creditors under state law.     |
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### § 368. Title to property of a bankrupt before trustee is appointed.

The title to the property, both real and personal, of the bankrupt remains in the bankrupt until a trustee is appointed and qualified.<sup>1</sup> Where no trustee is appointed the title of the bankrupt is not divested by bankruptcy proceedings.<sup>2</sup>

After a petition is filed and before a trustee is appointed the bankrupt may redeem land sold for taxes,<sup>3</sup> or institute

<sup>1</sup> Conner v. Long, 104 U. S. 228, 26 L. Ed. 723; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; Hampton v. Rouse, 22 Wall. 263, 275, 22 L. Ed. 755; Rand v. Iowa Central Ry. Co., 186 N. Y. 58, 16 Am. B. R. 692; Fuller v. New York Fire Insurance Co., 184 Mass., 12.

<sup>2</sup> Rand v. Iowa Central Ry. Co., 186 N. Y. 58, 16 Am. B. R. 692; Robinson v. Hall, No. 11592 Fed. Cas., 8 Ben. 61; Gordon v. Mechanics & Traders Ins. Co., 120 La. Ann. 441, 22 Am. B. R. 649.

<sup>3</sup> Hampton v. Rouse, 22 Wall. 263, 22 L. Ed. 755.



a suit in his own name for the infringement of a copyright,<sup>4</sup> or to recover damages on an insurance policy for a loss by fire occurring after the petition is filed.<sup>5</sup>

A bankrupt can not maintain a suit in his own name in relation to his property, not exempt, pending bankruptcy proceedings after the appointment of a trustee.<sup>6</sup> All suits on behalf of the estate or against it should be in the name of the trustee as the representative of the estate.

The title of the bankrupt in the interval between the adjudication and the appointment of the trustee is defeasible, and when the trustee is appointed is divested as of the date of the adjudication of bankruptcy.<sup>7</sup> All title derived under or through the bankrupt during this interval, will, by force of law, and without regard to the knowledge or motive of the claimant, be defeated by the appointment of a trustee.<sup>8</sup>

<sup>4</sup> Myers v. Callaghan, 5 Fed. Rep. 726.

<sup>5</sup> Fuller v. Jamieson, 184 N. Y. 605; Rand v. Iowa Central Ry. Co., 186 N. Y. 58, 16 Am. B. R. 692; Fuller v. New York Ins. Co., 185 Mass. 12; Gordon v. Mechanics & Traders Ins. Co., 120 La. Ann. 441, 22 Am. B. R. 649.

<sup>6</sup> Pickens v. Dent (C. C. A. 4th Cir.), 106 Fed. Rep. 653, 45 C. C. A. 522, 5 Am. B. R. 644, affirmed, *sub nom.*, Pickens v. Roy, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47.

<sup>7</sup> B. A. 1898, Sec. 70a. See Sec. 370, *post*.

In Gordon v. Mechanics & Traders Ins. Co., 120 La. Ann. 441, 22 Am. B. R. 649, 655, the court said: "In the interval between the adjudication in bankruptcy and the appointment of the trustee the title of the property tendered remains in the bankrupt. The decree itself does not pass the title. Its date simply marks the point of time to which the title, if subsequently ac-

quired by the trustee, relates back. The title of the bankrupt in the interval exists. It may vest in the trustee, or it may not, as circumstances should develop."

In Carpenter Bros. v. O'Connor, 16 O. C. C. 526, an application was made to the state court for an order directing a receiver appointed by that court after an adjudication in a court of bankruptcy, to deliver property of the bankrupt in his possession to a trustee, subsequently appointed by the creditors in the proceedings in bankruptcy, on the ground that the trustee's title vested as of the date of adjudication and prior to the property coming into the possession of the receiver. The application was granted.

<sup>8</sup> Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Taylor v. Robertson, 21 Fed. Rep. 209; *In re Randall*, No. 11552 Fed. Cas., 1 Saw. 56; Carpenter Bros. v. O'Connor, 16 O. C. C. 526.

**§ 369. Dealing with bankrupt before trustee is appointed.**

Although the legal title remains in the bankrupt,<sup>1</sup> the filing of the petition brings his property into the custody of the court of bankruptcy.<sup>2</sup>

The bankrupt occupies a sort of fiduciary relation to his creditors with respect to his property during the interval between the filing of the petition and the appointment of the trustee.<sup>3</sup> He is not civilly dead during this period.<sup>4</sup>

He may collect debts due the estate, which money must be paid over to the trustee.<sup>5</sup> The trustee can not collect a debt from a debtor, who has paid it to the bankrupt in good faith or on account of contracts in which the trustee has no interest.<sup>6</sup> If the bankrupt pays out money collected from debtors, with a knowledge of a petition filed against him, the court can not summarily order him to pay it over to the trustee, but the trustee must recover from them receiving it.

The bankrupt should not pay any old debts after the petition is filed.<sup>8</sup> This would have the effect of preferring those

<sup>1</sup> Sec. 368, *ante*.

<sup>2</sup> As to the effect of filing a petition, see Sec. 30, *post*.

<sup>3</sup> *March v. Heaton*, No. 9061 Fed. Cas., 1 Low. 278; *Williams v. Merritt*, 103 Mass. 187.

<sup>4</sup> In *Plaut v. Gorham Mfg. Co.*, 174 Fed. Rep. 852, 858, 23 Am. B. R. 42, 50, Judge Holt said: "The complainant's counsel argues that from the time of the adjudication until the appointment of a trustee the bankrupt is civilly dead, and that nothing that takes place in the meantime can deprive the trustee of his right to elect whether to accept any asset of the bankrupt or not. If that doctrine were true, the court would have no power to authorize any action whatever in respect to the assets of the estate until the trustee was appointed. It could not order a sale; it

could not permit a delivery of property admitted not to belong to the bankrupt; it could not permit a business to be carried on; the adjudication would strike the estate with a complete paralysis until necessary weeks or the usual months had passed before the appointment of the trustee. There is nothing in the Bankruptcy Act which authorizes such a conclusion."

*In re Leslie*, 119 Fed. Rep. 405, 9 Am. B. R. 561; *In re Wilson*, 108 Fed. 197, 6 Am. B. R. 287.

<sup>5</sup> *Mersfelder v. Peters Cartridge Co.*, 13 Ohio C. C. (N. S.) 220.

<sup>6</sup> *American Trust Co. v. Wallis* (C. C. A. 3d Cir), 126 Fed. Rep. 464, 61 C. C. A. 344, 11 Am. B. R. 360; *In re La Plume Condensed Milk Co.*, 145 Fed. Rep. 1013, 16 Am. B. R. 729.

<sup>8</sup> *Elmore v. Symonds*, 183 Mass. 321.

creditors. The property of the bankrupt is a trust fund for the benefit of all creditors alike, to be distributed by the court of bankruptcy. This could be defeated if the bankrupt could go on paying out assets of his estate to creditors.

If it is necessary the court may take actual possession through a receiver or marshal, or may restrain the bankrupt from dealing with his property, or the referee may put it in charge of a watchman or caretaker. If none of these things are done, the bankrupt may deal with his property after the petition is filed and before the trustee is elected. It is not unusual to permit the bankrupt to carry on his business and account to the creditors at their first meeting.

Transfers or conveyances of any kind made by the bankrupt during this period are liable to be set aside by the trustee. A transfer or conveyance in good faith may stand, because the creditors are not injured by it. If the transfer is tainted with fraud or collusion, or has the effect of preferring one or more creditors over the others, the trustee is entitled to reclaim the property transferred or conveyed.<sup>9</sup> The ground for recovering such property is that it was taken from the custody of the court, which exercises supervision over the bankrupt dealing in respect to it.

No lien can be created by the bankrupt or through legal proceedings after the property has come into the custody of the court by the filing of the petition, which shall affect the rights of creditors.<sup>10</sup> But a person having a mortgage, pledge

<sup>9</sup> B. A. 1898, Sec. 60b, as amended by the act of June 25, 1910, 36 Stat. at L. 840, expressly provides for recovering preferences given after the filing of the petition and before the adjudication.

*In re Duncan*, 148 Fed. Rep. 464, 17 Am. B. R. 788, a note accepted as collateral after the petition was filed although offer prior thereto was held to pass to the trustee.

<sup>10</sup> *Kinmouth v. Braeutigan*, 63 N. J. Eq. 103, 10 Am. B. R. 83; *In re*

*Engle*, 105 Fed. Rep. 893, 5 Am. B. R. 372; *In re Austin* (Hawaii) 13 Am. B. R. 136; *State Bank v. Cox* (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 74 C. C. A. 285, 16 Am. B. R. 33.

*In re Rich* (Ref.), 17 Am. B. R. 893, an artisan's lien was allowed for improvements and repairs and parts added to an automobile during this period, which enabled the trustee to sell it for much more than he otherwise could have done.

or other lien at the time of bankruptcy, may perfect any title during the interval between the filing of the petition and the appointment of a trustee, which the nature of his lien permits.<sup>11</sup> In other words, a person can not create a lien after the filing of the petition, but he may enforce a valid lien existing at that time.

**§ 370. Title of trustee is vested by operation of law.**

The trustee, or his successor, upon his appointment and qualification is vested by operation of law, without a deed of conveyance, with the title of the bankrupt *as of the date he was adjudged a bankrupt*.<sup>1</sup>

In this respect the act of 1898 differs from the act of 1867, which provided for a deed of conveyance from the register to the assignee, and that such assignment should relate back *to the commencement of the proceedings* in bankruptcy.<sup>2</sup>

A certified copy of the order approving the bond of a trustee is conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded imparts the same notice that a deed from the bankrupt to the trustee, if recorded, would have imparted had no bankruptcy proceedings intervened.<sup>3</sup>

The trustee must within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execu-

<sup>11</sup>Hiscock v. Varick Bank, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1, affirming *In re Mertens* (C. C. A. 2d Cir.), 144 Fed. Rep. 818, 75 C. C. A. 548, 15 Am. B. R. 362.

<sup>1</sup>B. A. 1898, Sec. 70a; Hiscock v. Varick Bank, 206 U. S. 28, 40, 51 L. Ed. 945, 18 Am. B. R. 1; Security Warehousing Co. v. Hand, 206 U. S. 415, 425, 51 L. Ed. 1117, 19 Am. B. R. 291; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *In re Engle*, 105 Fed. Rep. 893, 5 Am. B. R. 372.

<sup>2</sup>R. S. Sec. 5044; Hiscock v. Varick Bank, 206 U. S. 28, 40, 51 L. Ed. 945, 18 Am. B. R. 1.

<sup>3</sup>B. A. 1898, Sec. 21e; see *Shawhan v. Wherritt*, 7 How. 627, 12 L. Ed. 847; *Herndon v. Howard*, 9 Wall. 664, 19 L. Ed. 809; *Alexander v. McCullough*, 32 Leg. Int. 336; *Cove v. Purcell*, 56 N. Y. 649; *Dambmann v. White*, 48 Cal. 439; *Burk v. Winters*, 28 Ark. 6; *Rogers v. Stevenson*, 16 Minn. 68; *Zant-zinger v. Ribble*, 36 Md. 32.

tion, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.<sup>4</sup>

### § 371. The title of the trustee.

The trustee is vested "by operation of law with the title of the bankrupt, as of the date he was adjudged bankrupt, except in so far as it is to property which is exempt."<sup>1</sup>

The trustee takes the title that the bankrupt had at the date of adjudication, and also the title that the bankrupt had to property fraudulently conveyed or encumbered at the time of the fraudulent transaction.<sup>2</sup>

It may be said generally that the trustee stands in the shoes of the bankrupt, and the property in his hands, unless otherwise provided in the bankrupt act, is subject to all of the equities impressed upon it in the hands of the bankrupt.<sup>3</sup> He takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition subject to all valid claims, liens and equities.<sup>4</sup> Bankruptcy

<sup>4</sup> B. A. 1898, Sec. 47c, 32 Stat. at L. 797.

<sup>1</sup> B. A. 1898, Sec. 70a. As to title to exempt property, see *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107.

<sup>2</sup> *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

In *Thomas v. Sugarman*, 218 U. S. 129, 134, 54 L. Ed. —, speaking of a transfer by the bankrupt with intent to defraud creditors, the court said: "The legal title to the money had been in the bankrupt and was transferred by the statute to the trustee, Sec. 70."

<sup>3</sup> *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am.

B. R. 761; *Zartman v. First Nat. Bank*, 216 U. S. 134, 54 L. Ed. —, 23 Am. B. R. 635; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 708; *York Mfg. Co.*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437.

<sup>4</sup> *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *Zartman v. First Nat. Bank*, 216 U. S. 134, 54 L. Ed. —, 23 Am. B. R. 635.

does not suspend the jurisdiction of equity to correct errors in written contracts caused by mutual mistake.<sup>5</sup> What are valid claims, liens and equities is considered at length in another place.<sup>6</sup>

This general rule prevailed under the former acts.<sup>7</sup> It has been the rule under the present act and is not changed by the amendment of 1910,<sup>8</sup> which gives the trustee additional "rights, remedies and powers" to avoid liens, transfers and conveyances, as will be presently pointed out.<sup>9</sup>

Special provisions of the act place the title to certain property, encumbered with liens or transferred by the bankrupt, in the trustee and give him the power to avoid the same.<sup>10</sup> Such transfers and encumbrances may be good as against the bankrupt. In some cases the creditors might have set them aside, and in other cases they could not do so, had bankruptcy not intervened. The trustee may be said to stand in the bankrupt's shoes with additional powers conferred by special provisions of the act.

By these special provisions the trustee in bankruptcy is vested by the operation of law with the title the bankrupt had to all property transferred by him in fraud of creditors,<sup>11</sup>

<sup>5</sup> Zartman v. First Nat. Bank, 216 U. S. 134, 54 L. Ed. —, 23 Am. B. R. 635.

<sup>6</sup> See chapters on Liens, Preferences, etc.

<sup>7</sup> Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993; Winsor v. McLellan, No. 17887 Fed. Cas., 2 Story, 493.

<sup>8</sup> Section 8 of the act of June 25, 1910, 36 Stat. at L. 840.

<sup>9</sup> As to the effect of the amendment see Sec. 372, *post*.

<sup>10</sup> B. A. 1898, Sec. 70a, clause 4, Sec. 70c, Sec. 60b, Sec. 67a, c, e and f and Sec. 9 of the act of June 25, 1910, 36 Stat. at L. 840; Knapp v. Milwaukee Trust Co. 216 U. S.

545, 54 L. Ed. 610, 24 Am. B. R. 761; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

<sup>11</sup> B. A. 1898, Sec. 70a, clause 4, Sec. 70c, Sec. 67c. See Sec. 381, *post*; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; Thomas v. Sugarman, 218 U. S. 129, 54 L. Ed. —.

For a history and construction of these sections of the act, see also Judge Lowell's opinion *In re Mullen*, 101 Fed. Rep. 413, 4 Am. B. R. 224.

or as a preference,<sup>12</sup> or where the transfer or incumbrance is void as to creditors by the laws of the state, territory or district in which the property is situate.<sup>13</sup> Property subject to liens created through legal proceedings within four months prior to the filing of the petition, passes to the trustee as a part of the estate free of the lien, unless the court subrogates him to the right of the creditor holding the lien.<sup>14</sup>

These provisions confer on the trustee the title to the property mentioned and give him power to avoid the conveyance or encumbrance and reclaim the property for the estate. To this end he is vested with all the rights, remedies and powers of a lien creditor with respect to property in *custodia legis*, and with those of a judgment creditor holding an execution duly returned unsatisfied with respect to property not in *custodia legis*.<sup>15</sup>

The title of the trustee extends to all of the bankrupt's property in this country wherever situated, even though it be in a state other than that in which the bankruptcy proceedings are pending,<sup>16</sup> whether the property is scheduled by the bankrupt or not.<sup>17</sup>

<sup>12</sup> B. A. 1898, Sec. 60*b*. See Sec. 382, *post*; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; Kaufman v. Tredway, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 862; Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 51 L. Ed. 596, 17 Am. B. R. 675; Page v. Rogers, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; Miller v. New Orleans Fertilizer Co., 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416.

<sup>13</sup> B. A. 1898, Sec. 67*e*. See Sec. 383, *post*; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; Security Trust Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

<sup>14</sup> B. A. 1898, Sec. 67*f*. See Sec. 382, *post*; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; Clarke v. Larremore, 188

U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

<sup>15</sup> Section 8 of the act of June 25, 1910, amending Sec. 47*a*, clause 2, of the act of 1898, 36 Stat. at L. 840.

As to the effect of this amendment, see Sec. 272, *post*.

<sup>16</sup> *In re Wilka*, 131 Fed. Rep. 1004, 12 Am. B. R. 727; affirmed, *sub nom. In re Granite City Bank* (C. C. A. 2d Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re Peacock*, 178 Fed. Rep. 851, 24 Am. B. R. 159.

In *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519, it was held that property located in New York passed to the trustee appointed in Missouri.

As to the title to property in foreign countries, see Sec. 373, *post*.

<sup>17</sup> *Holbrook v. Conly*, 25 Ill. 447.



The title remains in the trustees, unless conveyed to a purchaser,<sup>18</sup> until the estate is finally distributed by direction of the court.

Upon the confirmation of a composition offered by a bankrupt the title to his property revests in him.<sup>19</sup> But wherever a composition is set aside or a discharge revoked, the trustee is, upon his appointment and qualification, vested with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.<sup>20</sup>

### § 372. The effect of the amendment of 1910.

Prior to the amendment of 1910,<sup>1</sup> the trustee took no better right or title to the bankrupt's property than belonged to the bankrupt or to his general creditors at the time the trustee's title accrued.<sup>2</sup>

<sup>18</sup> B. A. 1898, See Sec. 70c.

<sup>19</sup> B. A. 1898, Sec. 70f. See *Stevens v. Earles*, 25 Mich. 40. See *King v. Remington*, 36 Minn. 15; *Herndon v. Davenport*, 75 Tex. 462; *Oliver v. Sanborn*, 60 Mich. 346.

<sup>20</sup> B. A. 1898, Sec. 70d.

<sup>1</sup> Act of June 25, 1910, 36 Stat. at L. 840.

<sup>2</sup> *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *Zartman v. First Nat. Bank*, 216 U. S. 134, 54 L. Ed. —, 23 Am. B. R. 635; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 708; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Thompson v. Fairbanks*,

196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437.

*In re New York Economical Printing Co.* (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615, the court said: "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee." (Quoted with approval in *Hewit v. Berlin Machine Works*, *supra*.)



It was held by many courts at first that the trustee, by virtue of the bankruptcy proceedings, became vested with the rights of a judgment or execution creditor.<sup>3</sup> This doctrine was overruled by the supreme court which declared that the trustee took the property of the bankrupt, in cases not affected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which was void as against the trustee by some positive provision of the act.<sup>4</sup>

Where the bankrupt was estopped the trustee was estopped, except when he was subrogated to the rights of creditors.<sup>5</sup> Where the state statute gave to the party paying usurious interest the right to recover it the trustee might do so,<sup>6</sup> but not otherwise.<sup>7</sup> If the bankrupt's title under the state law was not good against some of the creditors, but was good in favor of other creditors, the trustee was entitled to enforce

<sup>3</sup> *In re Ducker* (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 13 Am. B. R. 760; *In re Pekin Plow Co.* (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 50 C. C. A. 257, 7 Am. B. R. 369; *Chesapeake Shoe Co. v. Seldner* (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 58 C. C. A. 261, 10 Am. B. R. 466; *In re First Nat. Bank* (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180.

<sup>4</sup> *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Hewit v. Berlin Mach. Co.*, 194 U. S. 276, 48 L. Ed. 986, 11 Am. B. R. 709; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74.

<sup>5</sup> *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 637; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

<sup>6</sup> *Moore v. Jones*, 23 Vt. 739; *Wheelock v. Lee*, 10 Am. B. R. 363; *In re Kellogg* (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7, affirming 113 Fed. Rep. 120, 7 Am. B. R. 623.

<sup>7</sup> *Tiffany v. Boatman's Savings Institution*, 18 Wall. 375, 21 L. Ed. 868; *Bromley v. Smith*, No. 1922 Fed. Cas., 2 Biss. 511; *National Bank v. Gish's Assignee*, 72 Penn. 13; *Nicholas v. Bellows*, 22 Vt. 581; *Sparhawk v. Cochran*, No. 13203 Fed. Cas., 30 Leg. Int. 233.

the right of the creditors against whom the title of the bankrupt was not valid.<sup>8</sup>

The rule thus established by the supreme court permitted creditors having an unrecorded chattel mortgage or conditional sale contract, or other lien valid against the bankrupt, and creditors who had not actually seized the property under legal process, to enforce such liens.<sup>9</sup> The object of the amendment of 1910<sup>10</sup> was to avoid the effect of this rule.<sup>11</sup>

The amendment provides that "such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."<sup>12</sup>

<sup>8</sup> B. A. 1898, Sec. 67a; *In re Garcewich* (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 53 C. C. A. 510, 8 Am. B. R. 149; *In re New York Economical Printing Co.* (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615; *In re Galt*, 120 Fed. Rep. 443, 9 Am. B. R. 682; *Chesapeake Shoe Co. v. Seldner* (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 58 C. C. A. 261, 10 Am. B. R. 466; *In re Hull*, 115 Fed. Rep. 858, 8 Am. B. R. 302.

The trustee, however, takes the title only to the extent of the claims of those against whom the title of the third party would not be good. *In re Ducker* (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 18 Am. B. R. 259; *In re Garcewich* (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 8 Am. B. R. 149; *In re N. Y. Econ. Printing Co.* (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615.

<sup>9</sup> *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 708; *In re Great Western Mfg. Co.* (C. C. A. 8th Cir.), 152 Fed. Rep. 123, 81 C. C. A. 341, 18 Am. B. R. 259; *In re Dunlop* (C. C. A. 8th Cir.), 156 Fed. Rep. 545, 86 C. C. A. 435, 19 Am. B. R. 361; *In re Platteville Foundry & Machine Co.*, 147 Fed. Rep. 828, 17 Am. B. R. 828.

<sup>10</sup> Section 8 of the act of June 25, 1910, amending Sec. 47a, clause 2 of the act of 1898, 36 Stat. at L. 840.

<sup>11</sup> *In re Bazemore*, 189 Fed. Rep. 236, 26 Am. B. R. 494; *In re Hammond*, 188 Fed. Rep. 1020, 26 Am. B. R. 336.

<sup>12</sup> Section 8 of the act of June 25, 1910, amending Sec. 47a of the act of 1898, 36 Stat. at L. 840.

It will be observed that it is section 47*a*, relating to the collection of assets, and not section 70*a* vesting title in the trustee that is amended. For, the purpose of reclaiming property for the estate the trustee is given the rights, remedies and powers of a lien creditor with respect to property in *custodia legis*; and those of a judgment creditor holding an execution duly returned unsatisfied with respect to property not in *custodia legis*, in lieu of the rights of a general creditor to which he was limited prior to this amendment.

The trustee may be said to now stand in the shoes of the bankrupt, clothed with the rights, remedies and powers of a lien creditor and a judgment creditor instead of a general creditor as before the amendment.<sup>13</sup> He may now challenge any security or conveyance that a lien creditor or a judgment creditor might challenge had bankruptcy not intervened. But a lien which is valid under the state law as against the claims of such creditors is valid under the bankrupt law as against a trustee since the amendment as well as before it.

The amendment applies only to proceedings begun since its passage.<sup>14</sup>

### § 373. Title to property in foreign countries.

A statutory conveyance of property can not strictly operate beyond the local jurisdiction.<sup>1</sup>

<sup>13</sup> *In re* Hammond, 188 Fed. Rep. 1020, 26 Am. B. R. 336.

*In re* Bazemore, 189 Fed. Rep. 236, 26 Am. B. R. 494, it is said that "The class of cases, unprovided for, by the original act, and intended to be reached by the amendment, were those in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors of that class. The language is readily susceptible of this construction. It recites that such trustees 'shall be deemed vested with all the

rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.' This language aptly refers to such rights, remedies, and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate."

But see *In re* Lausmen, 183 Fed. Rep. 647, 25 Am. B. R. 186.

<sup>14</sup> *In re* Gartman, 186 Fed. Rep. 349, 27 Am. B. R. —.

<sup>1</sup> *Oakey v. Bennett*, 11 How. 33, 13 L. Ed. 593; *Barnett v. Pool*, 23 Tex. 517.

The jurisdiction of the bankrupt act is national. The trustee takes the title to all of the bankrupt's property in this country wherever situated, even though it be in a state other than that in which the bankruptcy proceedings are pending.<sup>2</sup>

Vessels upon the high seas are deemed within the jurisdiction of the nation whose flag she carries.<sup>3</sup> The title to an American vessel passes to the trustee of the owner in bankruptcy in this country.

The bankrupt act passes no title to real estate situated in a foreign country.<sup>4</sup> The title to personal property in a foreign country passes subject to the rights of creditors enforcing a security in the local forum.<sup>5</sup> The reason is that the personal estate is held as situate in that country where the bankrupt has his domicile. This is the prevailing doctrine in this country with respect to statutory assignments under state insolvent statutes<sup>6</sup> and under foreign bankrupt laws.<sup>7</sup>

<sup>2</sup> *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519; *In re Wilka*, 131 Fed. Rep. 1004, 12 Am. B. R. 727, affirmed, *sub nom.*, *In re Granite City Bank* (C. C. A. 8th Cir.), 137 Fed. Rep. 818, 70 C. C. A. 316, 14 Am. B. R. 404; *In re Peacock*, 178 Fed. Rep. 851, 24 Am. B. R. 159.

<sup>3</sup> *Crapo v. Kelly*, 16 Wall. 610, 21 L. Ed. 430.

<sup>4</sup> *Oakey v. Bennett*, 11 How. 33, 13 L. Ed. 593; *Barnett v. Pool*, 23 Tex. 517; *In re Pollman*, 156 Fed. Rep. 226, 19 Am. B. R. 474.

<sup>5</sup> *Oakey v. Bennett*, 11 How. 33, 13 L. Ed. 593; *Maconkey v. Delehanty*, 11 Ariz. 366, 17 L. R. A. 173; *Bank of Scotland v. Cuthbert*, 1 Rose's Bankrupt Cases Appx. and 2 Rose's Cases, 291.

<sup>6</sup> *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624 and cases collated at p. 629, 43 L. Ed. 835.

<sup>7</sup> *Maconkey v. Delehanty*, 11 Ariz. 366, 17 L. R. A. 173.

In the matter of Accounting of Waite, 99 N. Y. 435, after reviewing the authorities Mr. Justice Earl said: "From all these cases the following rules are to be deemed thoroughly recognized and established in this state.

(1) "The statutes of foreign states can in no case have any force or effect in this state *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute.

(2) "But the comity of nations which Judge Denio in *Petersen v. Chemical Bank*, 32 N. Y. 31, said is a part of the common law, allows a certain effect here to titles derived under, and powers created by the laws of other countries, and from such comity the titles of

The effect which may be given to the bankrupt act to convey property in a foreign country is determined by the courts where the property to be affected is situated.<sup>8</sup> Any effect which may be given to it does not depend upon international law, but the principle of comity, and national comity does not require any government to give effect to such assignment when it shall impair remedies or lessen the securities of its own citizens.<sup>9</sup>

The bankrupt act provides that the bankrupt shall "execute to his trustee transfers of all his property in foreign countries."<sup>10</sup> In this way the trustee may become vested with the title to all the property of the bankrupt situated in foreign countries as well as that in the United States.

The conveyance of real estate must be in the form required by the local law to transfer the property.<sup>11</sup> "The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated."<sup>12</sup>

### **§ 374. The trustee's possession of the estate.**

As soon as the trustee is appointed and qualified, he is vested with the title to the bankrupt's property and is entitled to the actual possession and custody of it.

foreign statutory assignees are recognized and enforced here, when they can be, without injustice to our own citizens, and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also, that such titles are not in conflict with the laws or the public policy of our state.

(3) Such foreign assignees can appear and, subject to the conditions above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with or withheld the property of the bankrupt."

<sup>8</sup> *In re Pollman*, 156 Fed. Rep.

221, 19 Am. B. R. 474; *Maconkey v. Delehanty*, 11 Ariz. 366, 17 L. R. A. 173; *Matter of Accounting of Waite*, 99 N. Y. 433.

<sup>9</sup> *Oakey v. Bennett*, 11 How. 33, 13 L. Ed. 593; *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624, 43 L. Ed. 835; *Matter of Accounting of Waite*, 99 N. Y. 433; *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570, 52 L. Ed. 625.

<sup>10</sup> B. A. 1898, Sec. 7, clause 5.

<sup>11</sup> *Maconkey v. Delehanty*, 11 Ariz. 366, 17 L. R. A. 173.

<sup>12</sup> Sir Wm. Grant in *Curtis v. Hutton*, 14 Ves. 537, 541, approved by the supreme court in *Oakey v. Bennett*, 11 How. 33, 45, 13 L. Ed. 593.

It is his duty to get all of the property of the bankrupt into his possession as speedily as possible. Of all the tangible property he should take manual possession, and of all the intangible or incorporeal property such possession as he may be capable of getting.<sup>1</sup> He may be charged with the value of assets which do not come into his possession, if he fails in this duty through negligence on his part.<sup>2</sup>

The bankrupt should surrender to the trustee the actual possession of all of his property, whether included in the schedule or not.<sup>3</sup> The trustee must himself be active. He should assert his right to the property if the bankrupt does not voluntarily surrender it.<sup>4</sup> If the bankrupt fails or refuses to deliver any part of the property in his possession, the trustee may procure an order of court to compel him to do so.<sup>5</sup> He

<sup>1</sup> In *O'Dell v. Boyden* (C. C. A. 6th Cir.), 150 Fed. Rep. 731, 80 C. C. A. 397, 17 Am. B. R. 751, speaking of a membership in a stock exchange as an asset which passed to the trustee, Judge Lurton said: "It was as much in his custody and possession as such a specie of property is capable of. To deny the trustee's possession would be to deny the capability of possession of a chose in action or other incorporeal right or equity. The possession may be constructive and not manual, but it is only so because such property is not capable of a more tangible custody."

<sup>2</sup> *In re Reinboth* (C. C. A. 2d Cir.), 157 Fed. Rep. 672, 85 C. C. A. 340, 19 Am. B. R. 15.

<sup>3</sup> *Thomas v. Sugarman*, 218 U. S. 129, 54 L. Ed. —, 26 Am. B. R. —; *In re Averick*, 170 Fed. Rep. 521, 22 Am. B. R. 518; *In re Kaplan*, 144 Fed. Rep. 159, 16 Am. B. R. 267; *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1; *In re McKenon*, 9 Fed. Rep. 29; *In re Smith*, 93 Fed. Rep. 791, 2 Am. B. R. 190;

see also *In re Mayer* (C. C. A. 7th Cir.), 108 Fed. Rep. 599, 47 C. C. A. 512, 6 Am. B. R. 117.

<sup>4</sup> See *Skubinsky v. Bodek* (C. C. A. 3d Cir.), 172 Fed. Rep. 340, 97 C. C. A. 38, 22 Am. B. R. 699.

It was held in England that the mere fact that the trustee had not taken possession of a debtor's property for two months after the date of his appointment, but had allowed the debtor to continue trading as before, was not sufficient to destroy his right to the property. *Ex parte Cooper*, 39 L. T. 260.

<sup>5</sup> *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519; *In re Kurtz*, 125 Fed. Rep. 992, 11 Am. B. R. 129; *Schweer v. Brown* (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 64 C. C. A. 574, 12 Am. B. R. 178; *In re Henderson*, 130 Fed. Rep. 385, 12 Am. B. R. 351; *In re Averick*, 170 Fed. Rep. 521, 22 Am. B. R. 518; *In re Purvine* (C. C. A. 8th Cir.), 96 Fed. Rep. 192, 37 C. C. A. 446, 2 Am. B. R. 787; *In re Wilson*, 116 Fed. Rep. 419, 8 Am. B. R. 612.

may apply for such order to a court other than that in which the proceedings are pending.<sup>6</sup> The court will enforce such an order by commitment if necessary.<sup>7</sup>

Where the property, belonging to the estate, is in the possession of a person other than the bankrupt, it is the duty of the trustee to get it into his possession.<sup>8</sup> This may be done by simply requesting such person to turn it over to him or by suit if necessary. A certified copy of the order approving his bond is sufficient authority for a trustee to demand actual possession of the bankrupt's property.<sup>9</sup>

Where the property of a bankrupt is in the possession of a state court through its receiver, the sheriff, or other officer of that court, the trustee regularly applies to the state court for an order to surrender the property to him.<sup>10</sup> The assignee for the benefit of creditors may be required by a summary order of the court of bankruptcy to surrender possession of property in his hands.<sup>11</sup>

A receiver of the court of bankruptcy will be directed by the court to turn over the property in his possession to the trustee as soon as one is appointed and qualified.<sup>12</sup>

*In re Shaffer & Stern*, 185 Fed. Rep. 549, 26 Am. B. R. 54, a partner was ordered to turn over firm assets in his possession.

<sup>6</sup> *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519.

<sup>7</sup> *Mueller v. Nugent*, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224; *In re Rosser* (C. C. A. 8th Cir.), 101 Fed. Rep. 562, 41 C. C. A. 497, 4 Am. B. R. 153; *In re Wilson*, 116 Fed. Rep. 419, 8 Am. B. R. 612; *Schweer v. Brown* (C. C. A. 8th Cir.), 130 Fed. Rep. 328, 64 C. C. A. 574, 12 Am. B. R. 178.

<sup>8</sup> *In re Reimboth* (C. C. A. 2d Cir.), 157 Fed. Rep. 672, 85 C. C. A. 340, 19 Am. B. R. 15.

<sup>9</sup> B. A. 1898, Sec. 21e.

<sup>10</sup> Sections 47 and 48, *ante*; *In re*

*Watts & Sachs*, 190 U. S. 1, 47 L. Ed. 953, 10 Am. B. R. 113; *Carl- ing v. Seymour Lumber Co.* (C. C. A. 5th Cir.), 113 Fed. Rep. 483, 51 C. C. A. 1, 7 Am. B. R. 66; *Hooks v. Aldrich* (C. C. A. 5th Cir.), 145 Fed. Rep. 865, 79 C. C. A. 409, 16 Am. B. R. 664; *In re Knight*, 125 Fed. Rep. 35, 11 Am. B. R. 1.

<sup>11</sup> Section 39, *ante*, *Bryan v. Bern- heimer*, 181 U. S. 188, 45 L. Ed. 814, 5 Am. B. R. 523; *In re Thompson* (C. C. A. 2d Cir.), 128 Fed. Rep. 575, 63 C. C. A. 217, 11 Am. B. R. 714; *In re Stokes*, 106 Fed. Rep. 312, 6 Am. B. R. 262; *In re Smith*, 92 Fed. Rep. 135, 2 Am. B. R. 9.

<sup>12</sup> *In re Vogt*, 159 Fed. Rep. 317, 20 Am. B. R. 243, the court declined to order the funds turned over to the trustee at once.



The trustee is an officer of the court and his possession is the possession of the court, and the familiar cases of marshals and receivers are applicable with equal force to the protection of the trustee.<sup>13</sup> No other court and no other person acting under any process from any other court can, without permission of the court of bankruptcy, interfere with it.<sup>14</sup> This is true even if the trustee is not in manual possession of the property.<sup>15</sup>

### § 375. Trustees not bound to take incumbered interest.

Since the property passes to the trustee subject to equities it may be so burdened with liens and incumbrances as to be without value to the estate. In such case it can not be considered a real asset of the bankrupt.

It has long been a recognized principle of bankrupt law that a trustee is not bound to take property of an onerous or unprofitable character, or property which will be a burden instead of a benefit.<sup>1</sup> A trustee in this respect is regarded as

<sup>13</sup> Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660; Porter v. Sabin, 149 U. S. 473, 37 L. Ed. 815; McLean v. Mayo, 113 Fed. Rep. 106, 7 Am. B. R. 115.

<sup>14</sup> As to the jurisdiction of the court of bankruptcy over property in *custodia legis*, see Sec. 31, *ante*; Murphy v. Hofman Co., 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Russell* (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 568; *In re Alton Mfg. Co.*, 158 Fed. Rep. 367, 19 Am. B. R. 805; *In re Reynolds*, 127 Fed. Rep. 760, 11 Am. B. R. 758; *In re Epstein* (C. C. A. 8th Cir.), 156 Fed. Rep. 42, 84 C. C. A.

208, 19 Am. B. R. 89; *In re Rose Shoe Mfg. Co.* (C. C. A. 2d Cir.), 168 Fed. Rep. 39, 93 C. C. A. 461, 21 Am. B. R. 725; *In re Walsh Bros.*, 159 Fed. Rep. 560, 20 Am. B. R. 472.

<sup>15</sup> See Sec. 31, *ante*.

<sup>1</sup> Atchison, etc., Ry. Co. v. Hurley (C. C. A. 8th Cir.), 153 Fed. Rep. 503, 510, 82 C. C. A. 453, 18 Am. B. R. 396; *In re Frazin* (C. C. A. 2d Cir.), 183 Fed. Rep. 28, 105 C. C. A. 320, 24 Am. B. R. 903; Sessions v. Romadka, 145 U. S. 39, 36 L. Ed. 609; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. Ed. 915; American File Co. v. Garrett, 110 U. S. 295, 28 L. Ed. 149; Glenny v. Langdon, 98 U. S. 30, 31, 25 L. Ed. 43; DuShane v. Beall, 161 U. S. 513, 40 L. Ed. 791; First Nat. Bank v. Lasater, 196 U. S. 115, 49 L. Ed. 408, 13 Am. B. R. 698; *In re*



being in a very different position from that of an executor of a deceased person. The former takes the property by operation of law, but the latter claims title through his testator, and is bound to perform his obligations to the extent of his assets.

The trustee may elect, after due consideration and within a reasonable time, whether he will accept property of an onerous and unprofitable nature.<sup>2</sup> If his judgment is unwisely exercised, the creditors may apply to a court of bankruptcy to compel a different conclusion.

If he refuses to elect, when required to do so, it is deemed an election to reject the estate.<sup>3</sup>

If the trustee with knowledge "stands by without asserting his claim for a length of time, and allows third persons in the possession of their legal rights to acquire an interest in the property" then he may be held to have waived the assertion of his claim.<sup>3\*</sup>

Where the trustee elects not to take the property or right of the bankrupt and charge the estate with it, the property and right, whatever it is, remains in the bankrupt.<sup>4</sup> When a trustee once rejects property as onerous he can not later claim it if it turns out to be valuable.<sup>5</sup>

Chambers, 98 Fed. Rep. 865, 3 Am. B. R. 537; *In re Cogley*, 107 Fed. Rep. 73, 5 Am. B. R. 731.

<sup>2</sup> *In re Frazin* (C. C. A. 2d Cir.), 183 Fed. Rep. 28, 105 C. C. A. 320, 24 Am. B. R. 903; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408, 13 Am. B. R. 698; *Kenyon v. Mulert* (C. C. A. 3d Cir.), 184 Fed. Rep. 825, 107 C. C. A. 63, 26 Am. B. R. 184.

<sup>3</sup> *Sessions v. Romadka*, 145 U. S. 39, 36 L. Ed. 609; *Taylor v. Irwin*, 20 Fed. Rep. 615, 620; *Amory v. Lawrence*, No. 336 Fed. Cas., 3 Clif. 523; *Oakley v. Gardiner*, 2 La. Ann. 1005; *Lawrence v. Knowles*, 5 Bing. N. C. 399; *Tuck v. Fyson*, 6 Bing. 321; *Gra-*

*ham v. Van Dieman's Land Co.*, 11 Exch. 101.

<sup>3\*</sup> Judge Ware in *Smith v. Gordon*, No. 13052 Fed. Cas., 6 Law. Rep. 313, approved in *DuShane v. Beall*, 161 U. S. 516, 40 L. Ed. 791.

<sup>4</sup> *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *First Nat. Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408, 13 Am. B. R. 698; *Taylor v. Irwin*, 20 Fed. Rep. 615; *Smith v. Gordon*, No. 13052 Fed. Cas., 6 Law. Rep. 313.

<sup>5</sup> *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915.

In *Meyers v. Josephson* (C. C. A. 5th Cir.), 124 Fed. Rep. 734, 59 C. C. A. 650, 10 Am. B. R. 687, affirming 121 Fed. Rep. 142, 9 Am. B. R.

Where a trustee is kept in ignorance of the existence of certain property and has no opportunity to make an election, the bankrupt can not, after his estate in bankruptcy has been finally closed, assert title to the property on the ground that the trustee had never taken any action in respect to it.<sup>6</sup>

### § 376. After-acquired property does not pass to the trustee.

Property acquired by a bankrupt subsequent to the filing of the petition is called after-acquired property.

In England such property is an asset of the bankrupt's estate and has been so treated from early times.<sup>1</sup>

In this country after-acquired property does not go to the trustee as a part of the estate, but belongs to the debtor's new estate.<sup>2</sup> It is subject to the claims of new creditors.<sup>3</sup> It is not liable for his debts prior to bankruptcy, unless he fails to obtain a discharge.<sup>4</sup> A court of chancery may interfere by injunction to protect the bankrupt from his creditors in the enjoyment of such property, until it can be ascertained whether he will obtain his discharge.<sup>5</sup>

Under the act of 1841 all property vested in the bankrupt, at the time of the decree declaring him a bankrupt, passed

345, it was also held that a trustee having rejected an insurance policy as onerous, although he could not claim the proceeds, could claim the amount of the cash surrender value. See also *In re McKinney*, 15 Fed. Rep. 535.

<sup>6</sup> *First National Bank v. Lasater*, 196 U. S. 115, 49 L. Ed. 408, 13 Am. B. R. 698; *DuShane v. Beall*, 161 U. S. 513, 40 L. Ed. 791; *In re Wiseman & Wallace*, 159 Fed. Rep. 236, 20 Am. B. R. 293.

<sup>1</sup> 46-7 Vict., Chap. 52, Sec. 44 (1). Act of 5 George II., Chap. 30; *Ex parte Proudfoot* (1743), 1 Atk. 252; *Ashley v. Kell*, 2 Stra. 1207; *Webb v. Ward*, 7 T. R. 296; *Kitchen v. Bartsch*, 7 East. 53;

*Crofton v. Poole* (1830), 1 B. & Ad. 568; Bankrupt Act of 1869 (32-3 Vict.), Sec. 15.

<sup>2</sup> *In re Ghazal* (C. C. A. 2d Cir.), 174 Fed. Rep. 809, 98 C. C. A. 517, 23 Am. B. R. 178; *In re Le Claire*, 124 Fed. Rep. 654, 10 Am. B. R. 733; *In re Parish*, 122 Fed. Rep. 553, 10 Am. B. R. 548; *In re Karns*, 148 Fed. Rep. 143, 16 Am. B. R. 841; *In re Home Discount Co.*, 147 Fed. Rep. 538, 17 Am. B. R. 168; *In re Woods*, 133 Fed. Rep. 82, 13 Am. B. R. 240.

<sup>3</sup> *In re Burka*, 104 Fed. Rep. 326, 5 Am. B. R. 13.

<sup>4</sup> *Mosby v. Steele & Metcalfe*, 7 Ala., 299.

<sup>5</sup> *Mosby v. Steele*, 7 Ala., 299.

to his assignee and only property acquired after the adjudication was after-acquired property.<sup>6</sup> Under the act of 1867 the date of cleavage was the date of filing the petition and any property acquired thereafter was after-acquired property.<sup>7</sup>

Section 70 of the bankrupt act of 1898 provides that the title of the bankrupt shall vest in the trustee "as of the date he was adjudged a bankrupt" (except such as is exempt), to six classes of property there enumerated. These are, *first*, documents; *second*, patents and copyrights; *third*, powers; *fourth*, property transferred in fraud of creditors; *fifth*, property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; and *sixth*, rights of action upon contracts.

It will be observed that no date is fixed in the first four and sixth clauses other than the date of adjudication to determine what property in those classes passes to the trustee. It must be the property the title to which is vested in the bankrupt at the date he is adjudged a bankrupt. Property acquired by a bankrupt after his adjudication is clearly after-acquired property in all cases.

The fifth clause specifies particularly that it is the property which was alienable or subject to levy and execution at the date of filing the petition, which passes. This property passes as of the date of the adjudication and only such property passes as was alienable or subject to levy and execution at the date of filing the petition. Property acquired by the bankrupt between the date of filing the petition and the adjudication which would otherwise be embraced within the fifth clause may be considered after-acquired property.<sup>8</sup>

<sup>6</sup> Act of 1841, Sec. 3, 5 Stat. at L. 443; *Ex parte Newhall*, No. 10159 Fed. Cas., 2 Story, 360; *Fisher v. Currier*, 7 Met. (Mass.) 427.

<sup>7</sup> *In re Barnett*, No. 1024 Fed. Cas., 3 Pitts. Rep. 559; *Mays v. National Bank*, 64 Penn. St. 74; *Day v. Superior Court*, 61 Cal.

489; *Mosby v. Steele & Metcalfe*, 7 Ala. 299; *In re Benson*, No. 1328 Fed. Cas., 8 Biss. 116; *In re Grant*, No. 5693 Fed. Cas., 2 Story, 312.

<sup>8</sup> *In re Burka*, 104 Fed. Rep. 326, 5 Am. B. R. 12; *In re Harris* (Ref.), 2 Am. B. R. 359.

The trustee has no interest or title to property which may come to him by way of inheritance or devise unless at the time of filing the petition he had an interest which could have been transferred or which might have been levied upon and sold under judicial process against him.<sup>9</sup> In such case the property inherited passes to the trustee.<sup>10</sup>

The bankrupt is entitled to wages and salary earned after bankruptcy, although assigned to secure a debt prior to that time.<sup>11</sup> Commissions earned prior to bankruptcy although payable afterward, as commissions on renewal premiums on policies of insurance, pass to the trustee.<sup>12</sup>

After-acquired property includes property acquired subsequent to the filing of the petition in a new business in which the bankrupt may have engaged,<sup>13</sup> or money borrowed for the purpose of engaging in business,<sup>14</sup> or crops planted after but not before bankruptcy.<sup>15</sup> Property purchased after bankruptcy with funds belonging to his estate is not after-acquired property. It amounts to a mere change of form of assets.

<sup>9</sup> *In re Woods*, 133 Fed. Rep. 82, 13 Am. B. R. 240; *In re Burka*, 104 Fed. Rep. 326, 5 Am. B. R. 12; *In re Wetmore* (C. C. A. 3d Cir.), 108 Fed. Rep. 520, 47 C. C. A. 477, 6 Am. B. R. 210; *In re McKay*, 143 Fed. Rep. 671, 16 Am. B. R. 238; *Butler v. Bandoine*, 84 N. Y. App. Div. 215, 16 Am. B. R. 238n, affirmed, 177 N. Y. 530, without opinion.

<sup>10</sup> *In re Stoner*, 105 Fed. Rep. 752, 5 Am. B. R. 402; *McNaboe v. Marks*, 99 N. Y. Supp. 960, 16 Am. B. R. 769.

*In re McKenna*, 137 Fed. Rep. 611, 15 Am. B. R. 4, the testator died one hour and fifteen minutes before beneficiary filed his voluntary petition, and the legacy passed to trustee.

<sup>11</sup> *In re West*, 128 Fed. Rep. 205, 11 Am. B. R. 782; *In re Karns*,

148 Fed. Rep. 143, 16 Am. B. R. 841; *In re Home Discount Co.*, 147 Fed. Rep. 538, 17 Am. B. R. 168.

<sup>12</sup> *In re Wright*, 151 Fed. Rep. 361, 18 Am. B. R. 199, affirmed (C. C. A. 2d Cir.), 157 Fed. Rep. 544, 85 C. C. A. 206, 19 Am. B. R. 454.

As to an attorney's contingent fee partially earned at the time of his bankruptcy, see *In re McAdam*, 98 Fed. Rep. 409, 3 Am. B. R. 417.

<sup>13</sup> *In re Parish*, 122 Fed. Rep. 553, 10 Am. B. R. 548; *Whitlock's License*, 39 Pa. Superior Ct. Rep. 34, 22 Am. B. R. 262; *In re Rosenfield*, No. 12059 Fed. Cas., 1 N. B. R. 319.

<sup>14</sup> *In re Patterson*, No. 10815 Fed. Cas., 1 Ben. 508.

<sup>15</sup> *In re Barnett*, No. 1024 Fed. Cas., 3 Pitts. Rep. 559; *In re Barrow*, 98 Fed. Rep. 582, 3 Am. B. R. 414.

The trustee is not entitled to alimony granted after bankruptcy,<sup>16</sup> or property acquired under an agreement made subsequent to bankruptcy,<sup>17</sup> or a right to redeem lands obtained by a waiver of a previous forfeiture,<sup>18</sup> or a reward for information against smugglers allowed after bankruptcy,<sup>19</sup> or a liquor license granted to a person after he has been adjudicated a bankrupt.<sup>20</sup>

The trustee has no interest whatever in after-acquired property, and is not entitled to examine the bankrupt relative to such property.<sup>21</sup>

### § 377. What property passes to the trustee.

It may be said generally that all real and personal property, including rights of action, properly available for the payment of the bankrupt's obligations or debts pass to the trustee.

Property exempted by the state law does not pass.<sup>1</sup> Subject to this exception section 70 of the act enumerates six classes of property which pass to the trustee, namely:

*First*, documents relating to his property.

<sup>16</sup> *In re Le Claire*, 124 Fed. Rep. 654, 10 Am. B. R. 733; *In re Benson*, No. 1328 Fed. Cas., 8 Biss. 116.

<sup>17</sup> *Cullen v. Dawson*, 24 Minn. 66; *In re Oleson*, 110 Fed. Rep. 796, 7 Am. B. R. 22.

<sup>18</sup> *Kittredge v. McLaughlin*, 33 Me. 327.

<sup>19</sup> *In re Ghazal* (C. C. A. 2d Cir.), 174 Fed. Rep. 809, 98 C. C. A. 517, 23 Am. B. R. 178.

<sup>20</sup> *Whitlock's License*, 39 Pa. Superior Ct. Rep. 34, 22 Am. B. R. 262.

*In re Wiesel*, 173 Fed. Rep. 718, — Am. B. R. —, the application for a license to sell liquor was made before and was granted after bankruptcy. It was held to be an asset which could be sold by a receiver before adjudication.

<sup>21</sup> *In re Patterson*, No. 10815 Fed. Cas., 1 Ben. 508; *In re Rosenfield*, No. 12059 Fed. Cas., 1 N. B. R. 319; *In re Levy*, No. 8296 Fed. Cas., 1 Ben. 496.

<sup>1</sup> B. A. 1898, Sec. 70a and Sec. 6. In *Lockwood v. Exchange Bank*, 190 U. S. 294, 299, 47 L. Ed. 1061, 10 Am. B. R. 107, the supreme court said: "We think that the terms of the bankrupt act of 1898, above set out, as clearly evidence the intention of Congress that the title to the property of a bankrupt generally exempted by state laws should remain in the bankrupt and not pass to his representative in bankruptcy, as did the provisions of the act of 1867."

*Second*, interest in patents, patent rights, copyrights, and trade-marks.

*Third*, powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person.

*Fourth*, property transferred by him in fraud of his creditors.

*Fifth*, property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; and

*Sixth*, rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

These six subdivisions embrace every specie of property and interests in property of which we can well conceive a man invested with ownership. Under them the trustee takes all the property owned by the bankrupt at the time the petition is filed, whether it is in his possession or that of another, and such property as he has transferred in fraud of his creditors.<sup>2</sup> All such property situate in the United States passes to the trustee. He does not take real estate situated in foreign countries unless conveyed by the bankrupt.<sup>3</sup>

Property passes to the trustee whether named in the schedule of the bankrupt or not.<sup>4</sup>

The statute does not contemplate the property of other persons passing to the trustee although it may be in the possession of the bankrupt at the time.<sup>5</sup> If there is any controversy

<sup>2</sup> Thomas v. Sugarman, 218 U. S. 129, — L. Ed. —, — Am. B. R. —; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224.

<sup>3</sup> As to property in foreign countries, see Sec. 373, *ante*. Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593; Barnett v. Poole, 23 Tex. 517.

<sup>4</sup> Holbrook v. Coney, 25 Ill. 447.

<sup>5</sup> Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Donaldson v. Farwell, 93 U. S. 641, 23 L. Ed. 993; Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 856; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568.

with reference to the ownership of such property, it is for the court of bankruptcy to determine it.<sup>6</sup>

### § 378. Documents.

All documents relating to the bankrupt's property pass to the trustee.<sup>1</sup>

These include deeds or other muniments of title, contracts, securities (as bonds, mortgages, etc.), bills receivable, notes, bank books, bills of exchange, account books, and all papers and books relating to his business.<sup>2</sup> Corporate records and stock books of a corporation pass to its trustee.<sup>3</sup> While, strictly speaking, a document is a written or printed paper, it may also include anything bearing a legible or significant inscription, as a stencil-plate or marking and canceling stamp or a seal.<sup>4</sup>

Where a bankrupt has transferred his documents or any of them to another person before bankruptcy proceedings were instituted, such documents can not be recovered by the trustee until such transfer is shown to be fraudulent under the act.<sup>5</sup> But where there is no adverse holding the court may, upon motion and rule to show cause, compel the delivery of documents to the trustee.<sup>6</sup>

Where such papers and documents may tend to incriminate a bankrupt it has been intimated that he will not be required to turn them over to his trustee.<sup>7</sup>

<sup>6</sup> See Secs. 31 and 32, *ante*.

<sup>1</sup> B. A. 1898, Sec. 70, clause 1; *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519; *Matter of Harris*, 221 U. S. 274.

<sup>2</sup> The act defines a document to "include any book, deed, or instrument in writing." B. A. 1898, Sec. 1, clause 13.

<sup>3</sup> *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519; *Matter of Harris*, 221 U. S. 274.

<sup>4</sup> See *Century Dictionary*, subject, Document.

<sup>5</sup> *Rogers v. Winsor*, No. 12023 Fed. Cas., 6 N. B. R. 246; *In re West*, 46 L. T. 823.

<sup>6</sup> *Babbitt v. Dutcher*, 216 U. S. 102, 54 L. Ed. 402, 23 Am. B. R. 519.

<sup>7</sup> *In re Hess*, 134 Fed. Rep. 109, 14 Am. B. R. 559, and 136 Fed. Rep. 988, 14 Am. B. R. 826.

**§ 379. Patents, copyrights and trade-marks.**

All interests in patents, patent rights, copyrights and trade-marks pass to the trustee.<sup>1</sup> But the trustee takes no greater interest in these rights than the bankrupt had.<sup>2</sup>

Under this provision the interest of the bankrupt as a patentee, assignee or a licensee passes to his trustee in bankruptcy. The title passes by operation of law, and no instrument need be recorded in the patent office.<sup>3</sup> It is, however, proper for a trustee to record the order approving his bond in the patent office.

The trustee is not bound to take the interest of the bankrupt in the patents, copyrights or trade-marks if it is conceived to be worthless or would prove to be a burden or unprofitable.<sup>4</sup> If he declines to take the right it remains in the bankrupt.<sup>4</sup> If he elects to take it, the trustee may maintain a suit for infringement of the patent, copyright, or trade-marks in such courts as the bankrupt could have instituted it, but he is not obliged to bring such a suit.<sup>5</sup>

It has been held that the trustee is not entitled to patents issued after an adjudication, for which application had been

<sup>1</sup> B. A. 1898, Sec. 70, clause 2.

As to the nature of creditors' remedies for reaching book royalties, see *Lord v. Hart*, 118 Mass. 271; *Stephens v. Cady*, 14 How. 531, 14 L. Ed. 528.

As to trade-marks, see *Helmbold v. Helmbold Manufacturing Co.*, 53 How. Prac. 453; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Sohier v. Johnson*, 111 Mass. 238; *Leather Cloth Co. v. Cloth Co.*, 11 H. L. 523; *Kidd v. Johnson*, 100 U. S. 617, 25 L. Ed. 769; *Royal Baking Powder Co. v. Sherell*, 93 N. Y. 334.

<sup>2</sup> *In re McBride & Co.*, 132 Fed. Rep. 285, 12 Am. B. R. 81.

<sup>3</sup> *Prime v. Brandon Manufacturing Co.*, No. 11421 Fed. Cas., 16 Blatch. 453. Compare *Gordon v. Anthony*, No. 5605 Fed. Cas., 16 Blatch. 453. Compare *Ager v. Murray*, 105 U. S. 131, 26 L. Ed. 942; *Ashcroft v. Walworth*, No. 580 Fed. Cas., 1 Holmes, 132.

<sup>4</sup> *Sessions v. Romadka*, 145 U. S. 29, 36 L. Ed. 609.

<sup>5</sup> *Kittle v. Hall*, 29 Fed. Rep. 512, where the court said: "It can not be maintained that it is the duty of an assignee in bankruptcy to institute suits for the infringement of a patent owned by the bankrupt, and that his failure to do so is negligence."



made prior to the filing of the petition in bankruptcy.<sup>6</sup> It may be observed that in such cases the bankrupt owns an interest in the future patent which may be transferred before the patent issues.<sup>7</sup> It would therefore appear that the property in the patent should pass to the trustee under section 70, clauses 2 or 5, of the act.<sup>7\*</sup> If he elects to take it, he should record the order approving his bond in the patent office with a request that the patent issue to him as trustee.

Where an author has assigned his rights under a copyright absolutely, the interest in the copyright passes to the trustee of the assignee.<sup>8</sup> Where the contract between an author and publisher for copyrighting, publishing and selling by the latter of books under a royalty, which contract expressly provided that it should not be transferred without the consent of the author, the trustee of the publisher can not sell as an asset this interest in the copyright, but should assign it to the author.<sup>9</sup>

### § 380. Powers of appointment, etc.

A power<sup>1</sup> is distinct from property. It is not an interest in property which can be transferred to another or sold on execution or devised by will; nor is it a chose in action. It

<sup>6</sup> *In re McDonnell*, 101 Fed. Rep. 239, 4 Am. B. R. 92; *In re Dann*, 129 Fed. Rep. 495, 12 Am. B. R. 27.

But see *In re Cantelo Mfg. Co.*, 185 Fed. Rep. 276, 26 Am. B. R. 57.

<sup>7</sup> R. S. Sec. 4895; *Hendrie v. Sayles*, 98 U. S. 546, 25 L. Ed. 176; *Walker on Patents*, Sec. 171.

<sup>7\*</sup> *In re Cantelo Mfg. Co.*, 185 Fed. Rep. 276, 26 Am. B. R. 57, the court said: "In spite of the well-considered opinion in the *M'Donnell Case*, I think it not altogether clear but that the interests in the inventions which have become the subject of patent applications may

fairly be held to be an "interest in patents" within the meaning of the law; but, whether or not these inventions may be so held, it seems to me, under subdivision 5 of section 70a, they may be held to be 'property' which could be transferred."

<sup>8</sup> *In re Howley-Dresser Co.*, 132 Fed. Rep. 1002, 13 Am. B. R. 94.

<sup>9</sup> *In re McBride*, 132 Fed. Rep. 285, 12 Am. B. R. 81.

<sup>1</sup> As to powers generally, see *Sugden on Powers*; *Chance on Powers*; *Farwell on Powers*, 4 *Kent's Com.* 351, *et seq.*

was therefore held under the act of 1867 that a power of appointment did not pass to an assignee in bankruptcy of the person in whom the power resided.<sup>2</sup>

The act of 1898 expressly provides that powers which a bankrupt might have exercised for his own benefit pass to the trustee.<sup>4</sup> But those which he might have exercised for some other person do not pass.<sup>3</sup> The English bankrupt laws have for many years contained a similar provision.<sup>4</sup> The test of whether the power passes or not depends upon whether the power may be exercised by the bankrupt for his own benefit, or whether he can exercise it only in behalf of some other person. In the former case it passes to the trustee.<sup>5</sup> In the latter case it does not. A power of general appointment may be exercised for the benefit of himself, and therefore passes.<sup>6</sup> But it seems that the appointment must be exercised prior to the death of the bankrupt.<sup>7</sup>

This provision in bankruptcy law is similar to a rule in equity. The trustee for this purpose represents the creditors. Mr. Justice Gray, in *Clapp v. Ingraham*,<sup>8</sup> said: "It was settled in the English court of chancery, before the middle of the last century, that where a person has a general power of appointment, either by deed or by will, and executes this

<sup>2</sup> Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908.

<sup>3</sup> B. A. 1898, Sec. 70, clause 3.

<sup>4</sup> The statutes 13 Eliz., c. 7, s. 2, 21 Jac. 1 c. 19 s. 12, provided that every interest, power, or possibility which the bankrupt could have departed withal, or could have destroyed by recovery of fine, is transferred under the bankruptcy. And the bankruptcy act of 1869, 32 and 33 Vic. c. 71 s. 15, par. 4, enacted, and the act of 1883, 46 and 47 Vic. c. 52, s. 44, provides that the property of the bankrupt divisible among his creditors shall comprise (i i) "the capacity to exercise and to take proceedings for

exercising all such powers in and over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge."

<sup>5</sup> Doe v. Britian, 2 B. & Ald. 93; Badham v. Mee, 7 Bing. 695; Cooper v. Slight, 27 L. R. Chan. Div. 565; Ford v. Belmont, 7 Rob. (N. Y.) 97.

<sup>6</sup> Doe v. Britian, 2 B. & Ald. 93.

<sup>7</sup> Nichols v. Nixey, 29 L. R. Chan. Div. 1005; *In re Wetmore*, 102 Fed. Rep. 290, 4 Am. B. R. 335, 3 N. B. N. 143.

<sup>8</sup> 126 Mass. 201.

power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. The rule perhaps had its origin in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate.<sup>9</sup> But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never had any ownership or control during his life; and, while recognizing the logical difficulty that the power when executed took effect as an appointment, not of the testator's own assets, but of the estate of the donor of the power, said that the previous cases before Lord Talbot and himself (of which very meager and imperfect reports have come to us) had established the doctrine, that when there was a general power of appointment, which it was absolutely in the donee's pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his executors if he pleased, and, if he executed it voluntarily and without consideration, for the benefit of third persons, the money should be considered part of his assets, and his creditors should have the benefit of it.<sup>10</sup> The doctrine has been upheld to the full extent in England ever since."<sup>11</sup>

### § 381. Property fraudulently transferred passes to the trustee.

The trustee takes the title that the bankrupt had in property fraudulently transferred by him and is authorized to recover the property for the estate.<sup>1</sup>

<sup>9</sup> *Thompson v. Towne*, Prec. Ch. 52; and 2 Vern. 319.

<sup>10</sup> *Townshend v. Windham*, 2 Ves. Sen. 1, 9, 10; *Ex parte Caswall*, 1 Atk. 559, 560; *Bainton v. Ward*, 7 Ves. 503, note; s. c. cited 2 Ves. Sen. 2, and Belt's Suppl. 243; 2 Atk. 172; *Pack v. Bathurst*, 3 Atk. 269.

<sup>11</sup> *Chance on Powers*, Chap. 15, Sec. 2; 2 *Sugden on Powers* (7th ed.), 27; *Fleming v. Buchanan*; DeG., M. & G. 976; *In re Harvey's Estate*, 13 L. R. Chan. Div. 216.

<sup>1</sup> B. A. 1898, Secs. 60, 67e, 70a, clause 4, and Sec. 70e, as amended by the act of February 3, 1903, 32 Stat. at L. 797. For a history and

If a fraudulent transferee and the trustee rescind the transaction and the transferee turns the property over to the trustee, the trustee takes the title the bankrupt had and does not take as the grantee of the fraudulent transferee.<sup>2</sup>

A transfer, as defined by the act, includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."<sup>3</sup>

Transfers which are deemed fraudulent in bankruptcy may be classified as follows: *First*, those which, independently of any legislative system of bankruptcy, would have been fraudulent at common law, or under a statute of frauds.<sup>4</sup> *Second*, those which, in the absence of a legislative system of bankruptcy, would have been unobjectionable, but are made void by the bankrupt act, as against its manifest policy of equal and speedy distribution.<sup>5</sup> This distinction between conveyances

construction of these sections see Judge Lowell's opinion *In re Mul-len*, 101 Fed. Rep. 413, 4 Am. B. R. 224. For corresponding provisions in the act of 1867, see R. S. Secs. 5046, 5047 and 5129.

*Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

In *Thomas v. Sugarman*, 218 U. S. 129, 134, 54 L. Ed. —, speaking of a transfer by the bankrupt to Sugarman with intent to defraud creditors, the court said: "The legal title to the money had been in the bankrupt, and was transferred by the statute to the trustee, Sec. 70. He was entitled to have that money in his hands as against the bankrupt in any event, whether he decided to hand it back

to Sugarman or to distribute it in dividends."

<sup>2</sup> *In re Kellogg* (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7, affirming 113 Fed. Rep. 120, 7 Am. B. R. 623.

<sup>3</sup> B. A. 1898, Sec. 1, clause 4.

<sup>4</sup> B. A. 1898, Sec. 70a, clause 4, and Sec. 67e; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *Thomas v. Sugarman*, 218 U. S. 129, 54 L. Ed. —.

<sup>5</sup> B. A. 1898, Secs. 60 and 67f. *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416; *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496.

As to preferential transfers, see Sec. 382, *post*.

and transfers involving moral turpitude which are fraudulent in fact, and preferential transfers where the fraud is constructive or technical is well recognized.<sup>6</sup>

Vesting the trustee with certain rights and with a certain title does not make absolutely void a transfer hitherto held to be only voidable. The sections relating to property transferred in fraud of creditors provide that it may be recovered by the trustee, which plainly implies that, as against the trustee, as against the creditor, the transferee's title is not void, but voidable—voidable at law as well as in equity, but still voidable.

Section 67*e* invests the trustee with property transferred in fraud of creditors within four months of bankruptcy and section 70*a*, clause 4, with property so transferred without limit of time. Section 67*e* was inserted in the bill long after section 70*a*. It is hard to see what property may pass to the trustee under section 67*e* which would not pass under section 70*a*.<sup>7</sup>

Both of these provisions relate to fraudulent conveyances, which are so by common law, by statute law and by any other recognized rule of law, other than the special provisions of the bankrupt statute.<sup>8</sup> They are for the most part made fraudulent and void by statutes founded upon the statute of 13 Elizabeth, chap. 5, enacted in 1570, and perpetuated in 29 Elizabeth,

<sup>6</sup> *Coder v. Arts*, 213 U. S. 223, 241, 53 L. Ed. 772, 22 Am. B. R. 1; *In re Maher*, 144 Fed. Rep. 503, 16 Am. B. R. 340; *In re Armstrong*, 145 Fed. Rep. 202, 210, 16 Am. B. R. 583; *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re Mullen*, 101 Fed. Rep. 413, 4 Am. B. R. 224.

<sup>7</sup> *In re Mullen*, 101 Fed. Rep. 413, 4 Am. B. R. 224, Judge Lowell considers the history and construction of these two clauses at length.

<sup>8</sup> *Coder v. Arts*, 213 U. S. 223, 242-3, 53 L. Ed. 772, 22 Am. B. R. 1; *Lansing Boiler & Eng. Wks. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558; *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re Bloch* (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 74 C. C. A. 250, 15 Am. B. R. 748; *Allen v. Massey*, 17 Wall. 351, 21 L. Ed. 542; *Pearsall v. Smith*, 149 U. S. 231, 31 L. Ed. 713.

chap. 5, passed in 1587.<sup>9</sup> This statute was merely a legislative declaration of the principles of the common law on this subject.<sup>10</sup>

Property fraudulently transferred by the debtor passes to his trustee in bankruptcy, although the transaction was more than four months prior to the filing of the petition.<sup>11</sup>

The test of the transfer intended by these provisions is that of *bona fides* of the transfer.<sup>12</sup> If the transfer is one which would be fraudulent at common law it may be avoided

<sup>9</sup> Although this statute of Elizabeth is usually referred to as the foundation statute for avoiding fraudulent conveyances, the same principles are to a greater or less extent embodied in earlier statutes. The act of 50 Edward III., Chap. 6 (1376) provided that "Divers people . . . do give their tenements and chattels to their friends, by collusion to have the profits at their will, and after do flee to the franchise of Westminster of St. Martinle-Grand of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt and release the remnant, it is ordained and assented, that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenants and chattels as if no such gift had been made." See also statute of 2 Richard II., Chapter 3 (1379); 3 Henry VII., Chap. 4 (1487).

<sup>10</sup> In *Cadogan v. Kennett*, 2 Cowper, 434. Lord Mansfield said: "The principles and rules of the common law as now universally

known and understood are so strong against fraud in every shape that the common law would have attained every end proposed by the statutes 13 El. c. 5 and 27 El. c. 4." The same rule is laid down in *Clements v. Moore*, 6 Wall. 312.

<sup>11</sup> *In re Schenck*, 116 Fed. Rep. 554, 8 Am. B. R. 727; *In re Toot-haker Bros.*, 128 Fed. Rep. 187, 12 Am. B. R. 99; *Thomas v. Fletcher*, 153 Fed. Rep. 226, 18 Am. B. R. 623; *Prescott v. Galluccio*, 164 Fed. Rep. 618, 21 Am. B. R. 229; *Beasley v. Coggins*, 48 Fla. 215, 12 Am. B. R. 355.

<sup>12</sup> *Coder v. Arts*, 213 U. S. 223, 244, 53 L. Ed. 772, 22 Am. B. R. 1; *Bush v. Export Storage Co.*, 136 Fed. Rep. 918, 14 Am. B. R. 138; *In re Schenck*, 116 Fed. Rep. 554, 8 Am. B. R. 727; *Lansing Boiler & Eng. Wks. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558; *In re Bloch* (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 15 Am. B. R. 748.

In *Cadogan v. Kennett*, 2 Cowper, 435, Lord Mansfield said: "The question therefore in every case is whether the act done is a *bona fide* transaction or whether it is a trick or contrivance to defeat creditors."

by the trustee.<sup>13</sup> That is to say, the transaction must involve actual fraud involving moral turpitude. Transfers made in good faith, for an antecedent or present consideration, are not within these provisions, notwithstanding the effect may be to hinder or delay creditors by removing from their reach assets of the debtor.<sup>14</sup> Such a transfer may be preferential without being fraudulent.<sup>15</sup> The purpose must be to defraud the entire body of creditors. The conversion of the property of a single creditor is not sufficient.<sup>16</sup>

The intent of the bankrupt only is essential.<sup>17</sup> This may be determined from the circumstances connected with the transaction, because a person is presumed to intend the necessary consequence of his acts.<sup>18</sup> The issue as to whether or not a

<sup>13</sup> *In re Pease*, 129 Fed. Rep. 446, 12 Am. B. R. 66; *In re Benjamin*, 140 Fed. Rep. 320, 15 Am. B. R. 351; *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489; *In re Knopf*, 144 Fed. Rep. 245, 16 Am. B. R. 432, and 146 Fed. Rep. 109, 17 Am. B. R. 148; *Johnston v. Forsyth*, 127 Fed. Rep. 845, 11 Am. B. R. 669; *Sherman v. Luckhardt*, 67 Kan. 682, 11 Am. B. R. 26.

As to what constitutes such fraudulent conveyances generally, see Wait on Fraudulent Conveyances; Bump on Fraudulent Conveyances; Worthington on Fraudulent Conveyances.

<sup>14</sup> *Lansing Boiler & Eng. Wks. v. Ryerson* (C. C. A. 6th Cir.), 128 Fed. Rep. 701, 63 C. C. A. 253, 11 Am. B. R. 558; *Jacobs v. Van Sickle* (C. C. A. 3d Cir.), 127 Fed. Rep. 62, 61 C. C. A. 598, 11 Am. B. R. 470; *In re Duffey*, 118 Fed. Rep. 926, 9 Am. B. R. 358; *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re Maher*, 144 Fed. Rep. 503, 16 Am. B. R. 340; *In re Armstrong*, 145 Fed. Rep. 202, 16 Am. B. R. 583.

*Warren v. Moody*, 122 U. S. 133, 30 L. Ed. 1128; *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207; *Metropolitan National Bank v. Rogers* (C. C. A. 3d Cir.), 53 Fed. Rep. 776, 3 C. C. A. 666; *In re Schenck*, 116 Fed. Rep. 554, 8 Am. B. R. 727; *In re Toothaker Bros.*, 128 Fed. Rep. 187, 12 Am. B. R. 99.

<sup>15</sup> *Coder v. Arts*, 213 U. S. 223, 53 L. Ed. 772, 22 Am. B. R. 1; *Githens v. Shiffler*, 112 Fed. Rep. 505, 7 Am. B. R. 453; *In re Maher*, 144 Fed. Rep. 503, 16 Am. B. R. 340; *In re Armstrong*, 145 Fed. Rep. 202, 16 Am. B. R. 583.

<sup>16</sup> *In re Berry & Co.*, 146 Fed. Rep. 623, 15 Am. B. R. 360.

<sup>17</sup> *In re Hill*, 140 Fed. Rep. 984, 15 Am. B. R. 499; *In re McLam*, 97 Fed. Rep. 922, 3 Am. B. R. 245; *In re Bloch* (C. C. A. 2d Cir.), 142 Fed. Rep. 674, 74 C. C. A. 250, 15 Am. B. R. 748.

<sup>18</sup> *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *In re Knopf*, 146 Fed. Rep. 109; *In re Benjamin*, 140 Fed. Rep. 320, 15 Am. B. R. 351.



bankrupt had made a transfer of his property with intent on his part to hinder, delay or defraud his creditors is a question for the jury.<sup>19</sup> The intent of the transferee is immaterial, but he must be shown to have knowledge of or have participated in the fraud.<sup>20</sup> The fact that he had reasonable cause to inquire into the nature of the transaction is sufficient, although he may not have had actual knowledge of the fraud involved in the transaction.<sup>21</sup>

Property transferred in good faith and for a present fair consideration prior to bankruptcy does not pass to the trustee.<sup>22</sup> When *bona fide* sales and conveyances, and transfers of property exempted by the state law, the trustee has no concern.

It may be observed that though a present fair consideration was given for property transferred it alone will not save the conveyance. It must also be *bona fides*.<sup>23</sup> A sale may

<sup>19</sup> *Sherman v. Luckhardt*, 96 Mo. App. 320, 9 Am. B. R. 307.

<sup>20</sup> *Jacobs v. Van Sickle* (C. C. A. 3d Cir.), 127 Fed. Rep. 62, 11 Am. B. R. 470.

<sup>21</sup> *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489; *In re Moody*, 134 Fed. Rep. 628, 14 Am. B. R. 272; *In re Knopf*, 146 Fed. Rep. 109, 17 Am. B. R. 148; *Dokken v. Page* (C. C. A. 8th Cir.), 147 Fed. Rep. 438, 77 C. C. A. 674, 17 Am. B. R. 228.

<sup>22</sup> B. A. 1898, Sec. 67e and Sec. 70e.

As to what constitutes a *bona fide* holder, see *Marsh v. Armstrong*, 20 Minn. 81; *Murray v. Jones*, 50 Ga. 109; *Harrell v. Beal*, 17 Wall. 590, 21 L. Ed. 692; *Sedgwick v. Place*, No. 12621 Fed. Cas., 12 Blatch. 163.

In *Shelton v. Price*, 174 Fed. Rep. 891, 23 Am. B. R. 431, a sale in bulk was sustained.

<sup>23</sup> In *Davis v. Schwartz*, 155 U. S. 631, 39 L. Ed. 289, Mr. Justice

Brown speaking for the supreme court said: "It has been the accepted law ever since Twyne's case 3 Coke, 80, that good faith, as well as a valuable consideration, is necessary to support a conveyance as against creditors. In that case Pierce, being indebted to Twyne in 400 pounds was sued by a third party for 200 pounds. Pending such suit, he conveyed all his property to Twyne in consideration of his debt, but continued in possession, sold certain sheep, and set his mark on others. It was resolved to be a fraudulent gift, though the deed declared that it was made *bona fide*. Most of the cases illustrative of this doctrine, however, have been like that of Twyne, where a debtor, knowing that an execution was to be taken out against him, had sold his property to a vendee having knowledge of the facts, for the express purpose of avoiding a levy, or receiving a consideration which could not be reached by



be void for bad faith though the buyer pays the full value for the property bought.<sup>24</sup> This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly with guilty knowledge.<sup>25</sup>

A gift to the debtor's wife or children, in the absence of fraud, is valid and the property so conveyed does not pass to the trustee.<sup>26</sup> If fraud is present, it is invalid and the property passes to the trustee.<sup>27</sup>

Where a fraudulent transaction is alleged and a purchaser claims that the purchase was made in good faith for a present fair consideration, the burden is upon him to establish that fact.<sup>28</sup>

The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication.<sup>29</sup> To this end the trustee is vested with the "rights, remedies and powers" of a judgment creditor.<sup>30</sup> Such

execution. In such cases that fact that he receives a good consideration will not validate the transaction, unless at least the creditor has obtained the benefit of the consideration."

<sup>24</sup> *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66.

<sup>25</sup> *In re* Pease, 129 Fed. Rep. 446, 12 Am. B. R. 66; Clements v. Moore, 6 Wall. 312; Cadogan v. Kennett, 2 Cowper, 432; Walbrun v. Babbitt, 16 Wall. 581, 21 L. Ed. 489.

<sup>26</sup> Adams v. Collier, 122 U. S. 382, 30 L. Ed. 1230; Warren v. Moody, 122 U. S. 132, 30 L. Ed. 1128.

<sup>27</sup> Thomas v. Fletcher, 153 Fed. Rep. 226, 18 Am. B. R. 623; Pres-

cott v. Galluccio, 164 Fed. Rep. 618, 21 Am. B. R. 229.

<sup>28</sup> Lawrence v. Lowrie, 133 Fed. Rep. 995, 13 Am. B. R. 297; McNulty v. Wiesen, 130 Fed. Rep. 1012, 12 Am. B. R. 341; *In re* Knopf, 144 Fed. Rep. 245, 16 Am. B. R. 432, and 146 Fed. Rep. 109, 17 Am. B. R. 148; *In re* Moody, 134 Fed. Rep. 628, 14 Am. B. R. 272; Dokken v. Page (C. C. A. 8th Cir.), 147 Fed. Rep. 438, 77 C. C. A. 674, 17 Am. B. R. 228.

But see Shelton v. Price, 174 Fed. Rep. 891, 23 Am. B. R. 431.

<sup>29</sup> B. A. 1898, Secs. 70e and 67e.

<sup>30</sup> B. A. 1898, Sec. 47a, clause 2, as amended by the act of June 25, 1910, 36 Stat. at L. 838.

property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value.<sup>81</sup>

A trustee may pursue the property or the proceeds of the property to whoever may have received it until he reaches a *bona fide* purchaser.<sup>82</sup> Thus if A, in fraud of his creditors, transfers the property to B, who afterwards sells it to C, with notice, who afterwards sells it to D, a *bona fide* purchaser for value, the trustee in bankruptcy of A may hold C liable in damages for the value of the property.

An attaching creditor can not be deemed a purchaser in good faith for value. But where property conveyed in fraud of creditors is first attached by creditors of the transferee who have no knowledge of the fraud, their attachment will prevail as against the rights of the defrauded creditors of the grantor, or his trustee in bankruptcy.<sup>83</sup>

When a fraudulent conveyance or transfer is set aside, the court will order the property turned over to the trustee<sup>84</sup> in

<sup>81</sup> B. A. 1898, Sec. 70e; *Bush v. Export Storage Co.*, 136 Fed. Rep. 918, 14 Am. B. R. 138.

<sup>82</sup> *Sedgwick v. Place*, No. 12621 Fed. Cas., 12 Blatch. 163; *In re Mullen*, 101 Fed. Rep. 413, 4 Am. B. R. 224.

<sup>83</sup> *In re Mullen*, 101 Fed. Rep. 413, 4 Am. B. R. 224.

<sup>84</sup> In *Keating v. Keefer*, No. 7635 Fed. Cas., 5 N. B. R. 133, the court said: "The circumstances of this case are such as to force the conviction upon my mind that the transfers to defendant, and the placing of the title to the land in question in her name, were made and done with intent to hinder, delay and defraud not only the then existing creditors of Henry M. Keefer, but his future creditors also. A decree must be entered in accordance with the foregoing conclusions, and de-

claring the said farm, together with all the stock, grain and other personal property upon it, except such as the law excepts, assets of the said bankrupt, Henry M. Keefer and subject to be disposed of and distributed under the bankrupt act for the payment of his debts and the expenses of the bankruptcy proceedings, and for delivery and surrender up to the complainant as assignee of the said bankrupt, of the possession of all said property, except as aforesaid, for the accounting by the defendant of all personal property on said farm at the time the bankruptcy proceedings were commenced (adjudication), sold, disposed of or converted by her, other than for the necessary keep of the live stock, and for the preservation of said property, and requiring the defendant to execute and deliver all convey-

bankruptcy, but will preserve rights under the local exemption laws.<sup>85</sup>

### § 382. Preferences pass to the trustee.

Property transferred by a debtor to a creditor so as to create a preference under the act passes to the trustee and he is authorized to recover the same for the estate.<sup>1</sup>

To prefer a creditor by a transfer or assignment of property by an insolvent may sometimes be unjust to other creditors, but it was not forbidden by the common law and is not forbidden by many of the states. It is fraudulent and invalid because the bankrupt act says so. "In a preferential transfer the fraud is constructive and technical, consisting in the infraction of that rule of equal distribution among all creditors, which it is the policy of the law to enforce when all can not be fully paid."<sup>2</sup> In this it differs from a fraudulent transfer, which must involve actual fraud to be avoided.<sup>3</sup>

If a transfer by the debtor to a creditor has the effect of creating a preference under the act, the property so transferred

ances, releases, assignments, transfers or acquittances necessary to carry said decree into full force and effect, and for costs to the complainant."

See also *Sands v. Codwise*, 4 Johns (N. Y.), 536.

<sup>85</sup> B. A. 1898, Sec. 70; *McFarland v. Goodman*, No. 8789 Fed. Cas., 6 Biss. 111; *In re Detert*, No. 3829 Fed. Cas., 11 N. B. R. 293.

<sup>1</sup> B. A. 1898, Sec. 60, as amended by the act of June 25, 1910, 36 Stat. at L. 838. *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416; *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *Pirie v. Chicago Title & T. Co.*, 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814.

Compare R. S. Secs. 5084 and 5128 embracing a part of Secs. 23 and 35 of the act of 1867. For cases construing the act of 1867,

see *Tiffany v. Lucas*, 15 Wall. 410, 21 L. Ed. 198; *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *West Phil. Bank v. Dickon*, 95 U. S. 180, 24 L. Ed. 407; *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389; *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Judson v. The Courier Co.*, 8 Fed. Rep. 422.

<sup>2</sup> Judge Dodge *In re Maher*, 144 Fed. Rep. 503, 509, 16 Am. B. R. 340, quoted with approval by the supreme court in *Coder v. Arts*, 213 U. S. 223, 241, 53 L. Ed. 772, 22 Am. B. R. 1.

<sup>3</sup> See Sec. 381, *ante*.

<sup>4</sup> As to what constitutes a preference, see Sec. —, *et seq.*, *post*; *Pirie v. Chicago Title & T. Co.*, 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; *Pratt v. Columbia Bank*, 157 Fed. Rep. 137, 18 Am. B. R. 406.

must be delivered to the trustee.<sup>4</sup> If it does not have that effect the creditor receiving it may keep the property transferred.<sup>5</sup>

A creditor who has received a preference may be required to surrender it before proving a claim for the balance of his debt.<sup>6</sup> The trustee may compel a creditor to return the property so transferred to him by a suit instituted for that purpose.<sup>7</sup>

All levies, judgments, attachments or other liens, obtained through legal proceedings within four months prior to the filing of the petition are void and the property so levied on passes to the trustee;<sup>8</sup> but where property levied on has been sold to an innocent purchaser for value, such purchaser has a good title. The proceeds of such sale go to the trustee and not to the judgment creditor.<sup>9</sup>

### § 383. Transfers void as to creditors under state laws.

The bankrupt act provides that "All conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such prop-

<sup>4</sup> As to what constitutes a preference, see Sec. 488, *et seq.*, *post*; *Coder v. Arts*, 213 U. S. 223, 240, 53 L. Ed. 772, 22 Am. B. R. 1; *Tumlin v. Bryan* (C. C. A. 5th Cir.), 165 Fed. Rep. 166, 91 C. C. A. 200, 21 Am. B. R. 319; *Hussey v. Richardson-Roberts Dry Goods Co.* (C. C. A. 8th Cir.), 148 Fed. Rep. 598, 78 C. C. A. 370, 17 Am. B. R. 511; *In re First Nat. Bank* (C. C. A. 6th Cir.), 155 Fed. Rep. 100, 84 C. C. A. 16, 18 Am. B. R. 766; *McNaboe v. Columbian Mfg. Co.* (C. C. A. 2d Cir.), 153 Fed. Rep. 967, 83 C. C. A. 81, 18 Am. B. R. 684.

<sup>6</sup> See Secs. 342 and 343, *ante*.

<sup>7</sup> *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416; *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *Pratt v. Columbia Bank*, 157 Fed. Rep. 137, 18 Am. B. R. 406; *Warmath v. O'Daniel* (C. C. A. 6th Cir.), 159 Fed. Rep. 87, 86 C. C. A. 277, 20 Am. B. R. 101.

<sup>8</sup> B. A. 1898, Sec. 67f.

<sup>9</sup> *State Bank v. Cox* (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 74 C. C. A. 285, 16 Am. B. R. 32; *In re Kenney*, 95 Fed. Rep. 427, 2 Am. B. R. 494; *In re Franks*, 95 Fed. Rep. 635, 2 Am. B. R. 634.

erty shall pass to the assignee [trustee] and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.<sup>1</sup>

This provision is limited to transfers made within four months of bankruptcy, but is not confined to any particular class of transfers. Any conveyance or transfer of his property made by a bankrupt within four months before the filing of the petition may be held null and void as against the trustee, provided it could have been set aside by the creditors under the local law.

The failure to register or properly record a deed or bill of sale or mortgage, as required by the local statute, or to give possession of personal property, are familiar examples. In most states such a transfer is valid between the parties, but may be avoided where rights of creditors are concerned. In such case the trustees in bankruptcy may recover for the creditor's property so transferred, provided there has been an adjudication of bankruptcy.

### § 384. Real and personal property.

The title to all property, which prior to the filing of the petition the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him, passes to the trustee.<sup>1</sup>

The test as to whether property is of such a character as to pass or not depends upon whether, under the local law where the property has its *situs*, the bankrupt could have transferred it, or whether it could have been levied upon and sold under judicial process against him. If it is of such a character it

<sup>1</sup> B. A. 1898, Sec. 67*e*; *In re* Farrell Co. (Ref.), 9 Am. B. R. 341.

<sup>1</sup> B. A. 1898, Sec. 70, clause 5; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *Knapp v. Milwaukee*

*Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *In re* Burka, 104 Fed. Rep. 326, 5 Am. B. R. 12.

As to property acquired after the petition is filed, see Sec. 376, *ante*.

passes.<sup>2</sup> If not, it does not pass to the trustee.<sup>3</sup> Such questions are determinable only by local law where the property has its *situs*.<sup>4</sup> The *situs* of real property is the state in which it is situated.<sup>5</sup> The *situs* of personal property is the domicile of the bankrupt.<sup>5</sup>

The effect of this provision is to transfer the greater part of the assets of the bankrupt. They include a large number of different classes of property, which will be more particularly discussed under separate heads.

### § 385. Interest in real estate.

The title to all real estate within the United States held by the bankrupt at the time of filing the petition is vested in the trustee.<sup>1</sup>

As a title vested by law can have no extra territorial operations, lands situated in foreign countries do not pass except by deed.<sup>1</sup> The bankrupt should therefore execute a transfer of his real estate situated in foreign countries.<sup>2</sup>

Any interest in real estate which is alienable or subject to levy and execution passes to the trustee. Thus it has been held that an equity of redemption,<sup>3</sup> property devised,<sup>4</sup> a

<sup>2</sup> Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

<sup>3</sup> Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; Humphrey v. Tatman, 198 U. S. 91, 48 L. Ed. 956, 14 Am. B. R. 74; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

<sup>4</sup> Spindle v. Shreve, 111 U. S. 546, 28 L. Ed. 512; Nichol v. Levy, 5 Wall. 433, 18 L. Ed. 596; Mason v. Beebee, 44 Fed. Rep. 558; *In re McKenna*, 9 Fed. Rep. 27. See also Nichols v. Eaton, 91 U. S. 729, 23 L. Ed. 254, Reynolds v. Hanna, 55 Fed. Rep. 795.

<sup>5</sup> Oakley v. Bennett, 11 How. 33, 13 L. Ed. 593. See also *In re Bugbee*, No. 2115 Fed. Cas., 9 N. B. R. 258.

<sup>1</sup> Oakey v. Bennett, 11 How. 33, 13 L. Ed. 593; Barnett v. Pool, 23 Tex. 517.

<sup>2</sup> B. A. 1898, Sec. 7, clause 5.

<sup>3</sup> Barron v. Newberry, No. 1056 Fed. Cas., 1 Biss. 149; Robinson v. Denny, 57 Ala. 492. See also 4 Kent's Com. 160; *Ex parte Ames*, No. 323 Fed. Cas., 1 How. 561; *In re Novak*, 111 Fed. Rep. 161, 7 Am. B. R. 27.

<sup>4</sup> *In re Kane*, 161 Fed. Rep. 633, 20 Am. B. R. 616; Sanford v. Lackland, No. 12312 Fed. Cas., 2 Dill. 6; *Ex parte Fuller*, No. 5147 Fed. Cas., 2 Story, 327.

vested remainder,<sup>5</sup> a reversion with rent incident thereto,<sup>6</sup> a fee subject to an easement,<sup>7</sup> accretions to land by alluvion,<sup>8</sup> an estate of the husband by curtesy or dower,<sup>9</sup> a resulting trust,<sup>10</sup> or an equitable title conveyed to bankrupt subject to a trust imposed by a will,<sup>11</sup> or any vested interest,<sup>12</sup> is such property as vests in a trustee.

It has been held on the other hand that a contingent interest in an estate in remainder,<sup>13</sup> the income of a life estate under a will,<sup>14</sup> or Indian lands under an allotment act of Congress<sup>15</sup> do not pass to the trustee. Whether an equitable interest in real estate will pass to a trustee depends upon the local law where the property has its situs.<sup>16</sup>

The trustee of a bankrupt mortgagor is ordinarily entitled to take as a part of the estate the rents for mortgaged property which comes into his possession accrued up to the time that the mortgagee enters and brings his right of entry or

<sup>5</sup> *In re* Wood, 98 Fed. Rep. 972, 3 Am. B. R. 572, 3 N. B. N. 141; *In re* Twaddell, 110 Fed. Rep. 145, 6 Am. B. R. 539; *In re* Shenberger, 102 Fed. Rep. 978, 4 Am. B. R. 487; *In re* McHarry (C. C. A. 7th Cir.), 111 Fed. Rep. 498, 7 Am. B. R. 83; *Belcher v. Burnett*, 126 Mass. 230; *Woods v. Little* (C. C. A. 4th Cir.), 13 Am. B. R. 742, 67 C. C. A. 157, 134 Fed. Rep. 229; see also *Putnam v. Story*, 132 Mass. 205.

<sup>6</sup> *Evans v. Hamrick & Co.*, 61 Penn. St. 19.

<sup>7</sup> *Banks v. Ogden*, 2 Wall. 57, 17 L. Ed. 818.

<sup>8</sup> *Banks v. Ogden*, 2 Wall. 57, 17 L. Ed. 818.

<sup>9</sup> *In re* McKenna, 9 Fed. Rep. 27; *Hesseltine v. Prince*, 95 Fed. Rep. 802, 2 Am. B. R. 600.

<sup>10</sup> *In re* Dunavant, 96 Fed. Rep. 542, 3 Am. B. R. 41.

<sup>11</sup> *In re* Gailey (C. C. A. 7th Cir.), 127 Fed. Rep. 538, 11 Am. B. R. 539.

<sup>12</sup> *In re* Mosier, 112 Fed. Rep. 138, 7 Am. B. R. 268.

<sup>13</sup> *In re* Wetmore, 102 Fed. Rep. 290, 4 Am. B. R. 335, affirmed (C. C. A. 3d Cir.), 108 Fed. Rep. 520, 6 Am. B. R. 210; *In re* Hoadley, 2 N. B. N. 704. But see *Hammond v. Whittredge*, 204 U. S. 538, 51 L. Ed. 606.

<sup>14</sup> *Monroe v. Dewey* (Mass.), 2 N. B. N. 840. But see *In re* Baudouine, 96 Fed. Rep. 536, 3 Am. B. R. 55; *In re* St. John, 105 Fed. Rep. 234, 5 Am. B. R. 190, 3 N. B. N. 114.

<sup>15</sup> *In re* Russie, 96 Fed. Rep. 609, 3 Am. B. R. 6.

<sup>16</sup> *Spindle v. Shreve*, 111 U. S. 542, 28 L. Ed. 512; *In re* Goldman, 102 Fed. Rep. 122, 4 Am. B. R. 100, 2 N. B. N. 818.

his bill of foreclosure, or takes such action as entitles him to possession of the property.<sup>17</sup>

### § 386. Dower and curtesy.

Real estate of the bankrupt passes to the trustee subject to his wife's right of dower. A right of dower by a wife is no part of the bankrupt's property, and it can not be barred by a sale by the trustee in bankruptcy under order of the court.<sup>1</sup> It may be with her consent.<sup>1\*</sup> The same rule is applied in England.<sup>2</sup>

The present statute recognizes this right of the widow when it provides that in case of the death of the bankrupt the widow and children shall be entitled to all rights of dower and allowance allowed by the law of the state of the bankrupt's residence.<sup>3</sup> The wife is not estopped to claim dower by reason of having joined her husband in a deed which is fraudulent as against creditors, and which for this reason has been set aside by the trustee.<sup>4</sup> In what property the wife has a right of dower and the nature of the dower depends upon the local law.<sup>4\*</sup>

<sup>17</sup> *In re Dole*, 110 Fed. Rep. 926, 7 Am. B. R. 21; *In re Chase*, 133 Fed. Rep. 79, 13 Am. B. R. 294.

<sup>1</sup> *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669; *In re McKenzie* (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 73 C. C. A. 483, 15 Am. B. R. 679; *Porter v. Lazear*, 109 U. S. 84, 27 L. Ed. 865; *In re Shaeffer*, 105 Fed. Rep. 352, 5 Am. B. R. 248; *In re Slack*, 111 Fed. Rep. 523, 7 Am. B. R. 121.

<sup>1\*</sup> *In re Acretelli*, 173 Fed. Rep. 121, 21 Am. B. R. 537, *Savage v. Savage* (C. C. A. 4th Cir.), 141 Fed. Rep. 346, 72 C. C. A. 494, 15 Am. B. R. 599.

<sup>2</sup> *Smith v. Smith*, 5 Ves. 189; *Squire v. Compton*, Vin. Ab. Dower G. pl. 60.

<sup>3</sup> B. A. 1898, Sec. 8; *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132.

<sup>4</sup> *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669; *Cox v. Wilder*, No. 3308 Fed. Cas., 2 Dill. 45; *In re Detert*, No. 3829 Fed. Cas., 11 N. B. R. 293; *McFarland & Goodman*, No. 8789 Fed. Cas., 6 Biss. 111.

<sup>4\*</sup> *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669; *In re McKenzie* (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 73 C. C. A. 483, 15 Am. B. R. 679; *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535; 23 Am. B. R. 132.



Where the local law gives a wife dower in property "whereof the husband died seized and possessed," it has been held that the widow is not entitled to dower in property which has passed to her husband's trustee by virtue of bankruptcy before his death.<sup>5</sup> The wife of a bankrupt has no inchoate right of dower in real estate which has vested in a trustee as assets of a partnership.<sup>6</sup>

An estate by curtesy in a wife's property does not pass to the trustee of her husband during her life,<sup>7</sup> but does pass when the wife dies before the bankruptcy.<sup>7\*</sup> The wife's right of dower in her husband's estate does not pass to her trustee during the life of the husband.<sup>8</sup>

### § 387. Leaseholds.

A lease containing the usual provisions is not terminated by the bankruptcy of the lessee.<sup>1</sup> The estate of the bankrupt lessee passes to his trustee by operation of law, subject to his election to take or reject it.<sup>2</sup>

<sup>5</sup> *In re McKenzie*, 132 Fed. Rep. 986, 13 Am. B. R. 227, affirmed (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 73 C. C. A. 483, 15 Am. B. R. 679.

<sup>6</sup> *Hiscock v. Jaycox*, No. 6531 Fed. Cas., 12 N. B. R. 507.

<sup>7</sup> *Hesseltine v. Prince*, 95 Fed. Rep. 802, 2 Am. B. R. 600; *In re McKenna*, 9 Fed. Rep. 27; *Matter of Russell* (Ref.), 13 Am. B. R. 24.

<sup>7\*</sup> *Elmore v. Symonds*, 183 Mass. 321.

<sup>8</sup> *In re German American Bank* (Southern District of Ohio, 1905, not reported).

<sup>1</sup> *In re Roth & Appel* (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 588; *In re Pennewell* (C. C. A. 6th Cir.), 119 Fed. Rep. 139, 55 C. C. A. 571, 9 Am. B. R. 490; *Lamson Consol. Store Service Co. v. Bowland* (C.

C. A. 6th Cir.), 114 Fed. Rep. 639, 52 C. C. A. 335; *In re Ells*, 98 Fed. Rep. 967, 3 Am. B. R. 564; *Atkins v. Wilcox* (C. C. A. 5th Cir.), 105 Fed. Rep. 595, 44 C. C. A. 646, 5 Am. B. R. 313; *Watson v. Merrill* (C. C. A. 8th Cir.), 136 Fed. Rep. 359, 69 C. C. A. 185, 14 Am. B. R. 453.

But see *In re Jefferson*, 93 Fed. Rep. 948, 2 Am. B. R. 206; *Bray v. Cobb*, 100 Fed. Rep. 270, 3 Am. B. R. 788, 2 N. B. N. 586; *In re Hays, etc., Co.*, 117 Fed. Rep. 879, 9 Am. B. R. 144.

<sup>2</sup> *Gazlay v. Williams*, 210 U. S. 41, 52 L. Ed. 950, 20 Am. B. R. 18, affirming (C. C. A. 6th Cir.), 147 Fed. Rep. 678, 77 C. C. A. 662, 17 Am. B. R. 249; *In re Frazin* (C. C. A. 2d Cir.), 183 Fed. Rep. 28, 105 C. C. A. 320, 26 Am. B. R. —; *Watson v. Merrill* (C. C. A. 8th

The trustee may take a lease imposing forfeiture if the lessee assign, mortgage, or pledge the lease, or underlet the premises, or his interest is sold under execution or other legal process, without the lessor's consent.<sup>3</sup> He takes it without incurring the forfeiture under such clause.<sup>4</sup> The reason is that the lessee's property passes to the trustee by operation of law and not by any act on his part. The trustee may sell or assign it, because he takes only as the channel of conveyance to the whole body of creditors.<sup>5</sup>

The trustee is not entitled to a lease, containing a covenant providing that in the case of the lessee's insolvency or the institution of bankruptcy proceedings by or against him, or the appointment of a receiver or trustee of his property, that the lessor may re-enter, because it would be violated by the occurrence of any of the acts specified.<sup>6</sup> If the landlord waives

Cir.), 136 Fed. Rep. 359, 69 C. C. A. 185, 14 Am. B. R. 453; *In re Adams*, 134 Fed. Rep. 142, 14 Am. B. R. 23.

*In re Ells*, 98 Fed. Rep. 967, 3 Am. B. R. 564, Judge Lowell said: "A lease recently examined was made for a term of several hundred years, upon a payment of \$16,000 at the beginning of the term, and subject to a future rent of \$1 a year if demanded by the lessor. Clearly, this would be an asset of a bankrupt's estate which the trustee would almost certainly elect to assume, and I can find nothing in the bankrupt act which would terminate the lease and entitle the landlord to possession. Many existing ground leases, also, would certainly be assumed by a trustee in bankruptcy of the lessee, and it would be unjust to hold them terminated by the adjudication."

<sup>3</sup> *Gazlay v. Williams*, 210 U. S. 41, 52 L. Ed. 950, 24 Am. B. R. 18; *In re Pennewell* (C. C. A. 6th Cir.),

119 Fed. Rep. 139, 55 C. C. A. 571, 9 Am. B. R. 490; *In re Bush*, 126 Fed. Rep. 878, 11 Am. B. R. 415; *Doe v. Bevan*, 3 Maule & S. 353.

<sup>4</sup> *Gazlay v. Williams*, 210 U. S. 41, 52 L. Ed. 950, 24 Am. B. R. 18; *Doe v. Bevan*, 3 Maule & S. 353.

<sup>5</sup> *Gazlay v. Williams*, 210 U. S. 41, 52 L. Ed. 950, 24 Am. B. R. 18; *In re Bush*, 126 Fed. Rep. 878, 11 Am. B. R. 415; *Doe v. Bevan*, 3 Maule & S. 353.

<sup>6</sup> The general rule is well stated in *Jones on Landlord and Tenant*, section 466, cited with approval in *Gazlay v. Williams*, 210 U. S. 41, 52 L. Ed. 950, 20 Am. B. R. 18, where it is said that an ordinary covenant against subletting and assigning is not broken by a transfer of the leased premises by operation of law, but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.

his right of re-entry by accepting rent or otherwise after a breach of a covenant in a lease, the trustee is entitled to take the lease.<sup>7</sup>

The trustee is not entitled to a lease where there has been a judgment of dispossession before bankruptcy.<sup>8</sup>

It is well settled in this country that the trustee is not bound to take a lease and charge the estate with the payment of rent, when it would be a burden and not a benefit to the estate to do so.<sup>9</sup> The same rule prevailed in England under the earlier laws. Since the act of 1869 (32 and 33 Vic.), leases have passed subject to a statutory disclaimer and no power of election has been recognized.<sup>10</sup>

<sup>7</sup> *In re Montello Brick Wks.*, 163 Fed. Rep. 624, 20 Am. B. R. 859, affirmed (C. C. A. 3d Cir.), 167 Fed. Rep. 482, 93 C. C. A. 118, 21 Am. B. R. 896; *In re Frazin & Oppenheimer*, 174 Fed. Rep. 713, 23 Am. B. R. 289, reversed by a divided court (C. C. A. 2d Cir.), 183 Fed. Rep. 28, 105 C. C. A. 320, 26 Am. B. R. —.

<sup>8</sup> *Plaut v. Gorham Mfg. Co.*, 174 Fed. Rep. 872, 23 Am. B. R. 42.

<sup>9</sup> *In re Frazin* (C. C. A. 2d Cir.), 183 Fed. Rep. 28, 105 C. C. A. 320, 26 Am. B. R. —; *In re Frazin & Oppenheimer*, 174 Fed. Rep. 713, 23 Am. B. R. 289; *In re Roth & Appel* (C. C. A. 2d Cir.), 181 Fed. Rep. 670, 104 C. C. A. 649, 24 Am. B. R. 588; *Ex parte Houghton*, No. 6725 Fed. Cas., 1 Low. 554; *United States Trust Co. v. Wabash R. R. Co.*, 150 U. S. 287, 37 L. Ed. 1085.

<sup>10</sup> See Robson on Bankruptcy, Sec. 460, *et seq.*

In *Wilson v. Wallani*, 5 Ex. Div. 155, Judge Stephen reviews the English statutes upon this point, and reaches the conclusion on page 163 as follows: "I think that under the first act of bankruptcy laws

—those which were consolidated in 1824—the power of the trustees to renounce onerous leases arose from the absence of any legal enactment citing such leases in them, and from the insufficiency for that purpose (as explained in *Copeland v. Stephens*, 1 B. & A. 393) of a general assignment. Under the second set of bankruptcy laws, including the act of 1849, the property was actually vested in them, but a power to elect whether they would take it or not was confirmed by the express words of s. 145 of the act of 1849. This act was repealed by 32 and 33 Vict. c. 83. Under the third system established by the act of 1869, the leases of the bankrupt are vested absolutely in the trustee, subject to his right of disclaimer, but no power of election is given to him or recognized in him. It thus appears to me that the power of election conferred by the act of 1849, being repealed by express words, and the estate being vested in the trustee by the express words of the act of 1869, he has no power to get rid of it, except by follow-

The trustee is entitled to a reasonable time to elect whether to adopt or repudiate a lease.<sup>11</sup> If his judgment is unwisely exercised, the creditors may apply to the court to compel a different conclusion.

The better practice is for the trustee to immediately serve a written notice upon the lessor stating his election. If he elects not to take he may make a new lease with the same landlord with reference to using the premises as may be for the best interests of the bankrupt's estate.

When the trustee does not give a notice of his election in writing his intention may be presumed from his acts. No general rule can be laid down as to the effect of remaining in possession of the leased premises, or paying rent for them, or doing any other act consistent with the supposition that the trustee has not elected to take the lease as a part of the property of the bankrupt. Each case must be determined by the particular circumstances belonging to it, and the examination of the decisions is only useful to get at the general principle by which they are governed. Thus, ordinarily, if he takes any steps toward the management of or continues to

ing the express words of s. 23. I do not think this view is inconsistent with the cases to which I have referred. They show only that the provisions of the act of 1869 are not to be extended by implication. I do not intend to do so by this judgment. I think that the position of the trustee has been altered by express words, though not by words which expressly state all the consequences of the alteration. Upon the whole, I hold that the lease was vested in the trustees on their appointment, and that they are personally liable upon the covenants, unless they make a valid disclaimer. I think *Ex parte Dressler* (9 Ch. D. 252), is an ex-

press authority as to their personal liability, assuming the lease to be vested in them absolutely." In this case he held that the disclaimer was not formal, and therefore not binding. See also *Titterton v. Cooper*, 9 L. R. Q. B. Div. 473.

The act of 1883, enacted since this decision, also provides for formal disclaimer.

<sup>11</sup> *In re Frazin* (C. C. A. 2d Cir.), 183 Fed. Rep. 28, 105 C. C. A. 320, 26 Am. B. R. —; *United States Trust Co. v. Wabash R. R. Co.*, 150 U. S. 287, 37 L. Ed. 1085; *In re Rubel*, 166 Fed. Rep. 131, 21 Am. B. R. 566; *In re Schwartzman*, 167 Fed. Rep. 399, 21 Am. B. R. 885.

use the leased premises, he may be presumed to have elected to take the lease.<sup>12</sup>

If the trustee elects to reject the lease, it is a nullity so far as bankruptcy proceedings are concerned. In that

<sup>12</sup> It has been held that it amounts to an election for the trustee to intermeddle with and assume the management of a farm. *Thomas v. Pemberton*, 7 Taunt. 206; *Bradshaw v. Jones*, 20 L. T. 781, and W. R. 1010; or where the trustee allowed his cows to remain upon the pasture land for two days after appointment and ordered them to be milked there, *Welch v. Myers*, 4 Camp. 368, or where he pays rent for leased property, *Ansell v. Robson*, 2 C. & J. 610; also *Broome v. Robinson*, 7 East. 339. Where the trustee takes possession of leasehold property, although the trustee delivered up the keys immediately after the bankrupt's effects are sold, *Hansen v. Stevenson*, 1 B. & A. 303; or where the trustee of a bankrupt lessee chosen on the 15th of November kept the bankrupt in the premises, carrying on the business for the benefit of the creditors until April following, although on the 23d of December he disclaimed the lease by letter to the landlord, *Clark v. Hume*, R. & M. 207; or where the trustee assigns the lease to the owner as security for advances, *Mackey v. Patendon*, 30 L. J. Q. 225, and 4 L. T. 285; or where the trustees so act as to make the property of less value, *Carter v. Warne*, 4 C. & P. 191; or where the trustees sell a bankrupt's estate and reversionary interest in the premises, *Page v. Godden*, 2 Stark, 309. See also *Hastings v. Wilson*, Holt, 290.

But it was held not to be an election to take where the trustees of a bankrupt having allowed his effects to remain on the premises occupied by him nearly twelve months after the bankruptcy and paid the arrears of the rent due, at the same time intimating to the landlord that they did not mean to take the land unless it could be advantageously disposed of; effects were soon after sold and removed from the premises; the land was put up for sale by order of the trustees, but there were no bidders; they omitted to return the key to the landlord for nearly four months after, *Wheeler v. Bramah*, 3 Camp. 340; or where the trustee of a bankrupt lessee of a hotel, upon the bankruptcy, closed the hotel with the exception of the bar, which was occupied by a third party, tenant to the bankrupt before bankruptcy, and he was supplied by order of the trustee with liquor at a slight advance over cost price, *Goodwin v. Noble*, 27 L. J. Q. B. 204, and 8 El. & Bl. 587; or where trustees were possessed of a farm, part of which he had underlet to another, released such under-tenant, being afterwards asked by the lessor to elect, refused to take the original lease, *Hill v. Dobie*, 2 Moore, 342, and 8 Taunt. 325. Trustees may likewise do reasonable acts to ascertain the value of property by putting up farms to sell. See *Turner v. Richardson*, 7 East, 336; *Hastings v. Wilson*, Holt, 290.

case the bankrupt retains the term on precisely the same footing as before bankruptcy, with the right to occupy and the obligation to pay rent.<sup>13</sup> If he fails to make an election, or refuses to do so when requested, the trustee is deemed to have elected not to take the lease.<sup>14</sup>

If the trustee elects to take the lease as an asset of the tenant's estate, it is regularly sold subject to the future payments of rent stipulated in it.<sup>15</sup> The purchase price becomes an asset of the estate, subject to the payment of any accrued rent secured by a lien reserved in the lease.<sup>16</sup>

Where the trustee elects to take the lease he makes the estate and himself personally liable for the payment of rent for the full term of the lease or until it passes by assignment to another person.<sup>17</sup> He may relieve himself of liability by surrendering the lease to the lessor, or assigning it to a third party, who may be a pauper.<sup>18</sup> The reason for this rule is that the trustee holds in privity of estate only, not in privity of contract, between himself and the landlord, which is the sole basis of his liability. If this is taken away by assignment it destroys the privity, and hence the liability.

Following the English decisions a trustee will not be allowed

<sup>13</sup> *In re* Roth v. Appel (C. C. A. 2d Cir.), 181 Fed. Rep. 667, 104 C. C. A. 649, 24 Am. B. R. 488; *Ex parte* Houghton, No. 6725 Fed. Cas., 1 Low. 554.

<sup>14</sup> *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *Taylor v. Irwin*, 20 Fed. Rep. 615; *Smith v. Gordon*, No. 13052 Fed. Cas., 6 L. R. 313.

<sup>15</sup> *Gazlay v. Williams*, 210 U. S. 41, 52 L. Ed. 950, 20 Am. B. R. 18.

*In re* Fulton, 153 Fed. Rep. 664, 18 Am. B. R. 591, it was held that a lease should not be sold until a trustee was elected.

<sup>16</sup> *In re* Ketterer Mfg. Co., 162 Fed. Rep. 583, 20 Am. B. R. 694.

<sup>17</sup> *Hansen v. Stevenson*, 1 B. & A. 307; *Thomas v. Pemberton*, 7 Taunt. 205; *Welch v. Myers*, 4 Camp. 368; *Ansell v. Robson*, 2 C. & J. 610; *Carter v. Warne*, 4 Car. & P. 191; *Hastings v. Wilson*, Holt, 290.

In *Clark v. Hume*, R. & M. 207, a trustee in bankruptcy was held personally liable.

<sup>18</sup> *Hopkinson v. Lovering*, 11 L. R. Q. B. Div. 92. As to the right to pursue a bankrupt after bankruptcy proceedings in an action of covenant, see *Auriol v. Mills*, 4 T. R. 60.

to sell off crops, manure, hay or straw,<sup>19</sup> or to remove fixtures<sup>20</sup> contrary to the terms of the lease.

The benefit of a contract or option for a lease to which the bankrupt is entitled will also probably vest in the trustee, and may be assigned by him,<sup>21</sup> or he may decline to take such contract.<sup>22</sup> Where the trustee elects to take such contract or option, the lessor will not be bound to grant a lease to him, unless he enters into the same covenants as the bankrupt must have entered into if solvent.<sup>23</sup> It may be that the trustee can not assign the benefit of such a contract so as to entitle the assignee of it to a lease without a stipulation to that effect.<sup>24</sup>

The acceptance or rejection of the lease by the trustee will not release from liability a surety for the lessee.<sup>25</sup> The surety will continue liable for breaches of covenant committed before the lease is surrendered.

A trustee has no greater rights under a lease than the lessee. A landlord may re-enter and terminate a lease containing such a covenant,<sup>26</sup> or may enforce a lien for rent under a state law.<sup>27</sup>

<sup>19</sup> *Ex parte* Maundrell, 2 Mad. 315; *Ex parte* Whittington, Buck. 87.

<sup>20</sup> See *Stansfield v. Portsmouth*, 4 C. B. N. S. 120, 4 Jur. N. S. 440; *Saint v. Pilley*, L. R. 10 Ex. 137, s. c. 33 L. T. 93.

<sup>21</sup> *Buckland v. Papillon*, 1 L. R. Eq. 477; *Crosbie v. Tooke*, 1 M. & K. 421; *Morgan v. Rhodes*, 1 M. & K. 435.

<sup>22</sup> *Ex parte* Blake, 11 Chan. Div. 572; *Ex parte* Llynvi Coal Co., 7 Chan. App. 28.

<sup>23</sup> *Powell v. Lloyd*, 1 Y. & J. 427, and 2 Y. & J. 372; *Page v. Broom*, 3 Beav. 36.

<sup>24</sup> See *Dowell v. Dew*, 1 W. & C. Chan. 365; *Buckland v. Papillon*, 1 L. R. Eq. 477; *Weatherall v. Geering*, 12 Ves. 504.

<sup>25</sup> B. A. 1898, Sec. 16; *Inglis v. McDougal*, 1 J. B. Moore, 196; *Tuck v. Fyson*, 6 Bing. 321.

<sup>26</sup> *In re* Ells, 98 Fed. Rep. 967, 3 Am. B. R. 564, 2 N. B. N. 360; *In re* Arnstein, 101 Fed. Rep. 706, 4 Am. B. R. 246, 2 N. B. N. 106.

<sup>27</sup> *In re* West Side Paper Co. (C. C. A. 3d Cir.), 162 Fed. Rep. 110, 89 C. C. A. 110, 20 Am. B. R. 660; *Martin v. Orgain* (C. C. A. 5th Cir.), 174 Fed. Rep. 772, 98 C. C. A. 246, 23 Am. B. R. 454; *In re* Pittsburg Drug Co., 164 Fed. Rep. 482, 20 Am. B. R. 227; *McFarland Carriage Co. v. Solanes*, 108 Fed. Rep. 532, 6 Am. B. R. 221; *In re* Mitchell, 116 Fed. Rep. 87, 8 Am. B. R. 324.



**§ 388. Growing crops.**

Growing crops which are annually produced by the cultivator are considered emblements, and before their severance from the soil pass to the trustee as personal property.<sup>1</sup> But where the crop is gathered after an adjudication by the bankrupt he should be allowed a reasonable compensation for work and care from date of adjudication.<sup>2</sup>

They do not pass where a mortgagee is entitled to possession and demands it in pursuance of the terms of his mortgage,<sup>3</sup> or where the bankrupt has parted with his interest in the crops,<sup>4</sup> or where the crop is planted by a bankrupt after the filing of a petition in bankruptcy.<sup>5</sup>

It has been held that crops growing in a field on the homestead is not for that reason exempt, but pass to the trustee.<sup>6</sup>

**§ 389. Fixtures.**

The trustee succeeds to the bankrupt's right and interest in fixtures.

If a bankrupt-lessee or contract-vendee could remove fixtures at the time of bankruptcy, his trustee takes them.<sup>1</sup> If

<sup>1</sup> *In re Barrow*, 98 Fed. Rep. 582, 3 Am. B. R. 414, 3 N. B. N. 95; *In re Daubner*, 96 Fed. Rep. 805, 3 Am. B. R. 368; *In re Coffman*, 93 Fed. Rep. 422, 1 Am. B. R. 530; *In re Rooney*, 109 Fed. Rep. 601, 6 Am. B. R. 478; *In re Schumpert*, No. 12491 Fed. Cas., and 8 N. B. R. 415; *Ex parte National Mercantile Bank*, 16 Chan. Div. 104.

<sup>2</sup> *In re Barrow*, 98 Fed. Rep. 582, 3 Am. B. R. 414, 3 N. B. N. 95.

<sup>3</sup> *Bagnall v. Villar*, 12 Chan. Div. 812.

<sup>4</sup> Consult *In re Gregg*, No. 5796 Fed. Cas., 1 Hask. 173.

<sup>5</sup> *In re Barnett*, No. 1024 Fed. Cas., 3 Pitts. Rep. 559.

<sup>6</sup> *In re Sullivan* (C. C. A. 8th Cir.), 148 Fed. Rep. 815, 78 C. C. A. 505, 17 Am. B. R. 578; *In re Hoag*, 97 Fed. Rep. 543, 3 Am. B. R. 290; *In re Coffman*, 93 Fed. Rep. 422, 1 Am. B. R. 530.

<sup>1</sup> *In re Montello Brick Wks.*, 163 Fed. Rep. 624, 20 Am. B. R. 859, affirmed (C. C. A. 3d Cir.), 167 Fed. Rep. 482, 93 C. C. A. 118, 21 Am. B. R. 896; *In re Rodgers & Hite*, 143 Fed. Rep. 594, 16 Am. B. R. 401; *In re Breck*, No. 1822 Fed. Cas., 8 Ben. 93; *Stansfeld v. Portsmouth*, 4 C. B. N. S. 118.



he could not do so, the fixtures do not pass to his trustee.<sup>2</sup> If a bankrupt owner of land is entitled to hold the fixtures as realty, his trustee takes them with the land. If any person is entitled to the fixtures as against the bankrupt, he may hold them as against his trustee.<sup>3</sup>

"The general rule of the common law certainly is, that whatever is once annexed to the freehold is a part of it and can not afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace it in the books, inflexible, and without exception."<sup>4</sup> Whether fixtures lose their character as personalty depends in a great measure upon the intention of the parties at the time they are erected.<sup>5</sup>

Where the terms of a lease permit a tenant to remove fixtures, the trustee succeeds to his right,<sup>6</sup> but otherwise not.<sup>7</sup> The general rule with reference to tenants is, that after the expiration of his tenancy he has no right to remove fixtures which he might have removed during his lease,<sup>8</sup> but that

<sup>2</sup> *In re Montello Brick Wks.*, 163 Fed. Rep. 624, 20 Am. B. R. 859, affirmed (C. C. A. 3d Cir.), 167 Fed. Rep. 482, 93 C. C. A. 118, 21 Am. B. R. 896; *In re Smith*, 119 Fed. Rep. 1004, 9 Am. B. R. 590; *Ex parte Ames*, No. 323 Fed. Cas., 1 Low. 561; *Ex parte Thomas*, 44 L. T. 781, 29 W. R. 527; *Ex parte Morrow*, No. 9850 Fed. Cas., 1 Low. 386.

<sup>3</sup> *In re Smith*, 119 Fed. Rep. 1004, 9 Am. B. R. 590; *In re Thomas*, 29 W. R. 527, 44 L. T. 781.

<sup>4</sup> Mr. Justice Story in *Van Ness v. Packard*, 2 Pet. 137, 7 L. Ed. 374.

<sup>5</sup> *In re Rodgers & Hite*, 143 Fed. Rep. 594, 16 Am. B. R. 401; *Western Union Tel. Co. v. Penna. R. Co.*, 125 Fed. Rep. 67, and cases there collated.

<sup>6</sup> *In re Montello Brick Wks.*, 163

Fed. Rep. 624, 20 Am. B. R. 859, affirmed (C. C. A. 3d Cir.), 167 Fed. Rep. 482, 93 C. C. A. 118, 21 Am. B. R. 896; *In re Breck*, No. 1822 Fed. Cas., 8 Ben. 93; *Stansfeld v. Portsmouth*, 4 C. B. Rep. N. S. 118.

<sup>7</sup> *In re Montello Brick Wks.*, 163 Fed. Rep. 624, 20 Am. B. R. 859, affirmed (C. C. A. 3d Cir.), 167 Fed. Rep. 482, 93 C. C. A. 118, 21 Am. B. R. 896; *Ex parte Ames*, No. 323 Fed. Cas., 1 Low. 561; *Ex parte Morrow*, No. 9850 Fed. Cas., 1 Low. 386; *Ex parte Thomas*, 44 L. T. 781, 29 W. R. 527.

<sup>8</sup> See *Lyde v. Russell*, 1 B. & Ad. 394; *Pugh v. Arton*, L. R. 8 Eq. 626. See also and compare *McIntosh v. Trotter*, 3 M. & W. 184; *Weaton v. Woodcock*, 7 M. & W. 14.

they become the property of the landlord in the absence of express provision in the lease.<sup>9</sup>

If one enters on land under an agreement to purchase it and annexes fixtures, the presumption is that he is permitted to do so with the intention to make them permanent and a part of the realty.<sup>10</sup> Structures for the purposes of trade or manufacture and not intended to become irrevocably part of the realty are not within this rule.<sup>11</sup> Nor is it applicable where the fixtures are erected under an agreement or by consent, the presumption not arising that the builder intended transferring his own improvements to the owner.<sup>12</sup>

### § 390. Good-will.

Where good-will is local, and not of a personal nature, it will pass to the trustee.<sup>10</sup>

The reason for this exception may be readily understood when it is considered that the whole value of a good-will may be inseparable from personal professional skill, as, for example, that of a surgeon or lawyer, such being very different in nature from a commercial matter.<sup>11</sup>

<sup>9</sup> See *In re Thomas*, 29 W. R. 527, 44 L. T. 781.

<sup>10</sup> *In re Rodgers & Hite*, 143 Fed. Rep. 594, 16 Am. B. R. 401.

<sup>11</sup> *Van Ness v. Packard*, 2 Pet. 137, 7 L. Ed. 374; *In re Rodgers & Hite*, 143 Fed. Rep. 594, 16 Am. B. R. 401; *In re Montello Brick Wks.*, 163 Fed. Rep. 624, 20 Am. B. R. 859, affirmed (C. C. A. 3d Cir.), 167 Fed. Rep. 482, 93 C. C. A. 118, 21 Am. B. R. 896.

In *Freeman v. Dawson*, 110 U. S. 264, 270, 33 L. Ed. 740, Mr. Justice Gray said: "Trade fixtures put up by the lessee, although real estate as between the lessor and himself, while annexed to the land, yet may, during the term of the lease, be severed by the lessee, or by one deriving title from him, and thus

reconverted to their original condition of chattels. At any time before the expiration of the term, therefore, both the leasehold and the fixtures may be taken on execution against the lessee, like other personal property."

<sup>12</sup> *In re Montello Brick Wks.*, 163 Fed. Rep. 624, 20 Am. B. R. 859, affirmed (C. C. A. 3d Cir.), 167 Fed. Rep. 482, 93 C. C. A. 118, 21 Am. B. R. 896; *In re Rodgers & Hite*, 143 Fed. Rep. 594, 16 Am. B. R. 401; *Wiggins Ferry Co. v. Ohio & Miss. R. R. Co.*, 142 U. S. 396, 415, 35 L. Ed. 1055.

<sup>10</sup> See *Ex parte Punnett*, 16 Chan. Div. 226; *Ex parte Thomas*, 2 Mont. D. & DeG. 294, 10 L. J. Bankruptcy, 75.

<sup>11</sup> See *Farr v. Pearce*, 3 Madd. 74.

**§ 391. Shares of stock.**

Shares of stock in incorporated companies, standing in the name of a bankrupt, pass to his trustee subject to his election to take or reject them.<sup>1</sup>

Where the stock stands in the name of a fictitious person, but belongs to the bankrupt, the court may direct the corporation to erase the name of the fictitious person and insert the bankrupt's name on their books.<sup>2</sup>

Stock "deposited" as collateral without power to have it transferred on the books of the corporation passes to the trustee.<sup>2\*</sup> But stock delivered as security for a *bona fide* debt, with power of attorney to have transfer made on books of the company, does not pass.<sup>3</sup> The trustee, however, may redeem such stock by paying the debt which it secures. Nor does stock pass which was honestly purchased with a wife's separate property years before the commencement of bankruptcy proceedings.<sup>4</sup>

Where the trustee elects to take stock he is entitled to have it transferred on the books of the corporation.<sup>5</sup> The trustee thereupon becomes a stockholder in the corporation, and may attend meetings of the corporation and vote the stock,<sup>6</sup> and is liable for assessments upon such stock. Where he elects not to take the stock, neither he nor the bankrupt's estate is liable for such assessments.<sup>7</sup>

<sup>1</sup> American File Company v. Garrett, 110 U. S. 286, 28 L. Ed. 149; Graham v. The Van Dieman's Land Co., 11 Ex. Rep. 101; South Staffordshire Ry. Co. v. Burnside, 5 Ex. Rep. 128.

<sup>2</sup> Green v. The Bank of England, 3 Y. & C. 722.

As to stock standing in the name of the wife of a bankrupt, but which was purchased with joint funds, see Fellows v. Freudenthal, 102 Fed. Rep. 731, 4 Am. B. R. 490.

<sup>2\*</sup> French v. White, 78 Vt. 89, 18 Am. B. R. 905.

<sup>3</sup> Dickinson v. Central National Bank, 129 Mass. 279.

<sup>4</sup> Glover v. Love, 26 Coop. Sup. Court Rep. 657.

<sup>5</sup> Wilson v. Atlantic, etc., R. Co., 2 Fed. Rep. 459.

<sup>6</sup> American File Co. v. Garrett, 110 U. S. 288, 28 L. Ed. 149.

<sup>7</sup> American File Co. v. Garrett, 110 U. S. 288, 28 L. Ed. 149.

### § 392. Unpaid stock subscriptions.

Unpaid subscriptions on stock in a bankrupt corporation pass to the trustee as assets of the bankrupt company.<sup>1</sup>

Stock subscribed is considered in equity as a trust fund for the payment of creditors.<sup>2</sup> The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of bankruptcy may lay an assessment.<sup>3</sup> The court has jurisdiction over all the stockholders of the bankrupt corporation for this purpose irrespective of their residence.<sup>4</sup> The reason is that the bankrupt corporation is within the jurisdiction of the court and its officers, directors and stockholders in so far as their dealings with the bankrupt are concerned are amenable to its authority.

The proper practice in such cases is for the trustee to file a petition in the bankruptcy court for an order directing him to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts.<sup>5</sup> The referee will thereupon make an order that the stockholders show cause why the assessment and call prayed for should not be made

<sup>1</sup> *In re Jassoy* (C. C. A. 2d Cir.), 178 Fed. Rep. 515, 101 C. C. A. 641, 23 Am. B. R. 622; *In re Remington Auto & Motor Co.* (C. C. A. 2d Cir.), 153 Fed. Rep. 345, 82 C. C. A. 421, 18 Am. B. R. 389; *In re Eureka Furniture Co.*, 170 Fed. Rep. 485, 22 Am. B. R. 395; *In re Monarch Corporation*, 177 Fed. Rep. 464, 24 Am. B. R. 428; *In re Miller Elec. Maintenance Co.*, 111 Fed. Rep. 515, 6 Am. B. R. 701; *In re Crystal Springs Bottling Co.*, 96 Fed. Rep. 945, 3 Am. B. R. 194; *Rathbone v. Ayer*, 82 N. Y. Supp., 235; *In re Morris Arc Lamp Co.*, 10 Am. B. R. 569.

<sup>2</sup> *In re Alleman Hardware Co.*, 172 Fed. Rep. 611, 22 Am. B. R. 870.

<sup>3</sup> *In re Miller Elect. Maintenance*

*Co.*, 111 Fed. Rep. 515, 6 Am. B. R. 701; *In re Eureka Furniture Co.*, 170 Fed. Rep. 485, 22 Am. B. R. 395; *In re Monarch Corporation*, 177 Fed. Rep. 464, 24 Am. B. R. 428; *In re Munger Vehicle Tire Co.* (C. C. A. 2d Cir.), 168 Fed. Rep. 910, 94 C. C. A. 314, 21 Am. B. R. 395.

<sup>4</sup> *In re Monarch Corporation*, 177 Fed. Rep. 464, 24 Am. B. R. 428.

<sup>5</sup> *In re Munger Vehicle Tire Co.* (C. C. A. 2d Cir.), 168 Fed. Rep. 910, 94 C. C. A. 314, 21 Am. B. R. 395; *In re Remington Auto & Motor Co.* (C. C. A. 2d Cir.), 153 Fed. Rep. 345, 82 C. C. A. 421, 18 Am. B. R. 389; *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *In re Eureka Furniture Co.*, 170 Fed. Rep. 485, 22 Am. B. R. 395.

and cause a copy of the order to show cause to be mailed to each stockholder.

The issue before the referee should be confined solely to the question. Should there be a call upon the shareholders of unpaid stock, and, if so, to what amount? This involves deciding whether at the time of the issue of any particular share the full value was or was not paid in,<sup>6</sup> whether any subsequent payments were made on account of it, whether the corporation was indebted in excess of assets, and what is the amount of its indebtedness?<sup>7</sup>

If the referee finds an assessment to be necessary he should make an order fixing the amount of the indebtedness of the corporation and the amount per share to be paid in to make a sufficient amount with the other assets of the company to satisfy its creditors. The trustee is authorized to collect no more.<sup>8</sup> On these questions the order is *res judicata* in any subsequent proceedings.<sup>9</sup> Execution for the respective amounts can not issue against the individuals named if they decline to pay.<sup>10</sup>

A plenary suit for the recovery of the assessment is necessary if the stockholder refuses to pay.<sup>11</sup> In such suit a stockholder has the right to set up such personal defenses as he may have to the claim.<sup>12</sup> A stockholder can not set up informalities in the issue of stock which the corporation had the

<sup>6</sup> *In re Munger Vehicle Tire Co.* (C. C. A. 2d Cir.), 168 Fed. Rep. 910, 94 C. C. A. 314, 21 Am. B. R. 395.

<sup>7</sup> *In re Remington Auto & Motor Co.* (C. C. A. 2d Cir.), 153 Fed. Rep. 345, 82 C. C. A. 421, 18 Am. B. R. 389.

<sup>8</sup> *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968.

<sup>9</sup> *In re Remington Auto & Motor Co.* (C. C. A. 2d Cir.), 153 Fed. Rep. 345, 82 C. C. A. 421, 18 Am. B. R. 389.

<sup>10</sup> *In re Remington Auto & Motor Co.* (C. C. A. 2d Cir.), 153

Fed. Rep. 345, 82 C. C. A. 421, 18 Am. B. R. 389.

<sup>11</sup> *In re Haley* (C. C. A. 6th Cir.), 158 Fed. Rep. 74, 85 C. C. A. 404, 19 Am. B. R. 313; *Babbitt v. Read*, 173 Fed. Rep. 712, 23 Am. B. R. 254; *In re Remington Auto & Motor Co.* (C. C. A. 2d Cir.), 153 Fed. Rep. 345, 82 C. C. A. 421, 18 Am. B. R. 389; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968.

But see *Skillin v. Magnus*, 162 Fed. Rep. 689, 19 Am. B. R. 397.

<sup>12</sup> *Babbitt v. Read*, 173 Fed. Rep. 712, 23 Am. B. R. 254; *In re Haley*

power to create,<sup>13</sup> but may set up the fact that the corporation was without power to issue the stock.<sup>14</sup>

A stockholder can not set off a debt due by the bankrupt corporation against his liability for an assessment on his stock in a suit by the trustee in bankruptcy.<sup>15</sup> The reason is that the fund belongs in equity to all the creditors and can not be appropriated by one stockholder to the exclusive payment of his own claim.

It has been held that where paid up stock was issued the court may inquire into the consideration to determine whether it was in fact paid up.<sup>16</sup>

### § 393. Stockholders' and corporate officers' liability.

The right to enforce a statutory liability against an officer, director or stockholder of a bankrupt corporation does not pass to its trustee in bankruptcy.<sup>1</sup>

The trustee is not entitled to maintain a suit to enforce such liability in a state or federal court. The reason for this is that such liability is not a part of the estate of the corporation. By virtue of statutes of this character the officers, directors,

(C. C. A. 6th Cir.), 158 Fed. Rep. 74, 85 C. C. A. 404, 19 Am. B. R. 313.

<sup>13</sup> Upton v. Tribelcock, 91 U. S. 45, 23 L. Ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384; Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. Ed. 349; Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731.

<sup>14</sup> Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968.

<sup>15</sup> Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Babbitt v. Read, 173 Fed. Rep. 712, 23 Am. B. R. 254.

<sup>16</sup> *In re* Alleman Hardware Co., 172 Fed. Rep. 611, 22 Am. B. R. 871; Sternbergh v. Duryea Power Co. (C. C. A. 3d Cir.), 161 Fed. Rep. 540, 88 C. C. A. 482, 20 Am. B. R. 625; Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968.

But see *In re* Jassoy Co. (C. C. A. 2d Cir.), 178 Fed. Rep. 515, 101

C. C. A. 641, 23 Am. B. R. 622.

In *Scovill v. Thayer*, *supra*, the company called upon stockholders to pay up that part of their stock which had been satisfied "by discount" according to their contract and the shares issued as full paid. After stating the English rule to the contrary, the supreme court said: "But the doctrine of this court is, that such a contract though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full."

<sup>1</sup> *Alsop v. Conway* (C. C. A. 6th Cir.), 188 Fed. Rep. 568, 109 C. C. A. —; *In re* Beachy & Co., 170 Fed. Rep. 825, 22 Am. B. R. 538.

or stockholders, or some of them, become, as it were, sureties for the debts of the corporation to the extent provided by the statute. It is in the nature of a security to which a creditor may resort if the corporation does not pay its debts.<sup>2</sup> The corporation could not enforce this liability.

The trustee in bankruptcy has power to enforce certain rights of creditors for the benefit of the estate, but he is not concerned with secondary security to which a creditor may resort for the balance of his debt after he has collected as much of it as may be collected from the bankrupt's estate. The bankrupt act expressly provides that such liability is not released by the discharge of the corporation.<sup>3</sup> The creditor may, therefore, proceed to enforce the liability in a state court without joining the trustee as a party and without regard for bankruptcy<sup>4</sup> except that a creditor will be permitted to recover in both proceedings the full payment of his debts only and no more.

### § 394. Membership in stock exchanges, etc.

A membership in a stock or produce exchange vests in the trustee, subject to the rules of the exchange<sup>1</sup> and valid liens on it.<sup>2</sup>

<sup>2</sup> *In re* Crystal Spring Bottling Co., 96 Fed. Rep. 945, 3 Am. B. R. 194. See also *Merrill v. Nat. Bank*, 173 U. S. 131, 43 L. Ed. 640.

<sup>3</sup> B. A. 1898, Sec. 4, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>4</sup> *Wood & Selick v. Vanderveer*, 55 N. Y. App. Div. 549; *Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co.*, 183 Mass. 557.

See also *In re* Marshall Paper Co., 102 Fed. Rep. 872, 4 Am. B. R. 468; *In re* Remington Auto & Motor Co., 119 Fed. Rep. 441, 9 Am. B. R. 533.

<sup>1</sup> *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277; *In re* Currie (C. C. A. 2d

Cir.), 185 Fed. Rep. 263, 107 C. C. A. 369, 26 Am. B. R. 345; *In re* Gregory (C. C. A. 2d Cir.), 174 Fed. Rep. 629, 98 C. C. A. 383, 23 Am. B. R. 270; *In re* Hurlbutt, Hatch & Co. (C. C. A. 2d Cir.), 135 Fed. Rep. 504, 68 C. C. A. 216, 13 Am. B. R. 50; *In re* Gaylord, 111 Fed. Rep. 717, 7 Am. B. R. 195; *In re* Neimann, 124 Fed. Rep. 738, 10 Am. B. R. 739; *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264; *In re* Werder, 15 Fed. Rep. 789; *In re* Warder, 10 Fed. Rep. 275; *In re* Ketchum, 1 Fed. Rep. 840.

<sup>2</sup> *O'Dell v. Boyden* (C. C. A. 6th Cir.), 150 Fed. Rep. 731, 80 C. C. A. 397, 17 Am. B. R. 756; *Wrede v. Clark* (N. Y. App. Div.), 21 Am. B. R. 821.

The membership is personal to the member, but the inchoate right of sale and the right to the proceeds of the sale, if the stock exchange authorities shall permit that to be done, is a property right which passes to the trustee of the member. The court may compel the bankrupt to execute the papers necessary to effectuate the sale of the seat.<sup>3</sup>

The trustee may elect not to take such certificate of membership.<sup>5</sup> In such cases the certificate of membership remains in the bankrupt and can not be taken from him afterwards by the trustee if it becomes valuable.<sup>6</sup>

### § 395. Licenses, franchises and personal privileges.

A license, franchise or personal privilege, which might have been transferred by the bankrupt or levied upon and sold under judicial process against him before the filing of the petition pass to the trustee as an asset of the bankrupt's estate.<sup>1</sup> If it is not assignable at that time it will not pass to the trustee.<sup>2</sup>

While this kind of property is peculiar, and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors. The court may require the

<sup>3</sup> *In re Hurlbutt, Hatch & Co.* (C. C. A. 2d Cir.), 135 Fed. Rep. 504, 68 C. C. A. 216, 13 Am. B. R. 50; *O'Dell v. Boyden* (C. C. A. 6th Cir.), 150 Fed. Rep. 731, 80 C. C. A. 397, 17 Am. B. R. 756.

<sup>5</sup> See Sec. 375, *ante*; *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915.

<sup>6</sup> *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915.

<sup>1</sup> *Fisher v. Cushman* (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 43 C. C. A. 381, 4 Am. B. R. 646; *In re McArdle*, 126 Fed. Rep. 442, 11 Am.

B. R. 358; *In re Emrich*, 101 Fed. Rep. 231, 4 Am. B. R. 89; *Stewart v. Hargrove*, 23 Ala. 429; *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277.

But see *Tracy v. Ginsberg*, 189 Mass. 260, 16 Am. B. R. 792n.

<sup>2</sup> *Whitlock's License*, 39 Pa. Supr. Ct. 34, 22 Am. B. R. 262; *Jetter Brewing v. Scollan*, 111 N. Y. App. Div. 925, 15 Am. B. R. 300; *People v. Duncan*, 41 Cal. 508; *In re McBride & Co.*, 132 Fed. Rep. 285, 12 Am. B. R. 81.



bankrupt to execute the instruments necessary to effectuate the sale and transfer of such property.<sup>3</sup>

It is well settled that the proceeds realized from the sale of a license, or the right to renew a license, to sell liquor are assets of the estate in bankruptcy.<sup>4</sup> Rights under licenses are regularly sold, subject to the approval of the buyer by the state licensing authority.<sup>5</sup> The purchaser is bound by the terms of the sale.<sup>6</sup>

A license under a patent or copyright passes to the trustee of the licensee, if it is assignable, and does not pass if it is not.<sup>7</sup> The trustee takes such license, subject to the conditions imposed on the bankrupt.<sup>8</sup>

A permit to occupy a stand in market, revocable at the pleasure of the comptroller and transferable only with his permission, but which is ordinarily bought and sold for money, passes to the trustee.<sup>9</sup> A license to take toll for crossing a

<sup>3</sup> *In re Fisher*, 98 Fed. Rep. 89, 3 Am. B. R. 406; *In re Becker*, 98 Fed. Rep. 407, 3 Am. B. R. 412; *In re Emrich*, 101 Fed. Rep. 231, 4 Am. B. R. 89; *In re Ketcham*, 1 Fed. Rep. 840; *In re Hurlbutt, Hatch & Co.* (C. C. A. 2d Cir.), 135 Fed. Rep. 504, 68 C. C. A. 216, 13 Am. B. R. 50.

<sup>4</sup> *Fisher v. Cushman* (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 43 C. C. A. 381, 4 Am. B. R. 646; *In re McArdle*, 126 Fed. Rep. 442, 11 Am. B. R. 358; *In re Brod-bine*, 93 Fed. Rep. 643, 2 Am. B. R. 53; *In re Becker*, 98 Fed. Rep. 407, 3 Am. B. R. 412; *In re Olewine*, 125 Fed. Rep. 840, 11 Am. B. R. 40; *Snyder v. Bougher*, 214 Pa. St. 453, 16 Am. B. R. 792; *In re Wiesel*, 173 Fed. Rep. 718, 23 Am. B. R. 59; *In re Comer & Co.*, 171 Fed. Rep. 261, 22 Am. B. R. 558; *In re Miller*, 171 Fed.

Rep. 263, 22 Am. B. R. 560.

<sup>5</sup> *In re Miller*, 171 Fed. Rep. 263, 22 Am. B. R. 260; *In re McArdle*, 126 Fed. Rep. 442, 11 Am. B. R. 358; *Snyder v. Bougher*, 214 Pa. St. 453, 16 Am. B. R. 792.

But see *In re Comer & Co.*, 171 Fed. Rep. 261, 22 Am. B. R. 558.

<sup>6</sup> *In re Comer & Co.*, 171 Fed. Rep. 261, 22 Am. B. R. 558; *In re Miller*, 171 Fed. Rep. 263, 22 Am. B. R. 260; *Snyder v. Bougher*, 214 Pa. St. 453, 16 Am. B. R. 792.

<sup>7</sup> *In re Spitzel & Co.*, 168 Fed. Rep. 156, 21 Am. B. R. 729; *In re Hawley-Dresser Co.*, 132 Fed. Rep. 1002, 13 Am. B. R. 94; *In re McBride & Co.*, 132 Fed. Rep. 285, 12 Am. B. R. 81.

<sup>8</sup> *In re Spitzel & Co.*, 168 Fed. Rep. 156, 21 Am. B. R. 729.

<sup>9</sup> *In re Emrich*, 101 Fed. Rep. 231, 4 Am. B. R. 89; *In re Gallagher*. No. 5192 Fed. Cas., 16 Blatch 410.

bridge may be an asset of the estate of the owner of the license.<sup>10</sup>

A license or franchise, which is not assignable, because personal in its nature, does not pass to the trustee of the licensee.<sup>11</sup> For this reason a franchise to take toll on a turnpike,<sup>12</sup> a contract for goods to be made by a particular manufacturer,<sup>13</sup> and a personal license under a copyright,<sup>14</sup> have been held not to pass to the trustee as assets of the bankrupt estate. So also where a lease to a public house was determinable on the bankruptcy of the lessee, and contained a covenant by the lessee upon the termination of the term to assign the licenses to the lessor, it was held that no interest in the licenses passed to the trustee, but the lessor was entitled to have the licenses delivered up to him upon the bankruptcy of the lessee.<sup>15</sup>

### § 396. Negotiable instruments.

All bills of exchange, promissory notes and other negotiable instruments belonging to the bankrupt vest in the trustee.<sup>1</sup>

The bankrupt is no longer able to sue on such instruments, or to convey any perfect title to them by endorsement or otherwise. If the bankrupt makes a *bona fide* transfer of the instrument without endorsement before, he may endorse it after bankruptcy, and such endorsement will enable the holder of the instrument to maintain an action upon it in his own name.<sup>2</sup>

<sup>10</sup> *Stewart v. Hargrove*, 23 Ala. 429.

But see *People v. Duncan*, 41 Cal. 508.

<sup>11</sup> *Jetter Brewing Co. v. Scollan*, 111 N. Y. App. Div. 925, 15 Am. B. R. 300; *People v. Duncan*, 41 Cal. 508; *In re McBride & Co.*, 132 Fed. Rep. 285, 12 Am. B. R. 81.

<sup>12</sup> *People v. Duncan*, 41 Cal. 508.

But see *Stewart v. Hargrove*, 23 Ala. 429.

<sup>13</sup> *Jetter Brewing Co. v. Scollan*, 111 N. Y. App. Div. 925, 15 Am. B. R. 300.

<sup>14</sup> *In re McBride & Co.*, 132 Fed. Rep. 285, 12 Am. B. R. 81.

<sup>15</sup> *Ex parte Royle*, 46 L. T. Bk. 85, 25 W. R. 560.

<sup>1</sup> *Kitchen v. Bartsch*, 7 East. 53; *Gay v. Kingsley*, 93 Mass. 345; *Smith v. Chandler*, 69 Mass. 392.

<sup>2</sup> *Hughes v. Nelson*, 29 N. J. Eq. 547; *Hersey v. Elliott*, 67 Me. 526; *Ex parte Greening*, 13 Ves. 206; *Watkins v. Maule*, 2 J. & W. 237; *Ex parte Mowbray*, 1 J. & W. 428; *Smith v. Pickering*, 1 Peak's N. P. Rep. 69.

The trustee acquires no right to such instruments in the possession of the bankrupt, who has forged the name of the owner to transfer the same.<sup>2\*</sup>

When a bill of exchange or a note is dishonored after the bankruptcy of the drawer or maker, notice of dishonor must be given as though bankruptcy had not intervened.<sup>3</sup> The better opinion seems to be that a notice to the bankrupt is a proper and sufficient notice, if the trustee has not been appointed. He is the only person who can be notified.<sup>4</sup> If immediate action is necessary against the promisor or acceptor to save a probable loss, the bankrupt, upon application to the court, will be permitted to prosecute. After a trustee has been appointed, the safer practice is to give notice to him and also to the bankrupt.

### § 397. Pensions.

Pensions of a bankrupt granted by the government for military services are not vested in the trustee in bankruptcy, as they are made by statute inalienable and not subject to attachment.<sup>1</sup> Pension money in the hands of the bankrupt at the time of filing his petition passes to the trustee.<sup>2</sup>

In England, salaries and pensions of the army and navy and of all persons engaged in the civil service, pass to the trustee in bankruptcy.<sup>3</sup>

<sup>2\*</sup> *Unity Banking Co. v. Bettman*, 217 U. S. 127, 54 L. Ed. 695.

<sup>3</sup> *Ex parte Tremont National Bank*, No. 14169 Fed. Cas., 2 Low. 409; *Ex parte Moline*, 19 Ves. 216; *Esdale v. Sowerby*, 11 East. 114; *Nicholson v. Gouthit*, 2 H. Black. 609; *Bowes v. Howe*, 5 Taunt. 30; *Rohde v. Proctor*, 4 B. & Cres. 517; *Donnell v. Savings Bank*, 80 Mo. 165; *House v. National Bank*, 43 O. S. 346; *Calahan v. Bank of Kentucky*, 82 Ky. 231.

<sup>4</sup> *Ex parte Tremont National*

*Bank*, No. 14169 Fed. Cas., 2 Low. 409.

<sup>1</sup> R. S. Secs. 4745 and 4747; see *Streeter v. Sumner*, 11 Foster (N. H.) 557.

<sup>2</sup> *In re Jones*, 166 Fed. Rep. 337, 21 Am. B. R. 536.

But see *In re Bean*, 100 Fed. Rep. 262, 4 Am. B. R. 53.

<sup>3</sup> 46 and 47 Vict. Chap. 52, Sec. 52, which is substantially the same provision as that contained in Secs. 89 and 90 of the bankrupt act of 1869 (32 and 33 Vict.).

### § 398. Life insurance policies.

Policies of insurance on the life of the bankrupt, in which he has an interest that was transferable or subject to levy at the time of bankruptcy, passes to his trustee.<sup>1</sup>

This rule is subject to the right of the bankrupt to redeem the policy by paying the surrender value to the trustee,<sup>2</sup> or to claim the same to be exempt under the state law,<sup>3</sup> and the right of the trustee to elect not to take it, if he shall consider it onerous or without value to the estate.<sup>4</sup>

The title to the policy passes to the trustee in order to make the actual interest of the bankrupt in it available for distribution. If the bankrupt has an interest in it which may be converted into money, it is the duty of the trustee to collect and distribute the same as a part of the bankrupt's estate. If

<sup>1</sup> B. A. 1898, Sec. 70, clause 5; *In re Orear* (C. C. A. 8th Cir.), 178 Fed. Rep. 632, 102 C. C. A. 78, 24 Am. B. R. 343; *In re Hettling* (C. C. A. 2d Cir.), 175 Fed. Rep. 65, 99 C. C. A. 87, 23 Am. B. R. 161; *In re White* (C. C. A. 2d Cir.), 174 Fed. Rep. 333, 98 C. C. A. 205, 23 Am. B. R. 90; *In re Coleman* (C. C. A. 2d Cir.), 136 Fed. Rep. 818, 69 C. C. A. 496, 14 Am. B. R. 461; *In re Welling* (C. C. A. 7th Cir.), 113 Fed. Rep. 189, 51 C. C. A. 151, 7 Am. B. R. 340; *In re Herr*, 182 Fed. Rep. 716, 25 Am. B. R. 142; *In re Wolff*, 165 Fed. Rep. 984, 21 Am. B. R. 452; *In re Moore*, 173 Fed. Rep. 679, 23 Am. B. R. 109; *In re Diack*, 100 Fed. Rep. 770, 3 Am. B. R. 723; *In re Boardman*, 103 Fed. Rep. 783, 4 Am. B. R. 620; *Clark v. Equitable Life Assur Soc.* 143 Fed. Rep. 175, 16 Am. B. R. 137.

<sup>2</sup> B. A. 1898, Sec. 70, clause 5, *proviso*. *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771, 17 Am. B. R. 484; *Burlingham v. Crouse* (C. C. A. 2d Cir.), 181 Fed. Rep.

479, 104 C. C. A. 227, 24 Am. B. R. 632.

As to redeeming insurance policies, see Sec. 399, *post*.

<sup>3</sup> *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94; *In re Pfaffinger*, 164 Fed. Rep. 526, 24 Am. B. R. 255; *In re Booss*, 154 Fed. Rep. 494, 18 Am. B. R. 658; *In re Whelpley*, 169 Fed. Rep. 1019, 22 Am. B. R. 433; *In re Johnson*, 176 Fed. Rep. 591, 24 Am. B. R. 277; *Steele v. Buel* (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 44 C. C. A. 287, 5 Am. B. R. 165; *Pulsifer v. Hussey*, 97 Me. 434, 9 Am. B. R. 657.

<sup>4</sup> See Sec. 375, *ante*; *Meyers v. Josephson* (C. C. A. 5th Cir.), 124 Fed. Rep. 734, 59 C. C. A. 650, 10 Am. B. R. 687, affirming 121 Fed. Rep. 142, 9 Am. B. R. 345; *Burlingham v. Crouse* (C. C. A. 2d Cir.), 181 Fed. Rep. 479, 104 C. C. A. 227, 24 Am. B. R. 632; *In re Buelow*, 98 Fed. Rep. 86, 3 Am. B. R. 389; *Gould v. New York Life Ins. Co.*, 132 Fed. Rep. 927, 13 Am. B. R. 233.

he has no such interest, the trustee is not concerned with the policy.<sup>5</sup> The interest of bankrupt in such policies depends upon the terms of the contract with the company.

A policy of insurance on the life of the bankrupt passes to his trustee if he has any assignable interest of value in it, although it may have no surrender value.<sup>6</sup> The bankrupt has an interest, which passes to his trustee, in a policy, which has a cash surrender value and is payable to him, his estate, or personal representatives,<sup>7</sup> or an endowment policy payable to the bankrupt at maturity, and in case of his death, to his wife or other person,<sup>8</sup> or policy payable to another person where the insured is authorized to change the beneficiary at will.<sup>9</sup> The right to receive any accumulated dividends in cash or the entire cash value of the property, or to receive

<sup>5</sup> *Burlingham v. Crouse* (C. C. A. 2d Cir.), 181 Fed. Rep. 479, 104 C. C. A. 227, 24 Am. B. R. 632; *In re McKinney*, 15 Fed. Rep. 535; *In re Buelow*, 98 Fed. Rep. 86, 3 Am. B. R. 389; *Gould v. N. Y. Life Ins. Co.*, 132 Fed. Rep. 927, 13 Am. B. R. 233.

<sup>6</sup> *In re Welling* (C. C. A. 7th Cir.), 113 Fed. Rep. 189, 51 C. C. A. 151, 7 Am. B. R. 340; *In re Hettling* (C. C. A. 2d Cir.), 175 Fed. Rep. 65, 99 C. C. A. 87, 23 Am. B. R. 161; *In re Slingluff*, 106 Fed. Rep. 154, 5 Am. B. R. 76; *Clark v. Equitable Life Ins. Soc.*, 143 Fed. Rep. 175, 16 Am. B. R. 137; *In re Herr*, 182 Fed. Rep. 716, 25 Am. B. R. 142; *In re McKinney*, 15 Fed. Rep. 535.

<sup>7</sup> *In re Becker*, 106 Fed. Rep. 54, 5 Am. B. R. 438; *In re Steele*, 98 Fed. Rep. 78, 3 Am. B. R. 549, reversed on another point in *Steele v. Buel* (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 44 C. C. A. 287, 5 Am. B.

R. 165; *Clark v. Equitable Life Ins. Soc.*, 143 Fed. Rep. 175, 16 Am. B. R. 137; *In re Moore*, 173 Fed. Rep. 679, 23 Am. B. R. 109; *In re Herr*, 182 Fed. Rep. 716, 25 Am. B. R. 142.

<sup>8</sup> *In re Diack*, 100 Fed. Rep. 770, 3 Am. B. R. 723; *In re Boardman*, 103 Fed. Rep. 783, 4 Am. B. R. 620; *In re Slingluff*, 106 Fed. Rep. 154, 5 Am. B. R. 76; *In re Steele*, 98 Fed. Rep. 78, 3 Am. B. R. 549; *In re Welling* (C. C. A. 7th Cir.), 113 Fed. Rep. 189, 51 C. C. A. 151, 7 Am. B. R. 340.

<sup>9</sup> *In re Orear* (C. C. A. 8th Cir.), 178 Fed. Rep. 632, 102 C. C. A. 78, 24 Am. B. R. 343; *In re White* (C. C. A. 2d Cir.), 174 Fed. Rep. 333, 98 C. C. A. 205, 23 Am. B. R. 90; *In re Hettling* (C. C. A. 2d Cir.), 75 Fed. Rep. 65, 99 C. C. A. 87, 23 Am. B. R. 161; *In re Herr*, 182 Fed. Rep. 716, 25 Am. B. R. 142; *In re Wolff*, 165 Fed. Rep. 984, 21 Am. B. R. 452.

the entire cash value converted into an annual income for life, are property rights that pass to the trustee.<sup>10</sup>

The trustee does not take policies of insurance in which the bankrupt has no interest of value.<sup>11</sup> Such are policies payable to the wife, children, or other kin of the bankrupt, and their estates or personal representatives. But a policy on the life of the bankrupt payable to his wife, if she survive him, and if not, to his estate, passes to the trustee, because he has an interest vested or contingent in it.<sup>12</sup>

It has been held that a policy issued on the life of one bankrupt, whose wife, another bankrupt, was to pay the premiums and receive the benefit of the policy, was part of the estate of the wife;<sup>13</sup> and a policy payable to the executors, administrators or assigns of the bankrupt, who had by a writing assigned the same to his fiancée, who afterwards became his wife, made the policy one payable to the wife of the bankrupt and it did not pass to the trustee.<sup>13</sup>

Where the bankrupt is the beneficiary and not a contracting party and not entitled to the surrender value of the policy, the trustee has no interest in it.<sup>14</sup>

<sup>10</sup> *In re White* (C. C. A. 2d Cir.), 174 Fed. Rep. 333, 98 C. C. A. 205, 23 Am. B. R. 90; *In re Hettling* (C. C. A. 2d Cir.), 175 Fed. Rep. 65, 99 C. C. A. 87, 23 Am. B. R. 161; *In re Orear* (C. C. A. 8th Cir.), 178 Fed. Rep. 632, 102 C. C. A. 78, 24 Am. B. R. 343; *In re Moore*, 173 Fed. Rep. 679, 23 Am. B. R. 109.

<sup>11</sup> *Burlingham v. Crouse* (C. C. A. 2d Cir.), 181 Fed. Rep. 479; 104 C. C. A. 227, 24 Am. B. R. 632; *In re Buelow*, 98 Fed. Rep. 86, 3 Am. B. R. 389; *Gould v. New York Life Ins. Co.*, 132 Fed. Rep. 927, 13 Am. B. R. 233.

<sup>12</sup> *In re Coleman* (C. C. A. 2d Cir.), 136 Fed. Rep. 818, 69 C. C.

A. 496, 14 Am. B. R. 461; *In re Holden* (C. C. A. 9th Cir.), 113 Fed. Rep. 141, 51 C. C. A. 97, 7 Am. B. R. 615; *In re Boardman*, 103 Fed. Rep. 783, 4 Am. B. R. 620; *In re Diack*, 100 Fed. Rep. 770, 3 Am. B. R. 723; *In re Herr*, 182 Fed. Rep. 716, 25 Am. B. R. 142.

<sup>13</sup> *In re Steele*, 98 Fed. Rep. 78, 3 Am. B. R. 549, reversed on another point in *Steele v. Buel* (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 44 C. C. A. 287, 5 Am. B. R. 165.

<sup>14</sup> *In re McDonnell*, 101 Fed. Rep. 239, 4 Am. B. R. 92; *Carr v. Myers*, 211 Pa. St. 349, 15 Am. B. R. 116.

The actual value of the policy at the date of bankruptcy may be ascertained and an equitable apportionment of that value be made among the respective interests, if there are others interested in it.<sup>15</sup> In determining the interest of the bankrupt valid loans for which the policies are pledged should be deducted.<sup>16</sup> The bankrupt should be permitted to pay to the trustee the share of that value which would be coming to him at that time, if he desires to do so.<sup>17</sup> If he does not so desire, the court may direct the sale of his interest in the policy at the date of the bankruptcy and require him to execute papers necessary to effectuate at transfer.<sup>18</sup>

Where the bankrupt and his wife are interested in the surrender value, the court has required the bankrupt to execute an assignment to the creditors of his interest in the surrender value and directed that the bankrupt's interest in that sum should be payable out of the policy when it matured, or whenever sooner paid.<sup>19</sup>

In case the policy will become paid up before the estate is likely to be settled, the creditors may authorize the trustee to pay the premiums to obtain the benefit of the paid up policy.<sup>20</sup> But the court will not keep an estate unsettled for an indefi-

<sup>15</sup> *In re* Welling (C. C. A. 7th Cir.), 113 Fed. Rep. 189, 51 C. C. A. 151, 7 Am. B. R. 340; *In re* Boardman, 103 Fed. Rep. 783, 4 Am. B. R. 620; *In re* Slingluff, 106 Fed. Rep. 154, 5 Am. B. R. 76; *In re* Wolff, 165 Fed. Rep. 984, 21 Am. B. R. 452.

<sup>16</sup> *Burlingham v. Crouse* (C. C. A. 2d Cir.), 181 Fed. Rep. 479, 104 C. C. A. 227, 24 Am. B. R. 632; *Van Kirk v. Vermont Slate Co.*, 140 Fed. Rep. 38, 15 Am. B. R. 239.

<sup>17</sup> B. A. 1898, Sec. 70, clause 5, *proviso*. As to redeeming policies of insurance, see Sec. 399, *post*.

<sup>18</sup> *In re* Coleman (C. C. A. 2d Cir.), 136 Fed. Rep. 818, 69 C. C. A. 496, 14 Am. B. R. 461; *In re* Welling (C. C. A. 7th Cir.), 113 Fed. Rep. 189, 51 C. C. A. 151, 7 Am. B. R. 340; *In re* Hettling (C. C. A. 2d Cir.), 175 Fed. Rep. 65, 99 C. C. A. 87, 23 Am. B. R. 161; *Van Kirk v. Vermont Slate Co.*, 140 Fed. Rep. 38, 15 Am. B. R. 239; *In re* Herr, 182 Fed. Rep. 716, 25 Am. B. R. 142.

<sup>19</sup> *In re* Diack, 100 Fed. Rep. 770, 3 Am. B. R. 723; *In re* Slingluff, 106 Fed. Rep. 154, 5 Am. B. R. 76.

<sup>20</sup> *In re* Mertens, 131 Fed. Rep. 972, 12 Am. B. R. 712.

nite period for the purpose of speculating upon the chances of the bankrupt's early death.<sup>21</sup>

### § 399. Redeeming life insurance by paying surrender value.

The bankrupt act provides that "when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."<sup>1</sup>

The manifest object of this provision is to permit the bankrupt to continue his policies of insurance without depleting his estate to be distributed to his creditors.<sup>2</sup> The interest of a bankrupt in policies of insurance on his life is an asset for distribution.<sup>3</sup> The trustee may surrender such policies for the purpose of collecting their value in money. If there is paid or secured to the trustee for the creditors the sum that could be obtained by surrendering the policy the bankrupt may hold and carry it.

The words "cash surrender value" mean the present value of the policy of insurance.<sup>4</sup> It is the cash value which would be recognized and paid by the insurer on the surrender of the policy. There was a difference of opinion by the courts of bankruptcy as to whether the surrender value must be stipulated in the policy itself. It is now settled by the supreme

<sup>21</sup> *In re McKinney*, 15 Fed. Rep. 535; *In re Newland*, No. 10170 Fed. Cas., 6 Ben. 342.

<sup>1</sup> B. A. 1898, Sec. 70, clause 5; *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771, 17 Am. B. R. 484; *Holden v. Stratton*, 198 U. S. 202, 214, 49 L. Ed. 1018, 14 Am. B. R. 94.

<sup>2</sup> *Burlingham v. Crouse* (C. C. A.

2d Cir.), 181 Fed. Rep. 479, 104 C. A. 227, 24 Am. B. R. 632.

<sup>3</sup> See Sec. 398, *ante*.

<sup>4</sup> *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771, 17 Am. B. R. 484; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94; *In re McKinney*, 15 Fed. Rep. 535.



court that a policy may have a surrender value, although not provided for in the policy.<sup>5</sup>

If a policy has no surrender value this provision does not apply and the policy passes to the trustee, if the bankrupt has any interest in it.<sup>6</sup>

The bankrupt must state the amount and character of insurance policies in his schedules. The trustee ascertains the surrender value by applying to the company issuing the policy. Within thirty days after the trustee has ascertained the amount of the surrender value, the bankrupt may pay or secure to the trustee the sum so ascertained. If he does so he continues to hold, own, and carry such policy free from the claims of his creditors participating in the distribution of his estate. If he does not do so the policy passes to the trustee.<sup>7</sup>

#### § 400. Fire insurance policies.

Standard policies of fire insurance do not regularly pass to the trustee except by the consent of the insurance company. The trustee must insure the property after the title to it passes to him, if it is desired to have the property insured.

Where a fire occurs after a petition in bankruptcy is filed and before the appointment of a trustee, the trustee may sue on the policy issued to the bankrupt and recover for the loss.<sup>1</sup> The reason for this is that no change of title is effected until the appointment and qualification of the trustee.

A trustee can not recover for loss on property insured by a bankrupt and burned after the trustee is qualified. The reason is that most policies are void when the title to the property is changed and the title to the bankrupt's property is changed by the qualification of the trustee.

<sup>5</sup> *Hiscock v. Mertens*, 205 U. S. 202, 51 L. Ed. 771, 17 Am. B. R. 484.

<sup>6</sup> *In re Orear* (C. C. A. 8th Cir.), 178 Fed. Rep. 632, 102 C. C. A. 78, 24 Am. B. R. 343; *In re Hettling* (C. C. A. 2d Cir.), 175 Fed. Rep. 65, 99 C. C. A. 87, 23 Am. B. R. 161; *In re Slengluff*, 106 Fed. Rep.

154, 5 Am. B. R. 76; *Clark v. Equitable Life Ins. Soc.*, 143 Fed. Rep. 175, 16 Am. B. R. 137.

<sup>7</sup> *In re Herr*, 182 Fed. Rep. 716, 25 Am. B. R. 142.

<sup>1</sup> *Fuller v. Jameson*, 184 N. Y. 605; *Fuller v. New York Fire Ins. Co.*, 184 Mass. 12.

**§ 401. Property held in trust for bankrupt.**

Whether the beneficial interest of a bankrupt in property held in trust passes to the trustee or not, depends upon whether it is such an interest that the bankrupt might have transferred it, or it might have been levied upon or sold under judicial process against him. If it is so vested it passes.<sup>1</sup> If it is not, it will not pass to the trustee.<sup>2</sup>

Such questions are determinable only by the local law of the state, territory or district where the property has its situs.<sup>3</sup>

The bankruptcy of the beneficiary ordinarily puts an end to any discretion which the trustee under the trust may have in the disposition of the trust funds, and vests the whole in-

<sup>1</sup> *In re* Jersey Island Packing Co., 138 Fed. Rep. 625, 71 C. C. A. 75, 14 Am. B. R. 689; *In re* M'Harry (C. C. A. 7th Cir.), 111 Fed. Rep. 498, 49 C. C. A. 429, 7 Am. B. R. 83; *In re* Mosier, 112 Fed. Rep. 138, 7 Am. B. R. 278; Sanford v. Lackland, No. 12312 Fed. Cas., 2 Dill. 6; Smith v. Profit, 82 Va. 832; Sparhawk v. Cloon, 125 Mass. 263; Anderson v. Miller, 15 Smedes & M. (Miss.) 286.

<sup>2</sup> Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512; McNaboe v. Marks, 51 N. Y. Misc. 207, 16 Am. B. R. 767; *In re* McKay, 143 Fed. Rep. 671, 16 Am. B. R. 238; Butler v. Bandoine, 84 N. Y. App. Div. 215, 16 Am. B. R. 238n, affirmed, 177 N. Y. 530, without opinion; *In re* Hoadley, 101 Fed. Rep. 233, 3 Am. B. R. 780; *In re* Wetmore, 102 Fed. Rep. 290, 4 Am. B. R. 335, affirmed (C. C. A. 3d Cir.), 108 Fed. Rep. 520, 47 C. C. A. 477, 6 Am. B. R. 210; *In re* Ehle, 109 Fed. Rep. 625, 6 Am. B. R. 476.

<sup>3</sup> Nichol v. Levy, 5 Wall. 433, 18 L. Ed. 596; Spindle v. Shreve, 111 U. S. 542, 28 L. Ed. 512. See

also Nichols v. Eaton, 91 U. S. 729, 23 L. Ed. 254; Butler v. Bandoine, 84 N. Y. App. Div. 215, 16 Am. B. R. 238n, affirmed, without opinion, 177 N. Y. 530; *In re* Hoadley, 101 Fed. Rep. 233, 3 Am. B. R. 780.

In some of the states, as in New York, Illinois and Tennessee, there are statutory provisions preventing the alienation of trust estates or exempting the interests of the beneficiaries therein from liability for the debts where the trust is created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will duly recorded or deed duly registered. Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 N. Y. 361; Williams v. Thorn, 70 N. Y. 270; Nichol v. Levy, 5 Wall. 433, 18 L. Ed. 596; Spindle v. Shreve, 111 U. S. 542-548, 28 L. Ed. 512, and one branch of Potter v. Couch, 141 U. S. 319, 329, 35 L. Ed. 721, were cases where statutory provisions were construed and applied.

terest of the *cestui que trust* in the trustee in bankruptcy.<sup>4</sup> But where the bankrupt's interest is terminated by his bankruptcy there is nothing to pass to the trustee, because his beneficial interest in the trust property is ended.<sup>5</sup>

#### § 402. Rights of action upon contracts.

The bankrupt act transfers and vests in the trustee all rights of action arising upon contracts, or for the unlawful taking or detention of, or injury to, the bankrupt's property.<sup>1</sup>

As a general proposition bankruptcy does not discharge a contract.<sup>4</sup> In no case can the party who contracted with a bankrupt set up the bankruptcy against the assignees as a reason for not doing what he has agreed to do.<sup>5</sup> But where the contract has not been executed by the bankrupt he, or the trustee (if he may do the act) must perform the condition which remains to be performed in order to claim the benefit of the contract.<sup>6</sup>

Cases arising upon contracts may be either for the consideration of liquidated damages or for unliquidated damages on account of a breach of the covenants contained in the contract. All the rights of action being vested in the trustee by the bankrupt act, he, and not the bankrupt, must maintain all suits upon contracts made with the bankrupt, as well for unliquidated<sup>7</sup> as for liquidated damages, whether the breach occurred before<sup>8</sup> or after the bankruptcy,<sup>9</sup> unless the trustee elects to abandon the right.

Thus the trustee is the proper party to institute a suit to recover the value of lands or goods and merchandise sold by

<sup>4</sup> *Snowdon v. Dales*, 6 Sim. 524; *Graves v. Dolphin*, 1 Sim. 66; *Younghusband v. Gisborne*, 1 Coll. 400; *Piercy v. Roberts*, 1 Myl. & K. 4; *Re Sanderson's Trust*, 1 K. & J. 497; *Green v. Spicer*, 1 R. & M. 395.

<sup>5</sup> *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254.

<sup>1</sup> B. A. 1898, Sec. 70, clause 6.

<sup>4</sup> See Sec. 310, *ante*; *Brooke v. Hewitt*, 3 Ves. 253; *Carey v. Nagel*, No. 2403 Fed. Cas., 2 Biss. 244.

<sup>5</sup> *Rolfe, B.*, in *Gibson v. Carruthers*, 8 M. & W. 327.

<sup>6</sup> *Gibson v. Carruthers*, 8 M. & W. 321.

<sup>7</sup> *Wright v. Fairfield*, 2 B. & Ad. 727.

<sup>8</sup> *Beckham v. Drake*, 2 H. L. 579.

<sup>9</sup> *Gibson v. Carruthers*, 8 M. & W. 321; *Schondler v. Wace*, 1 Camp. 487; *Fuller v. N. Y. Fire Ins. Co.*, 184 Mass. 12; *Fuller v. Jameson*, 184 N. Y. 605.

the bankrupt,<sup>10</sup> or to maintain a suit for damages for not delivering goods to the bankrupt which had been contracted for,<sup>11</sup> or a suit to recover money had and received from the bankrupt,<sup>12</sup> or a suit to recover for services upon a *quantum meruit*.<sup>12\*</sup>

The trustee, where a right of action exists under the state or federal law, may recover money lost in gambling,<sup>13</sup> or may bring suit to recover usurious interest.<sup>14</sup>

A trustee may maintain a suit on a policy of insurance to recover damages by a fire after an adjudication in bankruptcy and before the appointment of the trustee,<sup>15</sup> or a suit on a policy of indemnity insurance against accidents.<sup>15\*</sup>

In those cases, where the common law prevails with reference to wife's property, choses in action belonging to her do not pass to the trustee, unless reduced to possession.<sup>16</sup> Nor does purely personal property of the wife, as ornaments, jewelry, apparel, etc., pass, even in those states.<sup>17</sup> A wife's separate property never passes to the trustee of the bankrupt husband.<sup>18</sup>

<sup>10</sup> *Stewne v. Aylesworth*, 18 Conn. 244.

<sup>11</sup> *Wright v. Fairfield*, 2 B. & Ad. 727; *Gibson v. Carruthers*, 8 M. & W. 321.

<sup>12</sup> *Foster v. Lowell*, 4 Mass. 307.

<sup>12\*</sup> *Rand v. Iowa Central Ry. Co.*, 96 N. Y. App. Div. 413, 12 Am. B. R. 164.

<sup>13</sup> *Moore v. Jones*, 23 Vt. 739; *Brandon v. Pate*, 2 H. Black, 308; *Brandon v. Sands*, 2 Ves. Jr., 514. But see *Lafountain v. Savings Bank*, 56 Vt. 332.

<sup>14</sup> *Wright v. First National Bank*, No. 18078 Fed. Cas., 8 Biss. 243; *Bromley v. Smith*, No. 1922 Fed. Cas., 2 Biss. 511; *Monongahela Bank v. Overholt*, 96 Penn. St. 327; *Gray v. Bennett*, 44 Mass. 522. See also *Tiffany v. Boatman's Institution*, 18 Wall. 375, 21 L. Ed. 868.

<sup>15</sup> *Fuller v. N. Y. Fire Ins. Co.*,

184 Mass. 12; *Fuller v. Jameson*, 184 N. Y. 605.

<sup>15\*</sup> *Travelers Ins. Co. v. Moses*, 63 N. J. Eq. 260.

<sup>16</sup> *Shay v. Sessaman*, 10 Penn. St. 432; *Chilton v. Cabiness*, 14 Ala. 447.

<sup>17</sup> *In re Grant*, No. 5693 Fed. Cas., 2 Story, 312; *In re Ludlow*, No. 8599 Fed. Cas., 1 N. Y. Leg. Obs. 332; *T. L. Lexan v. Wilson*, 43 Me. 186; *Carr v. Gale*, No. 2434 Fed. Cas., 2 Ware, 330; *Backhouse v. Jett*, No. 710 Fed. Cas., 1 Brock, 500.

<sup>18</sup> See *Voorhees v. Bonesteel*, 16 Wall. 16, 21 L. Ed. 268; *Porter v. Lazear*, 109 U. S. 84, 27 L. Ed. 865; *Driggs v. Russell*, No. 4084 Fed. Cas., 3 N. B. R. 161; *In re Eldred*, No. 4328 Fed. Cas., 3 N. B. R. 256; *Glenn v. Johnson*, 18 Wall. 476, 21 L. Ed. 856.

A suit begun by a trustee may be prosecuted to judgment in his name for the benefit of the bankrupt after a composition.<sup>18\*</sup>

The right to sue in partition, which the bankrupt had under the state law was held not to pass to the trustee, because it may be partitioned in the court of bankruptcy.<sup>18\*\*</sup>

Although, generally, rights under contracts pass to the trustee, the general rule is subject to two important exceptions.

*First Exception.* A right of action where the breach of a contract involves injury to the person or the feelings of the bankrupt, without immediate reference to his rights of property, does not pass to the trustee.<sup>19</sup> Such rights of action, for instance, are those for the breach of a contract of marriage, or for negligently carrying the bankrupt by rail, coach, or vessel, or negligently conducting a cure whereby his person is injured, or negligently conducting a suit whereby he is imprisoned. Although, it is true, the estate of the bankrupt is incidentally affected by the recovery or failure to recover in such actions, the gist of the action is conceived to be personal in its nature, and, therefore, does not pass to the trustee.

*Second Exception.* A right of action arising upon an executory contract, in which the personal skill or conduct of the bankrupt forms a material part, does not vest in the trustee.<sup>20</sup>

Some contracts of this nature are necessarily terminated by the bankruptcy because it becomes impossible to perform the condition thereafter. A contract by a bankrupt to enter into partnership is a familiar example. Manifestly neither the bankrupt nor his trustee can perform the part agreed or maintain a suit for the breach of it.

Other contracts of this nature can be performed by the bankrupt, although by no other person. Such are contracts

<sup>18\*</sup> *Stone v. Jenkins*, 176 Mass. 544, 4 Am. B. R. 568.

<sup>18\*\*</sup> *Hobb v. Frazier*, 56 Fla. 796, 22 Am. B. R. 684.

<sup>19</sup> See *Beckham v. Drake*, 8 M. & W. 846, and in House of Lords,

2 H. L. 579, where this subject is elaborately discussed.

<sup>20</sup> *Streeter v. Sumner*, 11 Foster (N. H.), 542. See also *Gibson v. Carruthers*, 8 M. & W. 321; and *Beckham v. Drake*, 2 H. L. 579.

with authors, actors, musicians, artists, etc. It may be doubted if such a contract may be enforced by a trustee under the present statute. It can not at all events be doubted that where a contract remains to be executed, and it can not be executed without the co-operation of the bankrupt, that the trustee can not enforce the contract unless he can procure the bankrupt to co-operate with him. Under the present statute after-acquired property does not pass. The bankrupt may refuse to do his part and thereupon make a new contract with the same party and receive the benefit of it himself.

### § 403. Rights of action in tort.

A right of action *ex delicto* for the recovery of damages arising from the unlawful taking or detention of, or injury to, the bankrupt's property is expressly vested in the trustee.<sup>1</sup>

Whether the right of action to recover damages for a tort passes to the trustee in bankruptcy of the injured party depends upon whether the tort is a property tort or a personal tort.<sup>2</sup>

If injury resulted to the property of the bankrupt before bankruptcy, the right of action to recover damages passes to the trustee.<sup>3</sup> Thus, claims for an unlawful seizure of property by a foreign government,<sup>4</sup> claims against the United States by a citizen,<sup>5</sup> or a resident alien,<sup>6</sup> pass to the trustee. The trustee, and not the bankrupt, is the proper party to institute a suit to recover for improvement made on govern-

<sup>1</sup> B. A. 1898, Sec. 70, clause 6.

<sup>2</sup> *In re Gay*, 182 Fed. Rep. 260, 25 Am. B. R. 111; *Hansen Co. v. Wyman, Partridge & Co.*, 105 Minn. 491, 22 Am. B. R. 877; *Sibley v. Nason*, 196 Mass 125, 22 Am. B. R. 712; *In re Haensell*, 91 Fed. Rep. 355, 1 Am. B. R. 286.

<sup>3</sup> *In re Gay*, 182 Fed. Rep. 260, 25 Am. B. R. 111; *Hansen Co. v.*

*Wyman, Partridge & Co.*, 105 Minn. 491, 22 Am. B. R. 877.

<sup>4</sup> *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *Williams v. Heard*, 140 U. S. 529, 35 L. Ed. 550.

<sup>5</sup> *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065.

<sup>6</sup> *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473.

ment lands,<sup>7</sup> or for money obtained by deceit and fraud,<sup>8</sup> or against a sheriff for not collecting the contents of an execution,<sup>9</sup> or a suit for the infringement of a patent, or copyright, or trade-mark, or for malicious attachment of property.<sup>10</sup>

A right of action for the recovery of damages for injuries to the person or personal feelings of the bankrupt are personal torts and does not vest in the trustee in bankruptcy of the injured person.<sup>11</sup> Such are actions for personal injuries sustained by a bankrupt prior to bankruptcy,<sup>12</sup> or malicious prosecution,<sup>13</sup> or slander or libel,<sup>14</sup> or seduction of a servant,<sup>15</sup> or assault and battery, or deceit arising out of a fraudulent recommendation of a person to a position of confidence, whereby property entrusted to him is lost,<sup>16</sup> or trespass for seizing and selling the plaintiff's goods under a false claim of debt,<sup>17</sup> or trespass to ship,<sup>18</sup> or trespass accompanied by personal annoyance,<sup>19</sup> or negligence of an attorney,<sup>20</sup> or for conspiracy in assisting a bankrupt to place his property beyond the reach

<sup>7</sup> French v. Carr, 7 Ill. 664.

<sup>8</sup> *In re* Gay, 182 Fed. Rep. 260, 25 Am. B. R. 111; *In re* Harper, 175 Fed. Rep. 412, 23 Am. B. R. 918; Hyde v. Tutts, 45 N. Y. Sup. Ct. 56.

<sup>9</sup> Sullivan v. Bridge, 1 Mass. 511.

<sup>10</sup> Hansen Co. v. Wyman, Part-ridge & Co., 105 Minn. 491, 22 Am. B. R. 877.

<sup>11</sup> *In re* Haensell, 91 Fed. Rep. 355, 1 Am. B. R. 286; Sibley v. Nason, 196 Mass. 125, 22 Am. B. R. 712; Cleland v. Anderson, 66 Neb. 276, 11 Am. B. R. 605,

*In re* Haensell, *supra*, Judge De Haven said: "The right to sue for a personal tort, such as slander, malicious prosecution, assault, etc., is strictly personal. It can not be assigned, is not subject to levy and sale upon judicial process and the statute does not contemplate that the bankrupt's right to maintain an action to recover damages for such

wrongs shall constitute any part of his estate in bankruptcy."

<sup>12</sup> Sibley v. Nason, 196 Mass. 125, 22 Am. B. R. 712.

<sup>13</sup> *In re* Haensell, 91 Fed. Rep. 355, 1 Am. B. R. 286; Noonan v. Orton, 34 Wis., 259; Francis v. Burnett, 34 Ky. 223.

<sup>14</sup> Dillard v. Collins, 25 Grat. (Va.) 343.

<sup>15</sup> Howard v. Crowther, 8 M. & W. 601.

<sup>16</sup> *In re* Brick, 4 Fed. Rep. 804; *In re* Crockett, No. 3402 Fed. Cas. 2 Ben. 514.

<sup>17</sup> Brewer v. Dew, 11 M. & W. 625; Rogers v. Spence, 13 M. & W. 571, affirmed by the H. of L., 12 Clark & Finn., 700.

<sup>18</sup> Bird v. Hempsted, 3 Day (Conn.), 272.

<sup>19</sup> Rose v. Buckett, 2 K. B. D. 449.

<sup>20</sup> Wetherell v. Julius, 10 C. B. 267.

of his creditors,<sup>21</sup> or conspiracy whereby the plaintiff was "driven out of business as a dealer in lumber."<sup>22</sup>

It has been held that a father's right of action in Michigan for the wrongful killing of a son passes to the trustee under section 70, clause 5.<sup>23</sup>

The trustee, as in the case of other property, may elect to adopt or reject such rights of action, according as they are likely to be beneficial or onerous to the estate.<sup>24</sup> Where the trustee does not elect to exercise such a right of action, it remains in the bankrupt.<sup>25</sup>

<sup>21</sup> *Friedman v. Meyers*, 30 O. C. C. 303, 19 Am. B. R. 883.

<sup>22</sup> *Cleland v. Anderson* (on rehearing), 66 Neb. 276, 11 Am. B. R. 605.

<sup>23</sup> *In re Burnstine*, 131 Fed. Rep. 828, 12 Am. B. R. 596.

<sup>24</sup> Sec. 375, *ante*; *Gibson v. Caruthers*, 8 M. & W. 326, Rolfe, B; *Lawrence v. Knowles*, 5 Bing. N. C. 399; *Morgan v. Bain*, L. R. 10 C. P. 15; *In re Phoenix Bessemer Steel Co.*, 4 Chan. D. 108. See also *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *Sessions v. Romadka*, 145 U. S. 39, 39 L. Ed. 608; *American File Co. v. Garrett*, 110 U. S. 295, 28 L. Ed. 149; *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43.

In *Kittle v. Hall*, 29 Fed. Rep. 512, the court said: "It can not be maintained that it is the duty of an assignee in bankruptcy to insti-

tute suits for the infringement of a patent owned by the bankrupt, and that his failure to do so is negligence."

<sup>25</sup> *Chilton v. Cabiness*, 14 Ala. 447.

In *Clark v. Calvert*, 8 Taunt. 742, an action for trespass on land before the bankruptcy of the assignee was maintained by the bankrupt in his own name. The court said (p. 751): "We form our opinion on the precise nature of the action and on the ground that the assignees had not interposed." See also *Rogers v. Spence*, 13 M. & W. 571, affirmed in the House of Lords, 12 Clark & Finn., 700.

Consult also *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *Taylor v. Irwin*, 20 Fed. Rep. 615; *Smith v. Gordon*, No. 13052 Fed. Cas., 6 Law Rep. 313.



## CHAPTER XXIII.

**PROPERTY OF OTHER PERSONS WITH BANKRUPT'S ESTATE—RECLAMATION.**

<b>SEC.</b>	<b>SEC.</b>
404. The general rule.	409. Tracing property of others in the bankrupt's estate.
405. Sale and bailment.	410. Proceedings to recover property in the possession of the trustee.
406. Conditional sale.	411. Petition to reclaim property.
407. Property fraudulently purchased.	412. Proceedings on intervening petition.
408. Property held by the bankrupt as trustee.	

**§ 404. The general rule.**

The property of other persons forms no part of the bankrupt's estate for the purpose of distribution among his creditors.<sup>1</sup> Such property in the possession of the bankrupt at the time of bankruptcy should be restored to its rightful owner.

The trustee takes title only to the property of the bankrupt, which may be applied to the payment of his debts. Property in the possession of the bankrupt, which is claimed by another person, regularly passes to the trustee until its ownership is determined. If there is a controversy with reference to the ownership of such property it is for the court of bankruptcy to determine it.<sup>2</sup> The referee has power to determine such

<sup>1</sup> Thomas v. Taggart, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; Hewit v. Berlin Mach. Wks., 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Donaldson v. Farwell, 93 U. S. 641, 23 L. Ed. 993; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Tennessee, etc., R. Co. v. East Alabama Ry. Co., 75 Ala.

529; Porter v. Lazear, 109 U. S. 84, 27 L. Ed. 856; Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568; Thompson v. Fairbanks, 196 U. S. 516; 49 L. Ed. 577, 13 Am. B. R. 437; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

<sup>2</sup> See Sec. 31, *ante*.

question.<sup>2\*</sup> The claimant should not resort to other courts for this purpose.<sup>2\*\*</sup>

The trustee may decline to take property which is of no value or benefit to the estate.<sup>3</sup> For the same reason the trustee may, when there is no controversy with respect to it, decline to take property in the possession of the bankrupt which is claimed by a third person, or he may return it to such claimant after having taken possession of it, without an order of court. It is safer practice in all cases to have the judge or referee direct its return by order of court. A receiver has no power to return to a claimant property in his possession as receiver without an order of court.<sup>4</sup>

Whether a person can recover property in the possession of the trustee depends upon the title of such claimant as against the title of the trustee. Prior to the amendment of 1910<sup>5</sup> if claimant's title were good as against the bankrupt and his creditors at the time the trustee's title accrued, he was entitled to have the property restored to him,<sup>6</sup> or if it had been sold, the proceeds of the sale of the property.<sup>7</sup> If his title was invalid as against the bankrupt or his creditors, the

<sup>2\*</sup> *In re Drayton*, 135 Fed. Rep. 883, 13 Am. B. R. 602; *In re Hadden Rodee Co.*, 135 Fed. Rep. 886, 13 Am. B. R. 604; *In re Coffey* (Ref.), 19 Am. B. R. 148; *In re Scrinopskie* (Ref.), 10 Am. B. R. 221.

<sup>2\*\*</sup> *Murphy v. Hoffman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *Berman v. Smith*, 171 Fed. 735, 22 Am. B. R. 662.

<sup>3</sup> See Sec. 375, *ante*.

<sup>4</sup> *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45.

<sup>5</sup> Section 8 of the act of June 25, 1910, 36 Stat. at L. 840.

<sup>6</sup> *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11

Am. B. R. 709; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *First Nat. Bank v. Staake*, 201 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

<sup>7</sup> *In re Susquehanna Roofing Co.*, 173 Fed. Rep. 150, 23 Am. B. R. 5; in *First National Bank v. Title & Trust Co.*, 198 U. S. 291, 49 L. Ed. 1051, 14 Am. B. R. 102, the supreme court said: "The sale in the circumstances did not change the situation. The proceeds stood in the place of the property and the order returning the proceeds was equivalent to an order returning the property. This it was proper to do, whether the court had held that it lacked jurisdiction, or ruled in favor of the petitioners on the merits."

property passes to the trustee as a part of the bankrupt's estate.<sup>8</sup>

Under the amendment of 1910, the trustee is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, although no such proceedings had been actually taken by a creditor.<sup>9</sup> A title which would have been valid between the parties prior to the amendment is not necessarily valid as against the trustee in proceedings since the amendment.<sup>10</sup> The reason is that the trustee is in the position of a creditor holding a legal or equitable lien for the purpose of attacking the claimant's title. The character and validity of title is to be determined by local law.<sup>11</sup>

It is a question of title including the right of possession. It may be observed that a person may have a valid legal title to property in the possession of a bankrupt and have parted with the right of possession, as in the case of a lease or a pledge. In such cases his title is not good as against the bankrupt, and he may not be entitled to the return of the property. Whatever right the bankrupt may have in such property passes to the trustee if of any value to the estate.

Applying these principles, it is clear that a claimant is entitled to recover his property, *first*, where his title has never

<sup>8</sup> *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re Ducker* (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 13 Am. B. R. 760; *In re Patterson*, 125 Fed. Rep. 562, 10 Am. B. R. 748.

<sup>9</sup> B. A. 1898, Sec. 47a, clause 2, as amended by the act of June 25, 1910, 36 Stat. at L. 840. *In re Franklin Lumber Co.*, 187 Fed. Rep. 281, 26 Am. B. R. 37.

<sup>10</sup> *In re Franklin Lumber Co.*, 187 Fed. Rep. 281, 26 Am. B. R. 37.

<sup>11</sup> *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 987, 11 Am. B. R. 709; *In re Galt* (C. C. A. 7th Cir.), 120 Fed. Rep. 64, 56 C. C. A. 470, 13 Am. B. R. 575; *In re Tice*, 139 Fed. Rep. 52, 15 Am. B. R. 97.

passed from him to the bankrupt, as where the bankrupt holds such property as bailee,<sup>12</sup> consignee,<sup>12</sup> or trustee,<sup>13</sup> or, *second*, if, having been induced by fraud to part with his title, as in the case of a fraudulent sale, he may become revested with his title and recover his property,<sup>14</sup> or, *third*, where the bankrupt has conveyed title to the claimant prior to bankruptcy, and retained possession of the property, such possession not being in fraud of creditors.<sup>15</sup> But, if the claimant's title has passed to the bankrupt as by gift or sale,<sup>16</sup> or being valid against the bankrupt is invalid as against the creditors, as where a chattel mortgage or conditional sale has not been registered or recorded according to local law,<sup>17</sup> or for any other reason the

<sup>12</sup> *In re* Miller & Brown (2d case), 135 Fed. Rep. 871, 14 Am. B. R. 443; *In re* Flanders (C. C. A. 7th Cir.), 134 Fed. Rep. 560, 67 C. C. A. 484, 14 Am. B. R. 27; *In re* Carpenter, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re* Columbus Buggy Co. (C. C. A. 8th Cir.), 143 Fed. Rep. 859, 74 C. C. A. 611, 16 Am. B. R. 759.

<sup>13</sup> See Sec. 173, *post*; *Welch v. Polley*, 197 N. Y. 117, 11 Am. B. R. 215; *In re* Gaskell, 130 Fed. Rep. 235, 12 Am. B. R. 251.

<sup>14</sup> *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *In re* Weil, 111 Fed. Rep. 897, 7 Am. B. R. 90; *Bloomington v. Empire Rubber Co.*, 114 Fed. Rep. 1016, 8 Am. B. R. 74; *In re* Patterson, 125 Fed. Rep. 562, 10 Am. B. R. 748.

<sup>15</sup> *In re* McDonald, 138 Fed. Rep. 463, 14 Am. B. R. 797; *Allen v. Hollander*, 128 Fed. Rep. 159, 11 Am. B. R. 753.

<sup>16</sup> *In re* Miller & Brown (1st case), 135 Fed. Rep. 868, 14 Am. B. R. 439; *In re* Wood, 140 Fed. Rep. 964, 15 Am. B. R. 411; *In re*

*Martin-Vernon Music Co.*, 132 Fed. Rep. 983, 13 Am. B. R. 276; *In re* Rabenau, 118 Fed. Rep. 471, 9 Am. B. R. 180.

<sup>17</sup> *In re* Smith & Shuck, 132 Fed. Rep. 301, 13 Am. B. R. 103; *In re* Press Post Printing Co., 134 Fed. Rep. 998, 13 Am. B. R. 797; *In re* Butterwick, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 13 Am. B. R. 760; *In re* Dunn Hardw. & Furniture Co., 132 Fed. Rep. 719, 13 Am. B. R. 147; *In re* Tweed, 131 Fed. Rep. 355, 12 Am. B. R. 648; *In re* Tatem, Mann & Co., 110 Fed. Rep. 519, 6 Am. B. R. 426; *In re* Fraizer, 117 Fed. Rep. 746, 9 Am. B. R. 21.

So far as these cases are based on the theory that the trustee occupies the position of an attachment or judgment creditor by virtue of the bankruptcy proceedings, they must be held to be overruled by *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

transaction is fraudulent as to creditors,<sup>18</sup> he is not entitled to recover such property as against the trustee, who is vested with the title of the bankrupt plus the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings.<sup>19</sup>

In actual practice the difficulty is usually to determine the nature of the transaction from the facts and circumstances of each case; that is, whether it is a sale, bailment, consignment or a conditional sale, in which the title to the property in question passes or not. The difficulty must be solved by the ascertainment of the real intent of the contracting parties as found in their agreement.<sup>20</sup> There are, however, certain discriminating earmarks, so to speak, by which they are distinguished. These are not peculiar to bankruptcy, but are determined by the general law.

#### § 405. Sale and bailment.

Whether a claimant may recover property in the possession of the bankrupt at the time of bankruptcy may depend upon whether the bankrupt held it as purchaser or as bailee.

In case of sale the title passes.<sup>1</sup> In case of a bailment the title remains in the original owner and the property may be

<sup>18</sup> *In re Garcewich* (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 53 C. C. A. 510, 8 Am. B. R. 149; *In re Carpenter*, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re Howland*, 109 Fed. Rep. 869, 6 Am. B. R. 495; *In re Ramussen's Estate*, 136 Fed. Rep. 704, 13 Am. B. R. 462.

<sup>19</sup> B. A. 1898, Sec. 47a, clause 2, as amended by the act of June 25, 1910, 36 Stat. at L. 840; *In re Franklin Lumber Co.*, 187 Fed. Rep. 281, 26 Am. B. R. 37.

<sup>20</sup> *In re Franklin Lumber Co.*, 187 Fed. Rep. 281, 26 Am. B. R.

37; *Walter A. Wood, etc., Co. v. Vanstory* (C. C. A. 4th Cir.), 171 Fed. Rep. 375, 96 C. C. A. 331, 22 Am. B. R. 740.

<sup>1</sup> *In re Simpson Mfg. Co.* (C. C. A. 7th Cir.), 130 Fed. Rep. 307, 64 C. C. A. 553, 12 Am. B. R. 212; *In re Miller & Brown* (1st case), 135 Fed. Rep. 868, 14 Am. B. R. 439; *In re Wells*, 140 Fed. Rep. 752, 15 Am. B. R. 419; *Parlett v. Blake* (C. C. A. 8th Cir.), 188 Fed. Rep. 200, 109 C. C. A. —, 26 Am. B. R. 25.

recovered by him.<sup>2</sup> The test is who held the title at the date of bankruptcy—the bankrupt or the claimant. The burden of showing this is on the claimant.<sup>3</sup>

Where a simple sale is made with delivery and acceptance<sup>4</sup> of the goods, there can be no question. The title passes to the debtor.

An option to return a purchase (sale and return) if he should not like is essentially different from an option to purchase if he liked. In the first case the property passes at once, subject to the right to rescind and return.<sup>5</sup> In the other case the title will not pass until the option is determined.<sup>6</sup>

If the transaction is one of sale upon payment and payment is not made on delivery, the title does not pass unless there is a waiver of the condition.<sup>7</sup>

Where a sale is made in one state, which contemplates or expressly provides that the property is to be delivered or used in another state, the law of the latter state governs.<sup>8</sup> The

<sup>2</sup> *Walter A. Wood Mowing & Reaping Mach. Co. v. Vanstory* (C. C. A. 4th Cir.), 171 Fed. Rep. 375, 96 C. C. A. 331, 22 Am. B. R. 740; *In re Columbus Buggy Co.* (C. C. A. 8th Cir.), 143 Fed. Rep. 859, 861, 74 C. C. A. 612, 16 Am. B. R. 759; *In re Susquehanna Roofing Co.*, 173 Fed. Rep. 150, 23 Am. B. R. 5; *Ludvigh v. American Woolen Co.* (C. C. A. 2d Cir.), 188 Fed. Rep. 30, 109 C. C. A. —, 27 Am. B. R. —; *Franklin v. Stoughton Wagon Co.* (C. C. A. 8th Cir.), 168 Fed. Rep. 857, 94 C. C. A. 269, 22 Am. B. R. 63; *In re Pierce* (C. C. A. 8th Cir.), 157 Fed. Rep. 757, 85 C. C. A. 14, 19 Am. B. R. 664.

<sup>3</sup> *In re Wells*, 140 Fed. Rep. 752, 15 Am. B. R. 419; *In re Burke*, 168 Fed. Rep. 994, 22 Am. B. R. 69.

<sup>4</sup> As to what constitutes an acceptance of machinery guaranteed to work satisfactorily, see *In re Simpson Mfg. Co.* (C. C. A. 7th

Cir.), 130 Fed. Rep. 307, 64 C. C. A. 553, 12 Am. B. R. 212; *In re Geo. M. Hill Co.* (C. C. A. 7th Cir.), 123 Fed. Rep. 866, 59 C. C. A. 354, 12 Am. B. R. 213, *note*.

<sup>5</sup> *In re Miller & Brown* (1st case), 135 Fed. Rep. 868, 14 Am. B. R. 439; *In re Froehlich Rubber Refining Co.*, 139 Fed. Rep. 201, 15 Am. B. R. 72.

<sup>6</sup> *Pridmore v. Puffer Mfg. Co.* (C. C. A. 4th Cir.), 163 Fed. Rep. 496, 90 C. C. A. 42, 20 Am. B. R. 851; *In re Miller & Brown* (2d case), 135 Fed. Rep. 871, 14 Am. B. R. 443; *In re Froehlich Rubber Refining Co.*, 139 Fed. Rep. 201, 15 Am. B. R. 72.

<sup>7</sup> *In re Kingston Realty Co.*, 157 Fed. Rep. 303, 19 Am. B. R. 703.

<sup>8</sup> *In re Legg*, 96 Fed. Rep. 326; *In re G. & K. Trunk Co.*, 176 Fed. Rep. 1007, 23 Am. B. R. 914; *In re Hess*, 138 Fed. Rep. 954, 14 Am. B. R. 635.

general rule is that the law of the place where the delivery is to be made or performed controls.<sup>9</sup>

The following distinction between a bailment and a sale is recognized by the courts.<sup>23</sup> When the identical article is to be returned in the same or some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed. The transaction is a sale.<sup>10</sup>

The consignment of goods to an agent to sell and return the proceeds or the specific goods, if not sold, stands upon precisely the same footing as any other bailment, and does not involve a change of title.<sup>11</sup> Where the contract provides that the consignee shall "buy and pay for" the goods on hand at the expiration of the contract, it is a sale as to such goods.<sup>12</sup>

<sup>9</sup> *In re* Pittsburg Industrial Iron Works, 179 Fed. Rep. 151, 22 Am. B. R. 851.

<sup>10</sup> *Lafin & R. Powder Co. v. Burkhardt*, 97 U. S. 110, 24 L. Ed. 973; *Sturm v. Boker*, 150 U. S. 312, 37 L. Ed. 1093; *In re Galt* (C. C. A. 7th Cir.), 120 Fed. Rep. 64, 56 C. C. A. 470, 13 Am. B. R. 575; *In re Flanders* (C. C. A. 7th Cir.), 134 Fed. Rep. 560, 67 C. C. A. 484, 14 Am. B. R. 27; *In re Rabenau*, 118 Fed. Rep. 471, 9 Am. B. R. 180; *In re Martin-Vernon Music Co.*, 132 Fed. Rep. 983, 13 Am. B. R. 276; *In re Taft* (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; *Troy Wagon Wks. v. Vastbinder*, 130 Fed. Rep. 232, 12 Am. B. R. 352; *In re Wells*, 15 Am. B. R. 419, 140 Fed. Rep. 752; *In re Heckathorn*, 144 Fed. Rep. 499, 16 Am. B. R. 467.

<sup>11</sup> *Franklin v. Stoughton Wagon Co.* (C. C. A. 8th Cir.), 168 Fed.

Rep. 857, 94 C. C. A. 269, 22 Am. B. R. 63; *In re Taft* (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; *In re Galt* (C. C. A. 7th Cir.), 120 Fed. Rep. 64, 56 C. C. A. 470, 13 Am. B. R. 575; *In re Flanders* (C. C. A. 7th Cir.), 134 Fed. Rep. 560, 67 C. C. A. 484, 14 Am. B. R. 27; *Deere Plow Co. v. McDavid* (C. C. A. 8th Cir.), 137 Fed. Rep. 802, 70 C. C. A. 422, 14 Am. B. R. 653; *In re Columbus Buggy Co.* (C. C. A. 8th Cir.), 143 Fed. Rep. 859, 74 C. C. A. 611, 16 Am. B. R. 759.

<sup>12</sup> *Parlett v. Blake* (C. C. A. 8th Cir.), 188 Fed. Rep. 200, 109 C. C. A. —, 26 Am. B. R. 25, the court said: "The contracts before us, disclosing no obligation or right in the agent to return the undisposed of goods to the consignors, but the contrary and inconsistent obligation 'to buy and pay for them,' are, therefore, in our opinion, not con-

**§ 406. Conditional sale.**

Whether property in the possession of the bankrupt under a conditional sale, by which the title is reserved in the vendor until the property is paid for, passes to the trustee, depends upon whether the arrangement with regard to such property is valid under the law of the state in which such sale is made, as against a creditor holding a lien by legal or equitable proceedings thereon.<sup>1</sup>

The construction and validity of a conditional sale contract must be determined by the local laws of the state.<sup>2</sup> Where a conditional sale is made in one state, which contemplates or expressly provides that the property is to be delivered or used in another state, the law of the latter state controls.<sup>3</sup> If the delivery is to be made in the state where the sale is made the law of that state governs.<sup>4</sup>

In the earlier cases the trustee was held to occupy the position of a judgment or attaching creditor from the date of the filing of the petition in bankruptcy, which operated as a judicial seizure to create a lien in favor of the general creditors.<sup>5</sup>

tracts of bailment. They stand on a different footing from the goods received and sold before the expiration of the contract period. These undoubtedly were bailments, and it is equally clear, we think, that the goods remaining undisposed of on July 1st, became, by virtue of the provisions of the contracts, the property of the erstwhile bailees."

See also *Ludigh v. American Woolen Co.* (C. C. A. 2d Cir.), 188 Fed. Rep. 30, 109 C. C. A. —, 27 Am. B. R. —.

<sup>1</sup> B. A. 1898, Sec. 47a, clause 2, as amended by the act of June 25, 1910, 36 Stat. at L. 838. *In re Franklin Lumber Co.*, 187 Fed. Rep. 281, 26 Am. B. R. 37.

<sup>2</sup> *Bryant v. Swofford Bros.*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

<sup>3</sup> *In re Legg*, 96 Fed. Rep. 326; *In re G. & K. Trunk Co.*, 176 Fed. Rep. 1007, 23 Am. B. R. 914; *In re Hess*, 138 Fed. Rep. 954, 14 Am. B. R. 635; *In re Agnew*, 178 Fed. Rep. 478, 23 Am. B. R. 360.

<sup>4</sup> *In re Pittsburgh Industrial Iron Wks.*, 179 Fed. Rep. 151, 22 Am. B. R. 851.

<sup>5</sup> *Dolle v. Cassell* (C. C. A. 6th Cir.), 135 Fed. Rep. 52, 67 C. C. A. 526, 14 Am. B. R. 52; *In re Ducker* (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 13 Am. B. R. 760; *In re Rodgers*



This theory was overruled by the supreme court, which held that the trustee had no greater right in property sold under a conditional sale contract than the bankrupt and the general creditors had.<sup>6</sup> If it was good as against the bankrupt and his creditors, the vendor might reclaim the property. If it was not, the property passed to his trustee. This rule prevailed after the decision in the case of *York Mfg. Co. v. Cassell*, where it was announced, until the amendment of 1910,<sup>7</sup> and applies to bankruptcy proceedings begun before June 25, 1910.<sup>8</sup>

The amendment of 1910 provides that "trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."<sup>9</sup> In respect to such property, in bankruptcy proceedings begun since the amendment, the

(C. C. A. 7th Cir.), 125 Fed. Rep. 169, 60 C. C. A. 567, 11 Am. B. R. 79; *Chesapeake Shoe Co. v. Seldner* (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 58 C. C. A. 251, 10 Am. B. R. 466; *In re Pekin Plow Co.* (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 50 C. C. A. 257, 7 Am. B. R. 369; *In re Press Post Printing Co.*, 134 Fed. Rep. 998, 13 Am. B. R. 797; *In re Butterwick*, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re Hess*, 138 Fed. Rep. 954, 14 Am. B. R. 635.

<sup>6</sup> *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Bryant v. Swofford Bros.*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111.

<sup>7</sup> Act of June 25, 1910, 36 Stat. at L. 838. *Unitype Co. v. Long* (C. C. A. 6th Cir.), 149 Fed. Rep. 196, 79 C. C. A. 154, 17 Am. B. R. 627; *Bryant v. Swofford Bros.*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111; *Davis v. Crompton*

(C. C. A. 3d Cir.), 158 Fed. Rep. 735, 85 C. C. A. 633, 20 Am. B. R. 53; *In re Pierce* (C. C. A. 8th Cir.), 157 Fed. Rep. 757, 85 C. C. A. 14, 19 Am. B. R. 64; *In re Gray*, 170 Fed. Rep. 638, 21 Am. B. R. 375; *Reardon v. Rock Island Plow Co.* (C. C. A. 7th Cir.), 168 Fed. Rep. 654, 94 C. C. A. 118, 22 Am. B. R. 26; *York Mfg. Co. v. Brewster* (C. C. A. 5th Cir.), 174 Fed. Rep. 566, 98 C. C. A. 348, 23 Am. B. R. 474; *John Deere Plow Co. v. Anderson* (C. C. A. 5th Cir.), 174 Fed. Rep. 815, 98 C. C. A. 523, 23 Am. B. R. 480.

<sup>8</sup> Section 14 of the act of June 25, 1910, 36 Stat. at L. 838, provides that the amendment "shall not apply to bankruptcy cases pending when this act takes effect."

<sup>9</sup> Section 8 of the act of June 25, 1910, 36 Stat. at L. 838. *In re Franklin Lumber Co.*, 187 Fed. Rep. 281, 26 Am. B. R. 37.

trustee may be said to stand in the shoes of the bankrupt clothed with all the rights, remedies and powers of a lien creditor.

If the arrangement between the vendor and the debtor is valid under the state law as to such creditors, it will be sustained in bankruptcy.<sup>10</sup> In that case the vendor may reclaim the property,<sup>11</sup> or recover the contract price from the proceeds of a sale of it,<sup>12</sup> or if the trustee elects to take the property, it passes to him subject to the claim or lien of the seller.

If the trustee elects not to take the property under the conditional sale contract, the estate is not liable under its provisions.<sup>13</sup>

Whenever a lien creditor may successfully attack a conditional sale contract under the state law, the trustee has the same right.<sup>14</sup> If the arrangement between the vendor and the debtor is invalid under the state law as to creditors, for want of record or any other reason, it is invalid as against the trustee.<sup>15</sup> In such cases the property passes to the trustee for the benefit of the general creditors.

<sup>10</sup> As to the remedies available to a vendor under a valid conditional sale, see Sec. 409, *post*. *In re* National Cash Register Co. (C. C. A. 6th Cir.), 174 Fed. Rep. 579, 98 C. C. A. 425, 23 Am. B. R. 497.

<sup>11</sup> *Pridmore v. Puffer* (C. C. A. 4th Cir.), 163 Fed. Rep. 496, 90 C. C. A. 42, 20 Am. B. R. 851; *In re* Pittsburgh Industrial Iron Wks., 179 Fed. Rep. 151, 22 Am. B. R. 851; *In re* Pierce (C. C. A. 8th Cir.), 157 Fed. Rep. 757, 87 C. C. A. 537, 19 Am. B. R. 664.

<sup>12</sup> *Bryant v. Swofford Bros.*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111; *National Bank v. Williams* (C. C. A. 5th Cir.), 159 Fed. Rep. 615, 86 C. C. A. 605, 20 Am. B. R. 79; *In re* Grainger (C. C. A. 6th Cir.), 160 Fed. Rep.

69, 87 C. C. A. 225, 20 Am. B. R. 166; *In re* Fabian, 151 Fed. Rep. 949, 18 Am. B. R. 488.

<sup>13</sup> See Sec. 375, *ante*; *In re* Daterson Pub. Co. (C. C. A. 3d Cir.), 188 Fed. Rep. 64, 107 C. C. A. —, 27 Am. B. R. —.

<sup>14</sup> *In re* Franklin Lumber Co., 187 Fed. Rep. 281, 26 Am. B. R. 37.

<sup>15</sup> B. A. 1898, Sec. 67a; *In re* G. & K. Trunk Co., 176 Fed. Rep. 1007, 23 Am. B. R. 914; *In re* Faulkner, 181 Fed. Rep. 981, 25 Am. B. R. 416; *In re* Rinker, 174 Fed. Rep. 490, 23 Am. B. R. 62; *In re* Smith & Shuck, 132 Fed. Rep. 301, 13 Am. B. R. 103; *In re* Press Post Printing Co., 134 Fed. Rep. 998, 13 Am. B. R. 797; *In re* Butterwick, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43,

When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction will not be upheld as a conditional sale, because it is a fraud upon the creditors of the vendee, and such property passes to the trustee of the vendee.<sup>16</sup> A sale with privilege of return of the goods, if not satisfactory, can not be upheld as a conditional sale when the goods are placed in stock for sale, and that such property as remained unsold can not be reclaimed as against the trustee of the vendee.<sup>17</sup> Machinery, sold on condition that it shall be made to work satisfactorily and bankruptcy intervenes pending repairs, is the property of the bankrupt, and can not be recovered on the ground that it was a conditional sale, and that the title had not passed by reason of not having been accepted by the bankrupt.<sup>18</sup>

#### § 407. Property fraudulently purchased.

Whenever a bankrupt has goods in his possession, obtained by purchase from a person who has been fraudulently induced

67 C. C. A. 117, 13 Am. B. R. 760; *In re* Dunn Hardw. & Furniture Co., 132 Fed. Rep. 719, 13 Am. B. R. 147; *In re* Tweed, 131 Fed. Rep. 355, 12 Am. B. R. 648; *In re* Tatem Mann & Co., 110 Fed. Rep. 519, 6 Am. B. R. 426; *In re* Fraizer, 117 Fed. Rep. 745, 9 Am. B. R. 21.

<sup>16</sup> *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 53 C. C. A. 510, 8 Am. B. R. 149; *In re* Carpenter, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re* Howland, 109 Fed. Rep. 869, 6 Am. B. R. 495; *In re* Ramussen's Estate, 136 Fed. Rep. 704, 13 Am. B. R. 462; *In re* Tweed, 131 Fed. Rep. 355, 12 Am. B. R. 648; *In re* Butterwick, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re* Bement (C. C. A. 7th Cir.),

172 Fed. Rep. 98, 96 C. C. A. 412, 22 Am. B. R. 616; *In re* Hassam & Son, 153 Fed. Rep. 932, 18 Am. B. R. 749; *Pontiac Buggy Co. v. Skinner*, 158 Fed. Rep. 858, 20 Am. B. R. 206; *In re* Galt (C. C. A. 7th Cir.), 120 Fed. Rep. 64, 56 C. C. A. 470, 13 Am. B. R. 575; *Mishawaka Woolen Co. v. Westveer* (C. C. A. 6th Cir.) 191 Fed. Rep. — 110 C. C. A. —, 27 Am. B. R. —.

<sup>17</sup> *In re* Miller & Brown (1), 135 Fed. Rep. 868, 14 Am. B. R. 439.

<sup>18</sup> *In re* Simpson Mfg. Co. (C. C. A. 7th Cir.), 130 Fed. Rep. 307, 64 C. C. A. 553, 12 Am. B. R. 212.

But see *In re* Geo. M. Hill Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 866, 59 C. C. A. 354, 12 Am. B. R. 213, note.

to make the sale prior to bankruptcy, such vendor is entitled to disaffirm the sale and recover such property from the vendee's trustee in bankruptcy.<sup>1</sup>

The most usual species of fraud by a vendee consists in misstatements as to his ability to pay, or means of payment, such as false statements as to what property he owns, or debts he owes, what amount of business he is doing, that his property is unencumbered, and the like.

In order to authorize the rescission of an executed sale of goods to one who subsequently becomes a bankrupt on the ground that he obtained the same by false and fraudulent representations, it must be shown that he made such misrepresentations, knowing them to be false, and they must have induced the seller to consummate the sale when he would otherwise not have done so.<sup>2</sup> It is not necessary that the false representations should be the sole and exclusive consideration for the credit; but only that they were a material consideration without which in all probability the credit would not have been given.<sup>3</sup>

The vendor must have relied upon the statements of the vendee as an inducement to make the sale.<sup>4</sup> A promise to pay cash when the goods are delivered and failure to do so is not a fraudulent representation.<sup>5</sup> A scheme to defraud creditors generally is not sufficient evidence of fraud to justify

<sup>1</sup> *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *In re Gany*, 103 Fed. Rep. 930, 4 Am. B. R. 576; *Bloomington v. Empire Rubber Co.*, 114 Fed. Rep. 1016, 8 Am. B. R. 74; *In re Weil*, 111 Fed. Rep. 897, 7 Am. B. R. 90; *In re Patterson & Co.*, 125 Fed. Rep. 562, 10 Am. B. R. 748; *In re Burkle*, 116 Fed. Rep. 766, 8 Am. B. R. 542.

<sup>2</sup> *In re Patterson & Co.*, 125 Fed. Rep. 562, 10 Am. B. R. 748; *In re Gany*, 103 Fed. Rep. 930, 4 Am. B. R. 576; *In re Roalswick*, 110 Fed. Rep. 639, 6 Am. B. R. 752; *In re*

*O'Conner*, 114 Fed. Rep. 777, 7 Am. B. R. 428; *Bloomington v. Empire Rubber Co.*, 114 Fed. Rep. 1016, 8 Am. B. R. 74.

<sup>3</sup> *In re Gany*, 103 Fed. Rep. 930, 4 Am. B. R. 576.

<sup>4</sup> *In re Sweeney* (C. C. A. 6th Cir.), 168 Fed. Rep. 612, 94 C. C. A. 90, 21 Am. B. R. 866; *In re Epstein*, 109 Fed. Rep. 878, 6 Am. B. R. 60; *In re Davis*, 112 Fed. Rep. 294, 7 Am. B. R. 276.

<sup>5</sup> *In re Lewis*, 125 Fed. Rep. 143, 10 Am. B. R. 741.

one creditor to disaffirm his contract of sale.<sup>6</sup> The mere omission of a purchaser of goods to disclose his insolvency to the vendor is not regarded as fraudulent in itself.<sup>7</sup> There is a distinction between withholding information and making false statements with reference to one's financial condition.

A statement made by a person to a mercantile agency, which statement has been shown to the vendor prior to the sale, and upon which he relied in giving such person credit, may be considered a statement of the vendee made to the vendor, and, if false in fact, will amount to a false representation with reference to his financial condition.<sup>8</sup> On the other hand, the report of a mercantile agency derived from other sources than the person seeking credit, is not such a fraudulent representation as to justify rescission.<sup>9</sup>

Another ground of rescission of an executed sale is that the vendee purchased the goods with a positive intention not to pay for them. The supreme court says:<sup>10</sup> "The doctrine is now established by a preponderance of authority, that a party not intending to pay, who induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods." In some states it is held that even a positive intention not to pay, if unaccompanied with any "artifices intended and fitted to deceive" will not avoid a sale.<sup>11</sup> The courts of bankruptcy will follow the state rule in this respect.

<sup>6</sup> *In re O'Conner*, 114 Fed. Rep. 777, 7 Am. B. R. 428.

<sup>7</sup> *In re Davis*, 112 Fed. Rep. 294, 7 Am. B. R. 276; *In re Levi & Picard*, 148 Fed. Rep. 654, 17 Am. B. R. 430.

<sup>8</sup> Consult *In re Epstein*, 109 Fed. Rep. 878, 6 Am. B. R. 60; *In re Patterson*, 125 Fed. Rep. 562, 10 Am. B. R. 748; *In re Weil*, 111 Fed. Rep. 897, 7 Am. B. R. 90. See *American Lumber Co. v. Taylor*

(C. C. A. 3d Cir.), 137 Fed. Rep. 321, 70 C. C. A. 21, 14 Am. B. R. 231.

<sup>9</sup> Consult *In re Roalswick*, 110 Fed. Rep. 639, 6 Am. B. R. 752.

<sup>10</sup> *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993.

<sup>11</sup> *In re Lewis*, 125 Fed. Rep. 143, 10 Am. B. R. 741; *In re Levi & Picard*, 148 Fed. Rep. 654, 17 Am. B. R. 430.

In the case of a fraudulent sale the title passes to the vendee, subject to be defeated at the option of the vendor.<sup>12</sup> He may affirm or rescind the sale, but he can not do both. If he elects to affirm the contract by some positive action, or unreasonably delays to disaffirm it, he is not entitled to a return of the goods in the possession of the trustee.

Proving a claim in bankruptcy for the total amount of the goods sold has been held an election to affirm the contract of sale, and that the vendor was not entitled afterwards to the return of the unsold goods in the possession of the trustee.<sup>13</sup> Proving a claim with a reservation of rights in this respect is not a waiver.<sup>14</sup>

#### § 408. Property held by the bankrupt as trustee.

Property which the bankrupt holds in trust for some other person does not vest in the trustee.<sup>1</sup> This rule has been long recognized in England and this country.<sup>2</sup>

<sup>12</sup> Benjamin on Sales, Sec. 433.

<sup>13</sup> *Standard Varnish Wks. v. Haydock* (C. C. A. 6th Cir.), 143 Fed. Rep. 318, 74 C. C. A. 456, 16 Am. B. R. 286; *In re Hildebrant*, 120 Fed. Rep. 992, 10 Am. B. R. 184; *Ormsby v. Dearborn*, 116 Mass. 386; *Seavey v. Potter*, 121 Mass. 297; *In re Kenyon*, 156 Fed. Rep. 863, 19 Am. B. R. 194; *Lynch v. Bronson*, 160 Fed. Rep. 139, 20 Am. B. R. 409.

But see *Sessler v. Paducah Distilleries Co.* (C. C. A. 5th Cir.), 168 Fed. Rep. 44, 93 C. C. A. 466, 21 Am. B. R. 723.

<sup>14</sup> *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710.

<sup>1</sup> *Perry on Trusts*, Sec. 345. *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; *In re Acheson Co.* (C. C. A. 9th Cir.), 170 Fed. Rep. 427, 95 C. C.

A. 597, 22 Am. B. R. 338; *Smith v. Au Gres* (C. C. A. 6th Cir.), 150 Fed. Rep. 257, 80 C. C. A. 145, 22 Am. B. R. 338; *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 266, 80 C. C. A. 154, 17 Am. B. R. 863; *Bills v. Schliep* (C. C. A. 2d Cir.), 127 Fed. Rep. 103, 62 C. C. A. 103, 11 Am. B. R. 607; *Southern Pine Co. v. Savannah Trust Co.* (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 73 C. C. A. 60, 15 Am. B. R. 618; *Welch v. Polleys*, 177 N. Y. 117, 11 Am. B. R. 215.

<sup>2</sup> This rule was laid down as early as 1742 by Lord Chief Justice Willes, in *Scott v. Surman*, Willes' Rep. 400: "My notion," he said, "is that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seized and possessed, as heirs and execu-

Property, which belongs in law or equity to another person, does not pass to the trustee as an asset in bankruptcy.<sup>3</sup> This includes property held by the bankrupt as an express trustee, or as an agent or bailee, or collector of rents, or in any fiduciary position.<sup>4</sup> Whenever a court of equity would declare and enforce a trust relation—either an express or constructive trust—a court of bankruptcy will do the same. The *cestui que trust* may follow and reclaim such property in the possession of the trustee in bankruptcy so long as he can find it or its substantial equivalent in whatever form it may have been changed.<sup>5</sup>

tors are of the estates of their ancestors and testators; but that nothing vests in these assignees even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts. And I found this my opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason of the case, I rely here again upon the rule concerning circuitry of action; for I think it would be very absurd to say that anything shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account, and, according to the case of *Burdett v. Willett*, 2 Vern. 638, will likewise have costs decreed against them; and so the effects of the bankrupt which ought to be applied to the discharge of his debts will be wasted to serve no purpose whatever. If, therefore, the bankrupt were seized of a trust estate in lands, for the reasons already men-

tioned, I should think that it did not vest in the assignees at all, but that the legal estate as to that should still remain in the bankrupt for the benefit of the *cestui que trust*."

Speaking of the opinion of Lord Chief Justice Willes, Vice-Chancellor Whittlesey, in *Ontario Bank v. Mumford*, 5 N. Y. Chan. Rep. 616, after referring to the quotation above, said "But as his associates upon the bench were not prepared to put the decision of the case then under consideration upon that ground the point was left undecided. That motion of this learned and distinguished jurist, however, was subsequently followed, and has long since become the settled law not only in England, but in this state."

See also *Ludwig v. Highley*, 5 Pa. St. 132; *Kip v. Bank of New York*, 10 Johns. (N. Y.) 63; *Blin v. Pierce*, 20 Vt. 25.

<sup>3</sup> Sec. 404, *ante*.

<sup>4</sup> *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *In re Hallett's Estate*, 13 Ch. Div. 696.

<sup>5</sup> As to tracing trust property, see Sec. 409, *post*.



It is essential that the claimant establish the relation of trustee and *cestui que trust*, for if there is no trust the rule has no application.<sup>6</sup> The burden of proof is on the claimant.<sup>7</sup>

Clearly property held by the bankrupt under a deed or will for the benefit of some other person is trust property which does not vest in the trustee.<sup>8</sup> It is well settled that an exchange of securities held in trust is not a confusion of property, but that the new securities constitute the trust property.<sup>9</sup>

Property held by an agent, factor, bailee or broker for the owner is deemed trust property, which should be restored to the rightful owner and does not pass to the trustee in bankruptcy of such persons.<sup>10</sup> It has been held to be trust property which could be traced by the beneficiary where a broker kept the bonds of his principal, and proceeds from the sale of them, in a particular envelope or box, separate and apart from his own property,<sup>11</sup> or where shares of stock in a possession of a broker are capable of identification,<sup>11\*</sup> or where the

<sup>6</sup> *In re* Smith, Thorndike & Brown Co. (C. C. A. 7th Cir.), 170 Fed. Rep. 900, 96 C. C. A. 76, 22 Am. B. R. 350, affirming 159 Fed. Rep. 268, 20 Am. B. R. 312; *In re* Northrup (C. C. A. 2d Cir.), 159 Fed. Rep. 686, 86 C. C. A. 554, 20 Am. B. R. 86.

<sup>7</sup> *In re* Acheson Co. (C. C. A. 9th Cir.), 170 Fed. Rep. 427, 95 C. C. A. 597, 22 Am. B. R. 338; *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 266, 80 C. C. A. 154, 17 Am. B. R. 863.

<sup>8</sup> *Faxon v. Folvey*, 110 Mass. 392; *Swepson v. Rouse*, 65 N. C. 34; *Hatch v. Curtin* (C. C. A. 1st Cir.), 154 Fed. Rep. 791, 83 C. C. A. 495, 19 Am. B. R. 82.

<sup>9</sup> *Cook v. Tullis*, 18 Wall. 340, 21 L. Ed. 933; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235; *Taylor v. Plumer*, 3 Maule & S. 562.

<sup>10</sup> *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; *In re* Meadows, Williams & Co. (C. C. A. 2d Cir.), 177 Fed. Rep. 1004, 100 C. C. A. 667, 24 Am. B. R. 251, affirming 173 Fed. Rep. 694, 23 Am. B. R. 124; *In re* Woods & Malone, 121 Fed. Rep. 599, 9 Am. B. R. 615; *In re* Taft (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417.

<sup>11</sup> *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933; *Voight v. Lewis*, No. 16989 Fed. Cas., 14 N. B. R. 543. See also *Hugewitter v. Von Sacks*, No. 14343 Fed. Cas., 4 Ben. 167.

<sup>11\*</sup> *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; *In re* Meadows, Williams & Co. (C. C. A. 2d Cir.), 177 Fed. Rep. 1004, 100 C. C. A. 667, 24 Am. B. R. 251, affirming 173 Fed. Rep. 694, 23 Am. B. R. 124.



proceeds of the sales of property of a number of consignors were placed by the bankrupt factor in the hands of his attorney, in order that the fund might be kept separate and apart from his general estate.<sup>12</sup> Where cotton was by mistake delivered to factors to whom it was not consigned and was sold and the proceeds deposited in a bank, the owner of the cotton was entitled to the value as against the trustee of the factors in bankruptcy.<sup>13</sup>

The assets of a partnership in the hands of one partner charged with the payment of the debts of the firm, are trust property.<sup>14</sup>

There is a fiduciary relation between vendee and vendor in case of a fraudulent sale of goods when the vendor elects to rescind the sale and reclaim the goods.<sup>15</sup> Where a manufacturer mixed a consignment of raw material with other like material in the course of business, the owner of the consignment was permitted to follow the raw material in the mass.<sup>16</sup>

Moneys deposited in a bank for a specific purpose is a trust fund, which may be followed into the hands of the trustee of the bank.<sup>17</sup> But a general deposit in a bank creates only the relation of debtor and creditor between the depositor and the bank.<sup>17\*</sup>

<sup>12</sup> *In re Taft* (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417.

<sup>13</sup> *In re Woods & Malone*, 121 Fed. Rep. 599, 9 Am. B. R. 615.

<sup>14</sup> *Jones v. Newsom*, No. 7484 Fed. Cas., 7 Biss. 321; *Amsinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801; *Holland v. Fuller*, 13 Ind. 195.

<sup>15</sup> See Sec. 407, *ante*.

<sup>16</sup> *Erie R. R. Co. v. Dial* (C. C. A. 6th Cir.), 140 Fed. Rep. 689, 72 C. C. A. 183, 15 Am. B. R. 559.

<sup>17</sup> *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 206, 80 C. C. A. 154, 17 Am. B. R. 863; *Holder v. Western German Bank* (C. C. A. 6th Cir.), 136 Fed. Rep. 90, 68 C. C. A. 554; *Western German Bank*

*v. Norvell* (C. C. A. 5th Cir.), 134 Fed. Rep. 724; 69 C. C. A. 330; *Nat. Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693.

But see *In re Smart*, 136 Fed. Rep. 974, 14 Am. B. R. 672.

<sup>17\*</sup> *In re Smith, Thorndike & Brown Co.* (C. C. A. 7th Cir.), 170 Fed. Rep. 900, 96 C. C. A. 76, 22 Am. B. R. 350, affirming 159 Fed. Rep. 268, 20 Am. B. R. 312; *In re Northrup* (C. C. A. 2d Cir.), 159 Fed. Rep. 686, 86 C. C. A. 554, 20 Am. B. R. 86; *In re Smart*, 136 Fed. Rep. 974, 14 Am. B. R. 672.

In *Commercial Bank v. Armstrong*, 148 U. S. 59, 37 L. Ed. 363, it was held "that all deposits made with bankers may be divided

Where a sale of a stock of goods was made in bulk to buyers, who subsequently became bankrupt, and the seller fully complied with the state law requiring such sales to be accompanied by a list of the seller's creditors and payment of the price to be applied to their claims, a part of the price remaining unpaid at the time of the buyers' bankruptcy constituted a trust fund for the benefit of the seller's creditors, in so far as it represented a part of the stock remaining at the time of the bankruptcy, or was capable of being segregated from the other assets of the bankrupt.<sup>18</sup> The purchaser of such goods is not entitled to claim exemptions out of the trust property as against the creditors of the seller.<sup>19</sup>

**§ 409. Tracing property of others in the bankrupt's estate.**

The owner may reclaim his property from the trustee in bankruptcy of another person, if such property can be identified or can be traced and followed into other property into which it has been converted.<sup>1</sup>

If he can not trace his property or fund, in its original or some substituted form, in the estate which comes into the

into two classes, namely, those in which the bank, becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor for his own convenience parts with the title to his money and loans it to the bank."

<sup>18</sup> *In re Gaskill*, 130 Fed. Rep. 235, 12 Am. B. R. 251.

<sup>19</sup> *In re Connor*, 146 Fed. Rep. 998.

<sup>1</sup> *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; *In re Acheson Co.* (C. C. A. 9th Cir.), 170 Fed. Rep. 427, 95 C. C. A. 597, 22 Am. B. R. 338; *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 266, 80 C. C.

A. 154, 17 Am. B. R. 863; *Meadows v. Williams & Co.* (C. C. A. 2d Cir.), 177 Fed. Rep. 1004, 100 C. C. A. 667, 24 Am. B. R. 251; *Smith v. Au Gres* (C. C. A. 6th Cir.), 150 Fed. Rep. 257, 80 C. C. A. 145, 17 Am. B. R. 745; *In re Taft* (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; *Bills v. Schliep* (C. C. A. 2d Cir.), 127 Fed. Rep. 103, 62 C. C. A. 103, 11 Am. B. R. 607; *Southern Pine Co. v. Savannah Trust Co.* (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 73 C. C. A. 60, 15 Am. B. R. 618; *In re Gaskill*, 130 Fed. Rep. 235, 12 Am. B. R. 251; *Welch v. Polley*, 177 N. Y. 117, 11 Am. B. R. 215; *In re McGehee*, 166 Fed. Rep. 928, 21 Am. B. R. 656.

hands of the trustee, he is not entitled to any priority over the general creditors with whom he is entitled to share *pro rata*.<sup>2</sup>

The owner is entitled to reclaim his property in the possession of the bankrupt at the time of bankruptcy, when he can identify the specific property belonging to him.<sup>3</sup> Such is the case where shares of stock in the possession of a stock broker are capable of identification,<sup>4</sup> or where a broker kept the bonds of his principal and the proceeds from the sale of them in a particular envelope or box, separate and apart from his own property,<sup>5</sup> or where a commission merchant kept the proceeds of a sale for a customer separate from other funds,<sup>6</sup> or where goods, having been sold by the bankrupt, are separated from other goods belonging to him,<sup>7</sup> or where an incomplete vessel was being constructed under a contract pro-

<sup>2</sup> Board of Commissioners v. Strawn (C. C. A. 6th Cir.), 157 Fed. Rep. 49, 84 C. C. A. 553, Deere Plow Co. v. McDavid (C. C. A. 8th Cir.), 137 Fed. Rep. 802, 70 C. C. A. 422, 14 Am. B. R. 653; American Lumber Co. v. Taylor (C. C. A. 3d Cir.), 137 Fed. Rep. 321, 70 C. C. A. 21, 14 Am. B. R. 231; *In re Agnew*, 178 Fed. Rep. 478, 23 Am. B. R. 360; *In re Brunsing, Tolle & Postel*, 169 Fed. Rep. 668, 22 Am. B. R. 129; *In re Kearney*, 167 Fed. Rep. 995, 21 Am. B. R. 721.

<sup>3</sup> Thomas v. Taggart, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; Meadows v. Williams & Co. (C. C. A. 2d Cir.), 177 Fed. Rep. 1004, 100 C. C. A. 667, 24 Am. B. R. 251; *In re Taft* (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; *In re McDonald*, 138 Fed. Rep. 463, 14 Am. B. R. 797; Allen v. Hollander, 128 Fed. Rep. 159, 11 Am. B. R. 753.

As to following stock in hands

of a bankrupt broker, see *In re Brown & Co.*, 189 Fed. Rep. 432 and 440; *In re McIntire* (C. C. A. 2d Cir.), 181 Fed. Rep. 960, 104 C. C. A. 424; *In re Brown* (C. C. A. 2d Cir.), 175 Fed. Rep. 769, 99 C. C. A. 345; Richardson v. Shaw, 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717; Thomas v. Taggart, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710.

<sup>4</sup> Thomas v. Taggart, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; Meadows v. Williams & Co. (C. C. A. 2d Cir.), 177 Fed. Rep. 1004, 100 C. C. A. 667, 24 Am. B. R. 251.

<sup>5</sup> Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Voight v. Lewis, No. 16989 Fed. Cas., 14 N. B. R. 543.

<sup>6</sup> *In re Taft* (C. C. A. 6th Cir.), 133 Fed. Rep. 511, 66 C. C. A. 385, 13 Am. B. R. 417; *In re Woods & Malone*, 121 Fed. Rep. 599, 9 Am. B. R. 615.

<sup>7</sup> Allen v. Hollander, 128 Fed. Rep. 159, 11 Am. B. R. 753.

viding for payments as the work progressed and the trustee declined to complete it.<sup>8</sup>

Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability of identifying the specific property. This rule was first extended to the proceeds of that property, but it was held that if the proceeds became confused with other property of the same kind so as not to be distinguishable the equity was lost.<sup>9</sup> It was finally held in England and in this country that a person could follow money mixed with that of another or invested in property.<sup>10</sup>

The modern rule is that the owner may follow and reclaim the substantial equivalent of his property in whatever form it may have been changed.<sup>11</sup> "There is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account."<sup>12</sup> He may follow money even if put into a bag or indistinguishable mass by taking out the same quantity.<sup>13</sup> The property into which

<sup>8</sup> *In re McDonald*, 138 Fed. Rep. 463, 14 Am. B. R. 797.

<sup>9</sup> *Illinois Trust & Savings Bank v. First Nat. Bank*, 15 Fed. Rep. 858; *In re Janeway*, No. 7208 Fed. Cas., 4 N. B. R. 100; *In re Hobbs*, No. 6549 Fed. Cas., 2 Low. 491; *Phelan v. Iron Mountain Bank*, No. 11069 Fed. Cas., 4 Dill. 88; *In re Bank of Madison*, No. 890 Fed. Cas., 5 Biss. 515; *Bank of Commerce v. Russell*, No. 884 Fed. Cas., 2 Dill. 215.

<sup>10</sup> *In re Hallett's Estate*, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693.

<sup>11</sup> *Board of Commissioners v. Strawn* (C. C. A. 6th Cir.), 157 Fed. Rep. 49, 84 C. C. A. 553; *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 266, 80 C. C. A. 154, 17 Am. B. R. 763; *Smith v. Au Gres* (C. C. A. 6th Cir.), 150 Fed. Rep. 257, 80 C. C. A.

145, 17 Am. B. R. 745; *Bills v. Schliep* (C. C. A. 2d Cir.), 127 Fed. Rep. 103, 62 C. C. A. 103, 11 Am. B. R. 607; *Southern Pine Co. v. Savannah Trust Co.* (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 73 C. C. A. 60, 15 Am. B. R. 618; *In re Acheson Co.* (C. C. A. 9th Cir.), 170 Fed. Rep. 427, 95 C. C. A. 597, 22 Am. B. R. 338; *Welch v. Polley*, 177 N. Y. 117, 11 Am. B. R. 215; *In re McGehee*, 166 Fed. Rep. 928, 21 Am. B. R. 656.

<sup>12</sup> *National Bank v. Insurance Co.*, 104 U. S. 54, 68, 26 L. Ed. 693.

<sup>13</sup> *In re Hallett's Estate*, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 266, 80 C. C. A. 154, 17 Am. B. R. 763; *Board of Commissioners v. Strawn* (C. C. A. 6th Cir.), 157 Fed. Rep. 49, 84 C. C. A. 553.

his own has been changed is impressed with a trust in his favor, on the ground that, where a tortfeasor has mingled the property of the owner with his own, a lien attaches to the mass *pro tanto*, and the mass passes to his trustee in bankruptcy subject to such lien.<sup>14</sup>

The fact that his property is in the possession of the trustee is not sufficient to fasten a lien upon the general assets. The claimant must trace the presence of the proceeds of his property into some specific property in the hands of the trustee.<sup>15</sup>

The burden of showing that his property has been wrongfully mingled in a mass of the property of the bankrupt is upon the owner, but when this is done, the burden shifts to the trustee.<sup>16</sup> It is for him to distinguish the property of the bankrupt and that of the innocent party.

#### **§ 410. Proceedings to recover property in the possession of the trustee.**

A person claiming to own property in the possession of the bankrupt at the time of the filing of the petition in bankruptcy regularly asserts his claim in the court of bankruptcy. Sec-

<sup>14</sup> *Erie R. R. Co. v. Dial* (C. C. A. 6th Cir.), 140 Fed. Rep. 689, 72 C. C. A. 183, 15 Am. B. R. 559; *Southern Pine Co. v. Savannah Trust Co.* (C. C. A. 5th Cir.), 141 Fed. Rep. 802, 73 C. C. A. 60, 15 Am. B. R. 618; *Smith v. Au Gres* (C. C. A. 6th Cir.), 150 Fed. Rep. 257, 80 C. C. A. 145, 17 Am. B. R. 745; *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 266, 80 C. C. A. 154, 17 Am. B. R. 763; *Bills v. Schliep* (C. C. A. 2d Cir.), 127 Fed. Rep. 103, 62 C. C. A. 103, 11 Am. B. R. 607; *Board of Commissioners v. Strawn* (C. C. A. 6th Cir.), 157 Fed. Rep. 49, 84 C. C. A. 553.

<sup>15</sup> *Board of Commissioners v. Strawn* (C. C. A. 6th Cir.), 157 Fed. Rep. 49, 84 C. C. A. 553; *Peters v. Bain*, 133 U. S. 671, 33 L. Ed. 696; *In re Brown & Co.*, 189 Fed. Rep. 440.

<sup>16</sup> *In re Acheson Co.* (C. C. A. 9th Cir.), 170 Fed. Rep. 427, 95 C. C. A. 597, 22 Am. B. R. 338; *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 266, 80 C. C. A. 154, 17 Am. B. R. 763; *Smith v. Au Gres* (C. C. A. 6th Cir.), 150 Fed. Rep. 257, 80 C. C. A. 145, 17 Am. B. R. 745; *Board of Commissioners v. Strawn* (C. C. A. 6th Cir.), 157 Fed. Rep. 49, 84 C. C. A. 553.

tion 2 of the bankrupt act confers upon these courts ample power to determine all such controversies.<sup>1</sup>

A state court has concurrent jurisdiction of an action of trover to determine the title to property in possession of the trustee in bankruptcy as a part of the bankrupt's estate.<sup>2</sup> But the possession of such property can not be recovered by replevin or other proceedings instituted in the state court.<sup>3</sup> The reason is that the petition in bankruptcy is in effect an attachment, and a court of bankruptcy acquires constructive custody of all property in the possession of the debtor from the filing of the petition. If the claimant desires to recover specific property he must apply to the court of bankruptcy.

<sup>1</sup> In *Whitney v. Wenman*, 198 U. S. 539, 49 L. Ed. 1157, 14 Am. B. R. 45, Mr. Justice Day, speaking for the supreme court, said: "We think the result of these cases is, in view of the broad powers conferred in Section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon and rights therein."

See also Sec. 31, *ante*; *In re Whitener* (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198; *Fisher v. Cushman* (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 43 C. C. A. 381, 4 Am. B. R.

646; *In re Kellogg* (C. C. A. 2d Cir.), 121 Fed. Rep. 333, 57 C. C. A. 547, 10 Am. B. R. 7; *In re Antigo Screen Door Co.* (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 59 C. C. A. 248, 10 Am. B. R. 359; *In re McMahon* (C. C. A. 6th Cir.), 147 Fed. Rep. 685, 77 C. C. A. 668, 17 Am. B. R. 530.

<sup>2</sup> *In re Spitzer* (C. C. A. 2d Cir.), 130 Fed. Rep. 879, 66 C. C. A. 35, 12 Am. B. R. 346; *In re Kanter & Cohen*, 121 Fed. Rep. 984, 9 Am. B. R. 372; *Tiuda v. Osgood*, 71 N. H. 185; *Weeks v. Fowler*, 71 N. H. 518.

<sup>3</sup> *Murphy v. Hoffman Co.*, 211 U. S. 562, 53 L. Ed. 327, 21 Am. B. R. 487; *White v. Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 4 Am. B. R. 178; *In re Russell* (C. C. A. 2d Cir.), 101 Fed. Rep. 248, 41 C. C. A. 323, 3 Am. B. R. 658; *In re Weinger-Bergman & Co.*, 126 Fed. Rep. 875, 11 Am. B. R. 424; *Crosby v. Spear*, 98 Me. 542, 11 Am. B. R. 613; *Weeks v. Fowler*, 71 N. H. 221; *Cox v. State Bank*, 125 Fed. Rep. 654, 11 Am. B. R. 112; *Berman v. Smith*, 171 Fed. Rep. 735, 22 Am. B. R. 662.

A court will not determine the right of a claimant to such property by a summary proceeding, as upon rule to show cause.<sup>4</sup> The proceeding should be plenary in its nature. A claimant of such property may bring an original suit against the trustee or receiver in a court of bankruptcy for the recovery of the specific property claimed to be owned by him.

The usual practice, however, is to file an intervening petition in the bankruptcy proceedings.<sup>5</sup> The petition is regularly filed with the referee, who hears and decides the controversy in the first instance.<sup>6</sup>

The courts of bankruptcy will enforce in the bankruptcy proceedings such agreements with the bankrupt, as absolute or conditional sales, bailments, pledges, leases, liens, and the like, which are valid under the local law, and will avoid such as are invalid. In this way the rights of persons dealing with the bankrupt prior to his bankruptcy and his general creditors, as they existed at the date of the filing of the petition in bankruptcy, may be preserved and enforced in the bankruptcy proceedings without resort to a separate suit for that purpose. In other words, the courts of bankruptcy will administer the

<sup>4</sup> *In re Mundle*, 139 Fed. Rep. 691, 14 Am. B. R. 680; *In re Bailey*, 156 Fed. Rep. 691, 19 Am. B. R. 470.

<sup>5</sup> *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

*In re Whitener* (C. C. A. 5th Cir.), 105 Fed. Rep. 180, 44 C. C. A. 434, 5 Am. B. R. 198, 3 N. B. N. 316, the court said: "The property being in the custody of the district court sitting in bankruptcy, that court had jurisdiction to entertain the intervention filed by Ramseur, claiming the property, and to hear and determine the issues presented by the intervention, not only on general principles (see *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137

U. S. 171, 34 L. Ed. 625), but under the specific provisions of Sec. 2 of the bankruptcy act of 1898."

In *Fisher v. Cushman* (C. C. A. 1st Cir.), 103 Fed. Rep. 860, 43 C. C. A. 381, 4 Am. B. R. 646, the court said: "The rule is settled beyond all doubt that any person claiming an equitable or legal interest in a fund in the registry of a court is entitled to intervene in that behalf."

<sup>6</sup> *In re Drayton*, 135 Fed. Rep. 883, 13 Am. B. R. 602; *In re Hadden-Rodee Co.*, 135 Fed. Rep. 886, 13 Am. B. R. 604; *In re Coffey* (Ref.), 19 Am. B. R. 148; *In re Scrinopskie* (Ref.), 10 Am. B. R. 221.



debtor's property, having respect to all claims against it which are not invalid under the bankrupt law and are valid under the state law at the time of filing the petition in bankruptcy, and avoiding such as are invalid under the state law to the same extent as state courts having jurisdiction to determine the controversy.

#### § 411. The petition to reclaim property.

An intervening petition should be entitled in the district court and the bankruptcy proceedings. It may be as follows: "The District Court of the United States for the — District of — *In re* A. B., bankrupt. Intervening Petition of the X Y Company, petitioner. The trustee or receiver, if one has been appointed, is the proper respondent. The bankrupt and the creditors are not necessary or proper parties to the petition.

The intervening petition <sup>1</sup> should state the date of filing the petition in bankruptcy, the adjudication, the appointment of the trustee or receiver, and that the property in question is in the possession of the trustee or receiver as a part of the bankrupt's estate.

It should set forth the petitioner's claim of title to the specific property which is sought to be recovered. But it has been said that "it is not necessary in cases of this sort that the property claimed be described with that degree of definiteness and particularity that is required in a complaint and writ in an action of replevin." <sup>2</sup>

It should pray that the property specified may be returned to the petitioner, or if it has been sold that the proceeds of such sale may be paid to him, or for such relief as may be desired.

The petition should be signed and verified <sup>3</sup> by the petitioner or some other person who is able of his own knowledge to swear positively to the facts stated in the petition.

<sup>1</sup> For form of petition and orders thereon, see *In re* Hemstreet, 117 Fed. Rep. 568, 8 Am. B. R. 760. See Form No. 34b *post*.

<sup>2</sup> *In re* Pierce (C. C. A. 8th Cir.), 157 Fed. Rep. 757, 88 C. A. 14, 19 Am. B. R. 664.

<sup>3</sup> B. A. 1898, Sec. 18c.



**§ 412. Proceedings on intervening petition.**

An intervention of this character, sometimes called a reclamation proceeding, is really an equitable intervention and a "controversy arising in bankruptcy," as distinguished from proceedings in bankruptcy.<sup>1</sup> The practice is very similar to that upon an intervening petition filed in a suit in equity.

The petition may be filed with the referee.<sup>2</sup> The judge may hear and determine the controversy or the referee in charge of the bankruptcy proceedings. The latter course is usually pursued, and in that case all subsequent proceedings are had before the referee.

The court may permit the petitioner to take possession of the property in controversy before the trial upon giving a forthcoming bond.<sup>3</sup>

It is not necessary to issue a subpoena for the trustee. He must, however, have notice of filing the intervening petition and a reasonable time within which to put in his defense. It is common practice for the judge to enter an order requiring the trustee to show cause on a day fixed in the order why the prayer of the petitioner should not be granted. A copy of this order and the petition is served upon the trustee or his attorney. Proof of service is made by filing a copy of the order with service accepted by the trustee or his attorney, or by an affidavit of any person serving the papers. No notice to creditors is required.

The trustee may, before the day fixed in the order, demur, plead or answer to the petition. When the issues are properly joined a trial is regularly held before the referee, who has power to try the rights of the intervening petitioner, sub-

<sup>1</sup> *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re Mueller* (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256; *Smith v. Means* (C. C. A. 7th Cir.), 148 Fed. Rep. 89, 78 C. C. A. 10.

<sup>2</sup> *In re Drayton*, 135 Fed. Rep. 883, 13 Am. B. R. 602; *In re Haddon-Rodee Co.*, 135 Fed. Rep. 886, 13 Am. B. R. 604; *In re Coffey* (Ref.), 19 Am. B. R. 140; *In re Scrinopskie*, 10 Am. B. R. 221.

<sup>3</sup> As was done *In re Froehlich Rubber Refining Co.*, 139 Fed. Rep. 201, 15 Am. B. R. 82.

ject to review by the judge.<sup>4</sup> The trial may be had before the judge in the first instance.

A claimant waives his common-law right to a trial by jury by intervening in a bankruptcy proceeding for the reason that bankruptcy is governed by the same rules as apply to equity cases.<sup>5</sup> The right to a trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction.<sup>6</sup>

At the trial evidence may be introduced by oral testimony or by deposition.<sup>7</sup> Witnesses may be compelled to appear and testify, and if books or papers are required a subpoena *duces tecum* may be issued. The subpoena for a witness must be issued out of the court under the seal thereof, and be tested by the clerk.<sup>8</sup> Blanks with the signature of the clerk and the seal of the court may be furnished to the referees upon application.<sup>9</sup> A witness can not be compelled to attend a hearing more than one hundred miles from his residence.<sup>10</sup>

The petitioner is entitled to an inspection of all accounts and papers of the trustee, and to be furnished with any information concerning the bankrupt's estate which the trustee has, although the trustee may be resisting the petitioner's claim.<sup>11</sup>

The burden of proof is on the claimant to establish his claim to the property.<sup>12</sup> The referee will usually hear arguments of counsel, and thereupon enter an order either restor-

<sup>4</sup> *In re Drayton*, 135 Fed. Rep. 883, 13 Am. B. R. 602; *In re Had-den-Rodee Co.*, 135 Fed. Rep. 886, 13 Am. B. R. 604.

<sup>5</sup> *Dokken v. Page* (C. C. A. 8th Cir.), 147 Fed. Rep. 438, 77 C. C. A. 674, 17 Am. B. R. 228.

<sup>6</sup> B. A. 1898, Sec. 19c; *Flippin v. Kimball* (C. C. A. 4th Cir.), 87 Fed. Rep. 258; *Kennedy v. R. R. Co.*, 3 Fed. Rep. 97.

<sup>7</sup> B. A. 1898, Sec. 21, as amended Feb. 5, 1903, 32 Stat. at L. 797; R. S. Secs. 863 to 866.

<sup>8</sup> Gen. Ord. 3. Official Form No. 30, see Form No. 40, *post*; R. S. Sec. 911

<sup>9</sup> Gen. Ord. 3.

<sup>10</sup> B. A. 1898, Sec. 41; *In re Hemstreet*, 117 Fed. Rep. 568, 8 Am. B. R. 760.

<sup>11</sup> *In re Saur*, 122 Fed. Rep. 101, 10 Am. B. R. 353.

<sup>12</sup> *In re Heckathorn*, 144 Fed. Rep. 499, 16 Am. B. R. 467; *In re Wood*, 140 Fed. Rep. 964, 15 Am. B. R. 411.

ing the property, or dismissing the petition, or as the rights of the parties may require. Costs may be taxed against an unsuccessful claimant.<sup>13</sup>

This order of the referee may be reviewed by the judge as in other cases, and the order of the judge may be reviewed by a circuit court of appeals under section 6 of the act of March 3, 1891, on appeal, but not on a petition to review.<sup>14</sup>

<sup>13</sup> *In re* Acheson Co. (C. C. A. 9th Cir.), 170 Fed. Rep. 427, 95 C. C. A. 597, 22 Am. B. R. 338; *Smith v. Mottley* (C. C. A. 6th Cir.), 150 Fed. Rep. 266, 80 C. C. A. 154, 17 Am. B. R. 763; *Smith v. Au Gres* (C. C. A. 6th Cir.), 150 Fed. Rep. 257, 80 C. C. A. 145, 17 Am. B. R. 745; *Board of Commissioners v. Strawn* (C. C. A. 6th Cir.), 157 Fed. Rep. 49, 84

C. C. A. 553; *In re* Wells, 140 Fed. Rep. 752, 15 Am. B. R. 419; *In re* Burke, 168 Fed. Rep. 994, 22 Am. B. R. 69; *In re* Schocket, 177 Fed. Rep. 583, 24 Am. B. R. 47.

<sup>14</sup> 26 Stat. at L. 862; *Hewit v. Berlin Mach. Wks.*, 194 U. S. 297, 48 L. Ed. 986, 11 Am. B. R. 709; *In re* Mueller (C. C. A. 6th Cir.), 135 Fed. Rep. 711, 68 C. C. A. 349, 14 Am. B. R. 256.

## CHAPTER XXIV.

## PROPERTY EXEMPT BY LAW.

<b>SEC.</b>	<b>SEC.</b>
413. Exempt property not part of bankrupt's estate.	422. Family headship.
414. Property exempted by federal statute.	423. Exemptions in partnership property.
415. Property exempted by state statute.	424. Exemptions in property fraudulently conveyed.
416. The exemption law of the state of domicile governs.	425. Exemptions in property acquired on the eve of bankruptcy.
417. Wearing apparel.	426. Dower.
418. Specific property—implements of trade, etc.	427. Liens on exempt property.
419. Homesteads.	428. The power of the bankruptcy court over exempt property.
420. Ownership of homestead necessary.	429. Who may claim exemptions.
421. Occupancy of premises as a homestead.	430. Waiver of exemption.
	431. How to set apart exemptions.

**§ 413. Exempt property not part of bankrupt's estate.**

Property generally exempted by the federal or state law from the claims of creditors is not part of the assets of the bankrupt and does not pass to his trustee.<sup>1</sup>

By section 70a of the act, the title to the bankrupt's property is vested in the trustee "except in so far as it is the property which is exempt." By section 67 it is provided among other things, that the property of the debtor fraudulently conveyed, etc., "shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt." Section 6 provides that the act "shall not effect the allowance to bankrupts of the exemptions which are prescribed by the state laws." These provisions make as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy.

<sup>1</sup> Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; Holden v. Stratton, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94; Smalley v. Laugenour, 196 U. S. 93, 49 L. Ed. 400; *In re* National Grocer Co., (C. C. A. 6th Cir.), 181 Fed. Rep. 33, 104 C. C. A. 47, 24 Am. B. R. 360; *In re* Forbes (C. C.

A. 9th Cir.), 186 Fed. Rep. 79, 108 C. C. A. 191, 26 Am. B. R. 355; *In re* Owings, 140 Fed. Rep. 739, 15 Am. B. R. 472; *In re* Cohn, 171 Fed. Rep. 568, 22 Am. B. R. 761.

That state exemption laws include territorial exemptions, see *In re* Forbes (C. C. A. 9th Cir.), 186 Fed. Rep. 79, 108 C. C. A. 191, 26 Am. B. R. 355.

The title to such property not passing to his trustee remains in the bankrupt.<sup>2</sup> He may, if lawful under the state law, sell it or mortgage it or maintain suits in respect to it, as for the recovery of it in specie or for any damages or work done in respect to it.<sup>3</sup>

Where a transfer of exempt property has been surrendered as a preference, or recovered as in fraud of creditors, the title is in the bankrupt so that he may claim his exemption in it.<sup>4</sup>

Upon the death of the bankrupt exempted property descends to his heirs according to the law of the state.<sup>5</sup>

#### § 414. Property exempted by federal statute.

The bankrupt act adopts the laws of the several states and territories regulating exemptions.<sup>1</sup> This does not prevent a debtor claiming property as exempt under the federal statutes.<sup>2</sup>

<sup>2</sup> *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; *In re Forbes* (C. C. A. 9th Cir.), 186 Fed. Rep. 79, 108 C. C. A. 191, 26 Am. B. R. 355.

<sup>3</sup> *In re National Grocer Co.* (C. C. A. 6th Cir.), 181 Fed. Rep. 33, 104 C. C. A. 47, 24 Am. B. R. 360; *Winn v. Morse*, 59 N. H. 210; *Sulling v. Gunderman*, 35 Tex. 545; *Henly v. Lanier*, 75 N. C. 172; *Schlitz v. Schatz*, No. 12459 Fed. Cas., 2 Biss. 248.

<sup>4</sup> See Sec. 424, *post*; *In re Falconer* (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 49 C. C. A. 50, 6 Am. B. R. 557; *Bashinski v. Talbott* (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 56 C. C. A. 241, 9 Am. B. R. 513, affirming *In re Talbott*, 116 Fed. Rep. 417, 8 Am. B. R. 427; *In re Thompson*, 140 Fed. Rep.

257, 15 Am. B. R. 283; *In re Soper*, 173 Fed. Rep. 116, 22 Am. B. R. 868.

But see *In re Long*, 116 Fed. Rep. 113, 8 Am. B. R. 591; *In re Evans*, 116 Fed. Rep. 909, 8 Am. B. R. 730; *In re White*, 109 Fed. Rep. 635, 6 Am. B. R. 451.

Section 67*e* of the act provides that such property shall pass to the trustee, "if the same is not exempt."

<sup>5</sup> *In re Hester*, No. 6437 Fed. Cas., 5 N. B. R. 285; *In re Lambert*, No. 8026 Fed. Cas., 2 N. B. R. 426; *Rix v. Bank*, No. 11869 Fed. Cas., 2 Dill. 367; *Bulymore v. Cooper*, 46 N. Y. 236; *Fehley v. Barr*, 66 Penn. 196.

<sup>1</sup> See Sec. 415, *post*.

<sup>2</sup> *In re Cohn*, 171 Fed. Rep. 568, 22 Am. B. R. 761.

Military uniforms, arms and equipment are exempted by the statutes of the United States.<sup>3</sup>

Lands acquired under the provisions of the national homestead laws are not liable to the satisfaction of any debt contracted prior to the issuing of the patent.<sup>4</sup>

Pension money is exempt whether it remains with the Pension Office or any officer or agent, or is in the course of transmission to the pensioner entitled to it.<sup>5</sup> Pension money in the hands of or invested by the bankrupt prior to bankruptcy is not exempt.<sup>6</sup>

#### § 415. Property exempted by state statute.

Congress has adopted the laws of the several states and territories regulating exemptions.<sup>1</sup> The constitutional power of Congress to adopt the state exemption laws as a part of the bankruptcy system is well settled.<sup>2</sup>

The bankrupt statute declares that it "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."<sup>3</sup>

<sup>3</sup> R. S. Sec. 1628; *In re Owings*, 140 Fed. Rep. 739, 15 Am. B. R. 472.

<sup>4</sup> R. S. Secs. 2296 and 2468. *In re Cohn*, 171 Fed. Rep. 568, 22 Am. B. R. 761.

<sup>5</sup> R. S. Secs. 4745 and 4747; *Streeter v. Sumner*, 11 Foster (N. H.), 557.

<sup>6</sup> *In re Jones*, 166 Fed. Rep. 337, 21 Am. B. R. 536; *In re Ellethorpe*, 111 Fed. Rep. 163, 7 Am. B. R. 18; *In re Stout*, 109 Fed. Rep. 794, 6 Am. B. R. 505.

But see *In re Bean*, 100 Fed. Rep. 262, 4 Am. B. R. 53.

<sup>1</sup> B. A. 1898, Sec. 6; *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107;

*Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113, 8 Am. B. R. 1; *In re Dunham*, 104 Fed. Rep. 231, 4 Am. B. R. 760; *In re Scheier*, 188 Fed. Rep. 744, 26 Am. B. R. 739.

<sup>2</sup> U. S. Const., Art. 1, Sec. 8; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113, 8 Am. B. R. 1; *In re Kean*, No. 7630 Fed. Cas., 2 Hughes, 322.

<sup>3</sup> B. A. 1898, Sec. 6. Compare R. S. Sec. 5045.

Exemptions in bankruptcy and under state laws compared. See *Holland v. Withers*, 76 Ga. 667.

A court of bankruptcy is, therefore, to look to the exemption laws of the several states and territories for the description of the person who may claim exemption and for the amount and species of the property to be exempt.<sup>4</sup> A bankrupt is entitled to the same exemptions as if proceeded against as a debtor under the state laws and to none other.<sup>5</sup>

In order to claim exemptions in bankruptcy he must comply with the requirements of the state law. If he fails to bring himself within the conditions and requirements of such law, the property claimed is not exempt from the operation of the bankrupt law, and the trustee should administer it for the benefit of creditors.<sup>6</sup>

In applying state exemption laws the bankruptcy courts will adopt and follow the construction of them announced by the highest court of the state, the statute of which is involved.<sup>7</sup> If the state law has not been construed by the state tribunals, or if there is a conflict of opinion as to the meaning of a par-

<sup>4</sup> *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277; *In re Baker* (C. C. A. 6th Cir.), 182 Fed. Rep. 392, 104 C. C. A. 602, 24 Am. B. R. 411; *Richardson v. Woodward* (C. C. A. 4th Cir.), 104 Fed. Rep. 873, 44 C. C. A. 235, 5 Am. B. R. 94; *In re Meriwether*, 107 Fed. Rep. 102, 5 Am. B. R. 435; *Steele v. Buel* (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 44 C. C. A. 287, 5 Am. B. R. 165; *In re Owings*, 140 Fed. Rep. 739, 15 Am. B. R. 472; *In re McGowan*, 170 Fed. Rep. 493, 22 Am. B. R. 469; *In re Finklea*, 153 Fed. Rep. 492, 18 Am. B. R. 738.

<sup>5</sup> *Smalley v. Laugenour*, 196 U. S. 93, 49 L. Ed. 400, 13 Am. B. R. 692; *In re Manning*, 112 Fed. Rep. 948, 7 Am. B. R. 571.

<sup>6</sup> *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277; *In re Durham*, 104 Fed. Rep.

231, 4 Am. B. R. 760; *In re Blanchard*, 161 Fed. Rep. 793, 20 Am. B. R. 417; *In re Wilson*, 108 Fed. Rep. 197, 6 Am. B. R. 287; *In re McGowan*, 170 Fed. Rep. 493, 22 Am. B. R. 469; *In re Boyd*, 120 Fed. Rep. 999, 10 Am. B. R. 337; *In re Donahey*, 176 Fed. Rep. 458, 23 Am. B. R. 975.

<sup>7</sup> *In re Nye* (C. C. A. 8th Cir.), 133 Fed. Rep. 33, 66 C. C. A. 139, 13 Am. B. R. 142; *In re National Grocer Co.* (C. C. A. 6th Cir.), 181 Fed. Rep. 33, 104 C. C. A. 47, 24 Am. B. R. 36; *In re Stevenson*, 93 Fed. Rep. 789, 2 Am. B. R. 230; *In re Pope*, 98 Fed. Rep. 722, 3 Am. B. R. 525; *In re Waxelbaum*, 101 Fed. Rep. 228, 4 Am. B. R. 120; *In re Meriwether*, 107 Fed. Rep. 102, 5 Am. B. R. 435; *In re Irvin* (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 57 C. C. A. 47, 9 Am. B. R. 689, affirming *In re Stone*, 116 Fed.

ticular provision, the courts of bankruptcy are free to construe it.<sup>7\*</sup> These are familiar and well-settled rules recognized by the United States courts with reference to state laws and constitutions generally.<sup>8</sup>

A state law which is invalid or unconstitutional under a state or the federal constitution is not adopted by this provision.<sup>9</sup> A court of bankruptcy will not enforce such a law.

#### § 416. The exemption law of the state of domicile governs.

The state law, which governs any particular case, is that in force at the time of the filing of the petition in the state wherein the bankrupt has had his domicile for the six months,

Rep. 35, 8 Am. B. R. 416; *In re* Woodward, 95 Fed. Rep. 955, 2 Am. B. R. 692.

The supreme court of the United States recognized this principle, with reference to exemption laws, in *Gunn v. Barry*, 15 Wall. 621, 21 L. Ed. 212, when it said: "It may well be doubted whether both these provisions (of the exemption statute of Georgia) were not intended to be wholly prospective in their effect. But as we understand the supreme court of the state has come to a different conclusion we shall not consider the question."

<sup>7\*</sup> *In re* Baker (C. C. A. 6th Cir.), 182 Fed. Rep. 392, 104 C. C. A. 602, 24 Am. B. R. 411, Judge Warrington speaking of a state exemption statute said:

"We of course agree that where the decisions of the state court are in conflict and point to no definite rule touching the construction of a statute of the state, the federal courts are quite as much at liberty to place their own construction upon the statute as they would be

if the state court had not construed it at all. But if there be a rule of decision which is reasonably clear with respect to a given statute, we think the federal courts are bound in a case like this to follow the rule rather than to undertake to determine upon their own interpretation whether the state court may not change the rule in the future."

<sup>8</sup> *Morley v. Lakeshore Ry. Co.*, 146 U. S. 162, 36 L. Ed. 925; *Leffingwell and Warren*, 2 Black. 603, 17 L. Ed. 261; *Randall v. Brigham*, 7 Wall. 541, 19 L. Ed. 285; *Provident Institution v. Massachusetts*, 6 Wall. 630, 18 L. Ed. 907; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 582, 31 L. Ed. 795.

<sup>9</sup> See *In re* Everitt, No. 4579 Fed. Cas., 9 N. B. R. 90; *In re* Dillard, No. 3912 Fed. Cas., 2 Hughes, 190.

As to when an exemption law is unconstitutional because it impairs the obligation of a contract, see *Gunn v. Barry*, 15 Wall. 610, 21 L. Ed. 212.



or the greater portion thereof, immediately preceding the filing of the petition.<sup>1</sup>

This will usually be the law of the state in which the petition is filed. It is not necessarily so. A person may be adjudged a bankrupt in a district where he has his principal place of business and which is not the district of his domicile.<sup>2</sup> In such cases the amount and the species of the property to be exempt is determined by the law of the state of his domicile, and not the state in which he has his principal place of business. It is not necessary or proper to look to the law of the state in which the property is situated to see if it is exempt.

If the property is exempt under the law of the state of the bankrupt's domicile, it is exempt wherever it may be situated.<sup>3</sup> The court of bankruptcy can not assign to a bankrupt domiciled within its district a homestead in lands situated in another district,<sup>4</sup> but the court may set off homestead exemptions to a bankrupt domiciled in another district.<sup>5</sup>

Section 6 of the act expressly provides that it is the state law "in force at the time of the filing of the petition,"

<sup>1</sup> B. A. 1898, Sec. 6. As to what is the state of the domicile of a bankrupt, see Sec. 194, *ante*.

*In re* Youngstrom (C. C. A. 8th Cir.), 153 Fed. Rep. 98, 82 C. C. A. 232, 18 Am. B. R. 572; *In re* Donahey, 176 Fed. Rep. 458, 23 Am. B. R. 795; *In re* O'Hara, 162 Fed. Rep. 325, 20 Am. B. R. 714; *In re* McCutchen, 100 Fed. Rep. 779, 4 Am. B. R. 81; *In re* Grimes, 94 Fed. Rep. 800, 2 Am. B. R. 160; *In re* Woodard, 95 Fed. Rep. 260, 2 Am. B. R. 339; *In re* Buelow, 98 Fed. Rep. 86, 3 Am. B. R. 389; *In re* Lynch, 101 Fed. Rep. 579, 4 Am. B. R. 262.

<sup>2</sup> B. A. 1898, Sec. 2, clause 1; *In re* Schulz, 135 Fed. Rep. 228, 14 Am. B. R. 317.

*In re* Brady, 169 Fed. Rep. 152, 21 Am. B. R. 368, Judge Evans

said: "If the bankrupt resides in Tennessee (which, by the way, was well enough shown to be the fact, and so stated in our former opinion), his exemptions, as his response insists should be the case, will most probably be governed by the law of that state, and all questions in that connection can be easily presented and determined when the schedules are filed and exemptions claimed. He was adjudicated a bankrupt in Kentucky because his principal place of business had been in that state, and not because of residence here."

<sup>3</sup> *In re* Stevens, No. 13392 Fed. Cas., 2 Biss. 373.

<sup>4</sup> *In re* Owings, 140 Fed. Rep. 739, 15 Am. B. R. 472.

<sup>5</sup> *In re* Schulz, 135 Fed. Rep. 228, 14 Am. B. R. 317.

which fixes the right to exemptions. Congress evidently intended that the bankrupt should be allowed such exemptions, as at the time the petition was filed he would be entitled to claim under the state law existing at that time. That is the date the rights of parties generally are fixed.<sup>6</sup> The trustee takes title to all of the property of the bankrupt on that date, except such as is exempt, although the title to it vests as of the date of adjudication.<sup>7</sup> It has, however, been said that the right of a bankrupt to exemptions is determined as of the date he was adjudged bankrupt,<sup>8</sup> and in other cases as of the date when the exemption was claimed.<sup>9</sup>

If he has not had a domicile for more than three months in any one state during the six months prior to his bankruptcy, he is not entitled to exemptions.<sup>10</sup> The law of no state applies to such a case.

It may be contended that where a bankrupt has had a domicile in one state for more than three months, and has then removed his domicile into another state, and within three months thereafter a petition in bankruptcy is filed, that he has forfeited his right to claim exemptions. The statute is not so limited.<sup>11</sup> A bankrupt can establish only one domicile within the six months immediately preceding the filing of the petition. The law of the state in which he had this domicile, whether it be the first or the last part of the six months, determines what state law applies.

<sup>6</sup> Board of Commissioners v. Hurley (C. C. A. 8th Cir.), 169 Fed. Rep. 92, 94 C. C. A. 362, 22 Am. B. R. 209; Swarts v. Fourth Nat. Bank (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673; *In re* Bingham, 94 Fed. Rep. 796, 2 Am. B. R. 223.

<sup>7</sup> B. A. 1898, Sec. 70a.

<sup>8</sup> *In re* Youngstrom (C. C. A. 8th Cir.), 153 Fed. Rep. 98, 82 C. C. A. 232, 18 Am. B. R. 572; *In re* Mayer (C. C. A. 7th Cir.), 108 Fed. Rep. 599, 47 C. C. A. 512; 6

Am. B. R. 117; Matter of Fletcher (Ref.), 16 Am. B. R. 491.

<sup>9</sup> *In re* Donahey, 176 Fed. Rep. 458, 23 Am. B. R. 795; *In re* O'Hara, 162 Fed. Rep. 325, 20 Am. B. R. 714; *In re* Fisher, 142 Fed. Rep. 205, 15 Am. B. R. 652; *In re* Culwell, 165 Fed. Rep. 828, 21 Am. B. R. 614.

<sup>10</sup> *In re* Dinglehoef, 109 Fed. Rep. 866, 6 Am. B. R. 242.

<sup>11</sup> *In re* Cohn, 171 Fed. Rep. 568, 22 Am. B. R. 761.

Where a person has established a domicile in a state, the burden is upon the creditor opposing claim to exemption on the ground that the bankrupt has changed his domicile.<sup>12</sup>

### § 417. Wearing apparel.

Wearing apparel is regularly exempted by statute from the claims of creditors in the several states.

What a bankrupt may claim under a statutory exemption of wearing apparel depends upon the words used in the state statute as construed by the highest court in the state.<sup>1</sup> It may be said generally that articles intended and adapted to be worn on the person for protection against the elements, or personal comfort, or decency, or serving to ornament the person, may be wearing apparel.<sup>2</sup>

Jewelry is generally considered wearing apparel when it is acquired and used as ornamental apparel.<sup>3</sup> When it is acquired and kept as an investment of values, rather than for the purpose of ornament, it is not wearing apparel.<sup>4</sup> The value of

<sup>12</sup> *In re Grimes*, 94 Fed. Rep. 800, 2 Am. B. R. 160.

<sup>1</sup> *In re Leech*, 171 Fed. Rep. 591, 22 Am. B. R. 599, 604; *In re Smith*, 96 Fed. Rep. 833, 3 Am. B. R. 146; *In re Sullivan* (C. C. A. 8th Cir.), 148 Fed. Rep. 815, 78 C. C. A. 505, 17 Am. B. R. 578.

*In re Evans & Co.*, 158 Fed. Rep. 153, 155, 19 Am. B. R. 752, Judge Bradford said: "The Delaware statute now in force, unlike those of many of her sister states, contains, as above mentioned, no limitation of the value or amount of the exempt property. No sum of money is specified as the maximum value of the exempt apparel, nor is the term 'necessary' or any other expression employed which by implication might carry with it a restriction as to its amount or character."

<sup>2</sup> *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 36 C. C. A. 502, 2 Am. B. R. 529; *In re Evans & Co.*, 158 Fed. Rep. 153, 19 Am. B. R. 752.

<sup>3</sup> *In re Leech* (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 36 C. C. A. 502, 2 Am. B. R. 529; *In re Smith*, 96 Fed. Rep. 833, 3 Am. B. R. 146; *In re Evans & Co.*, 158 Fed. Rep. 155, 19 Am. B. R. 752; *In re Steele*, No. 13346 Fed. Cas., 2 Flipp. 324; *In re Caswell* (Ref.), 6 Am. B. R. 718; *In re Henry* (Ref.), 14 Am. B. R. 362.

<sup>4</sup> *In re Leech* (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599.

jewelry which may be exempt, unless limited by statute, depends largely upon the financial circumstances and the condition's of the debtor's life prior to his bankruptcy.<sup>5</sup>

It has been held that wearing apparel includes a watch customarily worn by the debtor,<sup>6</sup> a diamond stud,<sup>7</sup> cuff links, scarf pins and watch fobs,<sup>8</sup> finger rings,<sup>9</sup> and a Masonic uniform.<sup>10</sup>

The wearing apparel of an unmarried woman, not the head of a family, has been held to be exempt.<sup>11</sup>

### § 418. Specific property—Implements of trade, etc.

When a state statute designates certain articles as exempt, as policies of insurance, tools and implements of a trade or profession, household furniture, teams and live stock, and wages, a bankrupt may be allowed to hold the same as against his trustee in bankruptcy.<sup>1</sup>

<sup>5</sup> *In re* Leech (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 36 C. C. A. 502, 2 Am. B. R. 529; *In re* Smith, 96 Fed. Rep. 833, 3 Am. B. R. 146.

<sup>6</sup> *Sellers v. Bell* (C. C. A. 5th Cir.), 94 Fed. Rep. 801, 36 C. C. A. 502, 2 Am. B. R. 529; *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259; *In re* Henry (Ref.), 14 Am. B. R. 362; *In re* Caswell (Ref.), 16 Am. B. R. 718.

But see *In re* Turnbull, 106 Fed. Rep. 667, 5 Am. B. R. 549.

<sup>7</sup> *In re* Smith, 96 Fed. Rep. 833, 3 Am. B. R. 146.

<sup>8</sup> *In re* Evans & Co., 158 Fed. Rep. 153, 19 Am. B. R. 752.

<sup>9</sup> *In re* Leech, 171 Fed. Rep. 591, 22 Am. B. R. 604, affirmed, 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; *In re* Evans & Co., 158 Fed. Rep. 153, 155, 19 Am. B. R. 752.

But see *In re* Gemmell, 155 Fed. Rep. 551; *In re* Henry (Ref.), 14 Am. B. R. 362.

<sup>10</sup> *In re* Jones, 97 Fed. Rep. 773, 3 Am. B. R. 259.

*In re* Everleth, 129 Fed. Rep. 629, 12 Am. B. R. 236, it was held that the sword and belt were not, but that the hat was exempt.

<sup>11</sup> *In re* Stokes (Ref.), 14 Am. B. R. 560.

<sup>1</sup> *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94; *In re* Hindman (C. C. A. 9th Cir.), 104 Fed. Rep. 331, 43 C. C. A. 558, 5 Am. B. R. 20; *In re* Hemstreet, 139 Fed. Rep. 958, 14 Am. B. R. 825; *In re* Grady, 138 Fed. Rep. 935, 14 Am. B. R. 738; *In re* Mullen, 140 Fed. Rep. 206, 15 Am. B. R. 275; *In re* Wilson, 108 Fed. Rep. 197, 6 Am. B. R. 287; *In re* Peterson, 95 Fed. Rep. 417, 2 Am. B. R. 630; *In re* Diamond, 158 Fed. Rep. 370, 19 Am. B. R. 811.

If the articles claimed by the bankrupt are not within the terms of the exemption, as construed by the highest court of the state, the bankrupt can not hold them.<sup>2</sup> They pass to the trustee as a part of the estate.<sup>3</sup>

Where the bankrupt is called upon to designate the particular property which he desires to retain, it has been held that he could not claim the proceeds of the sale of the goods,<sup>4</sup> unless the sale was made after the property had been designated and by agreement with the trustee to let the proceeds take the place of the property,<sup>4</sup> or the property out of which the bankrupt can secure his exemption is indivisible or encumbered and above the value of that which is allowed him.<sup>5</sup> In such cases he may come in on the fund.

If policies of insurance are exempt by state law they are exempt under the bankrupt act, although they have a cash surrender value.<sup>6</sup>

<sup>2</sup> *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277; *In re Sullivan* (C. C. A. 8th Cir.), 148 Fed. Rep. 815, 78 C. C. A. 505, 17 Am. B. R. 578; *In re Wilson*, 108 Fed. Rep. 197, 6 Am. B. R. 287; *In re Coller*, 111 Fed. Rep. 503, 7 Am. B. R. 131; *In re Coffman*, 93 Fed. Rep. 422, 1 Am. B. R. 530; *In re Manning*, 112 Fed. Rep. 948, 7 Am. B. R. 571; *In re Donahey*, 176 Fed. Rep. 458, 23 Am. B. R. 975; *In re Cochran*, 185 Fed. Rep. 913, 26 Am. B. R. 459.

<sup>3</sup> *In re Donahey*, 176 Fed. Rep. 458, 23 Am. B. R. 975; *In re Blanchard*, 161 Fed. Rep. 763, 20 Am. B. R. 417; *In re Pfeiffer*, 155 Fed. Rep. 892; *In re Wunder*, 133 Fed. Rep. 821, 13 Am. B. R. 701; *In re Haskins*, 109 Fed. Rep. 789, 6 Am. B. R. 485; *In re Von Kerm*, 135 Fed. Rep. 447, 14 Am. B. R. 403.

<sup>4</sup> *In re Renda*, 149 Fed. Rep. 614, 17 Am. B. R. 521; *In re Donahey*, 176 Fed. Rep. 458; 2 Am. B. R. 975.

<sup>5</sup> *In re Kane* (C. C. A. 7th Cir.), 127 Fed. Rep. 552, 62 C. C. A. 616, 11 Am. B. R. 533; *In re Oderkirk*, 103 Fed. Rep. 779, 4 Am. B. R. 617.

<sup>6</sup> See Sec. 398, *ante*; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018, 14 Am. B. R. 94; *Steele v. Buel* (C. C. A. 8th Cir.), 104 Fed. Rep. 968, 44 C. C. A. 287, 5 Am. B. R. 165; *Pulsiver v. Hussey*, 97 Me. 434, 9 Am. B. R. 657; *In re Johnson*, 176 Fed. Rep. 591, 24 Am. B. R. 277; *In re Pfaffinger*, 164 Fed. Rep. 526, 21 Am. B. R. 255; *In re Booss*, 154 Fed. Rep. 494, 18 Am. B. R. 658; *In re Whelpley*, 169 Fed. Rep. 1019, 22 Am. B. R. 433.

A bankrupt may claim exemption out of the sale of a license to sell liquor which would become a part of his assets if not so claimed.<sup>7</sup>

A bankrupt may claim as exempt, under the Maryland statute, a cemetery lot used for burial purposes, but not lots in the cemetery not intended to be so used by him.<sup>8</sup>

The tools and implements of the trade or profession of a debtor are exempt in most of the states. The articles so exempted are those necessary to the practice of the trade or profession of the bankrupt. The object is not to take away from him his means of support. A bankrupt undertaker and funeral director was held to be entitled to such tools, instruments and appliances as were found necessary to the practice of his profession;<sup>9</sup> a baker to the implements used by himself and his assistant in a bakery;<sup>10</sup> a huckster to his wagon, horses and harness and other necessary equipment of his business;<sup>11</sup> a farmer to a cream separator, plow, harrow, rake, cultivator and other farm implements;<sup>12</sup> a whitewasher and paper hanger to a horse and wagon used in conveying his supplies, tools and ladders, etc.;<sup>13</sup> a guide to his canoe but not to his rifle;<sup>14</sup> a farmer to "two horses kept and used for team work"<sup>15</sup> and his best swine<sup>16</sup> a candy maker to his store and marble-top table used in making candy.<sup>17</sup>

<sup>7</sup> *In re Olewine*, 125 Fed. Rep. 840, 11 Am. B. R. 40.

But see *In re Myers*, 102 Fed. Rep. 869, 4 Am. B. R. 535.

<sup>8</sup> *Burdette v. Jackson* (C. C. A. 4th Cir.), 179 Fed. Rep. 229, 102 C. C. A. 481, 24 Am. B. R. 127.

<sup>9</sup> *Steiner v. Marshall* (C. C. A. 4th Cir.), 140 Fed. Rep. 710, 72 C. C. A. 103, 15 Am. B. R. 486.

<sup>10</sup> *In re Peterson*, 95 Fed. Rep. 417, 2 Am. B. R. 630.

<sup>11</sup> *In re Conley*, 162 Fed. Rep. 806, 19 Am. B. R. 200.

<sup>12</sup> *In re Hemstreet*, 139 Fed. Rep.

958, 14 Am. B. R. 823; *In re Fly*, 110 Fed. Rep. 141, 6 Am. B. R. 550.

<sup>13</sup> *In re Hindman* (C. C. A. 9th Cir.), 104 Fed. Rep. 331, 43 C. C. A. 558, 5 Am. B. R. 20.

<sup>14</sup> *In re Mullen*, 140 Fed. Rep. 206, 15 Am. B. R. 275.

<sup>15</sup> *In re Grady*, 138 Fed. Rep. 935, 14 Am. B. R. 738; *In re Alfred* (Ref.), 1 Am. B. R. 243.

<sup>16</sup> *In re Libby*, 103 Fed. Rep. 776, 4 Am. B. R. 615.

<sup>17</sup> *In re Trombly* (Ref.), 16 Am. B. R. 598.

A watch has been held a necessary tool of a cabinet maker,<sup>18</sup> but not of a barber.<sup>19</sup> A watch is regularly exempt as wearing apparel.<sup>20</sup>

The head of a family has been held entitled to wages or salary for personal services rendered prior to bankruptcy.<sup>21</sup>

Where growing crops are not exempt under the state law the bankrupt is not entitled to growing crops on an exempt homestead.<sup>22</sup>

A seat in a stock exchange, not exempt by the state law, can not be held by the bankrupt.<sup>23</sup>

It has been held that a bankrupt may claim as exempt, property which has not been paid for at the time of bankruptcy.<sup>24</sup> In other states a different rule prevails.<sup>25</sup>

#### § 419. Homesteads.

The right to a homestead exemption is fixed by the laws of the state where the bankrupt had his domicile,<sup>1</sup> and the decisions of the highest court of that state construing these laws are controlling upon the courts of bankruptcy.<sup>2</sup>

<sup>18</sup> *In re* Coller, 111 Fed. Rep. 503, 7 Am. B. R. 131.

<sup>19</sup> *In re* Everleth, 129 Fed. Rep. 620, 12 Am. B. R. 236.

<sup>20</sup> Sec. 417, *ante*.

<sup>21</sup> *In re* Holden, 127 Fed. Rep. 980, 12 Am. B. R. 96; *In re* Driggs, 171 Fed. Rep. 897, 22 Am. B. R. 621.

<sup>22</sup> *In re* Sullivan (C. C. A. 8th Cir.), 148 Fed. Rep. 815, 78 C. C. A. 505, 17 Am. B. R. 578; *In re* Hoag, 97 Fed. Rep. 543, 3 Am. B. R. 290; *In re* Coffman, 93 Fed. Rep. 422, 1 Am. B. R. 530; *In re* Daubner, 96 Fed. Rep. 805, 3 Am. B. R. 368.

<sup>23</sup> *Page v. Edmunds*, 187 U. S. 596, 47 L. Ed. 318, 9 Am. B. R. 277.

<sup>24</sup> *In re* Wells, 105 Fed. Rep. 762, 5 Am. B. R. 308; *In re* Butler,

120 Fed. Rep. 100, 9 Am. B. R. 539.

<sup>25</sup> *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 7 Am. B. R. 641; *Cannon v. Dexter Broom & Mattress Co.* (C. C. A. 4th Cir.), 120 Fed. Rep. 657, 57 C. C. A. 119, 9 Am. B. R. 724; *In re* Campbell, 124 Fed. Rep. 417, 10 Am. B. R. 723; *In re* Schechter (D. Ct.), 9 Am. B. R. 729; *In re* Boyd, 120 Fed. Rep. 999, 10 Am. B. R. 337.

<sup>1</sup> See Sec. 416, *ante*.

<sup>2</sup> *In re* Baker (C. C. A. 6th Cir.), 182 Fed. Rep. 392, 104 C. C. A. 602, 24 Am. B. R. 411; *Duncan v. Ferguson-McKinney Dry Goods Co.* (C. C. A. 5th Cir.), 150 Fed. Rep. 269, 80 C. C. A. 157, 18 Am. B. R. 155; *In re* Nye (C. C. A. 8th Cir.), 133 Fed. Rep. 33, 66

If a debtor is entitled to hold a homestead under the state exemption laws as against his creditors he may hold the same as exempt in bankruptcy.<sup>3</sup> If he is not entitled to hold a homestead under the state exemption laws as against his creditors he can not hold one in bankruptcy.<sup>4</sup>

A court of bankruptcy is therefore to look to the state law for the conditions essential to a homestead exemption. The requisites of a homestead exemption under the state law, generally speaking, are ownership,<sup>6</sup> occupancy and dedication,<sup>7</sup> and family headship.<sup>8</sup> Such of these conditions as are required by the state law must coexist to entitle a bankrupt to hold a homestead exemption.

If premises are required by the state law to be designated as a homestead by entering the word "homestead" upon the margin of the record title, this must be complied with by the bankrupt before bankruptcy.<sup>9</sup>

C. C. A. 139, 13 Am. B. R. 142; *In re* National Grocer Co. (C. C. A. 6th Cir.), 181 Fed. Rep. 33, 104 C. C. A. 47, 24 Am. B. R. 36; *In re* Scheier, 188 Fed. Rep. 744, 26 Am. B. R. 739; *In re* McGowan, 170 Fed. Rep. 493, 22 Am. 469.

<sup>3</sup> *Smalley v. Laugenour*, 196 U. S. 93, 49 L. Ed. 400, 13 Am. B. R. 692; *In re* Baker (C. C. A. 6th Cir.), 182 Fed. Rep. 392, 104 C. C. A. 602, 24 Am. B. R. 411; *McCarty v. Coffin* (C. C. A. 5th Cir.), 150 Fed. Rep. 307, 80 C. C. A. 195, 18 Am. B. R. 148; *Duncan v. Ferguson-McKinney Dry Goods Co.* (C. C. A. 5th Cir.), 150 Fed. Rep. 269, 80 C. C. A. 157, 18 Am. B. R. 155; *In re* Forbes (C. C. A. 9th Cir.), 186 Fed. Rep. 79, 108 C. C. A. 191, 26 Am. B. R. 355.

<sup>4</sup> *In re* Sale (C. C. A. 6th Cir.), 143 Fed. Rep. 310, 74 C. C. A. 448, 16 Am. B. R. 235; *In re* Dawley,

94 Fed. Rep. 795, 2 Am. B. R. 496; *In re* Youngstown (C. C. A. 8th Cir.), 153 Fed. Rep. 98, 82 C. C. A. 232, 18 Am. B. R. 572; *In re* Finklea, 153 Fed. Rep. 492, 18 Am. B. R. 738; *In re* Owings, 140 Fed. Rep. 739, 15 Am. B. R. 472.

<sup>6</sup> As to Ownership, see Sec. 420, *post*.

<sup>7</sup> As to Occupancy, see Sec. 421, *post*.

<sup>8</sup> As to Family Headship, see Sec. 422, *post*.

<sup>9</sup> *In re* Youngstrom (C. C. A. 8th Cir.), 153 Fed. Rep. 98, 82 C. C. A. 232, 18 Am. B. R. 572; *In re* McCrary Bros., 169 Fed. Rep. 485, 22 Am. B. R. 161.

*In re* Fisher, 142 Fed. Rep. 205, 15 Am. 652, a homestead deed was recorded after petition filed and adjudication made.



Where growing crops are not exempt under the state law the bankrupt is not entitled to crops growing on an exempt homestead.<sup>10</sup>

A homestead exemption is regularly limited in value or quality, or both, by the state statute. It is not unusual to permit one, who is not the owner of a homestead, to hold as exempt in lieu thereof real or personal property to an amount fixed by the statute.<sup>12</sup>

The burden of proof is on the bankrupt to establish his right to a homestead.<sup>13</sup>

#### **§ 420. Ownership of homestead necessary.**

Ownership is essential to create a homestead exemption.<sup>1</sup> Where the property would pass to his trustee, if no exemption was claimed, the title of the bankrupt is sufficient to hold a homestead as against his trustee.<sup>2</sup>

A bankrupt has been allowed a homestead in property in which he had a life estate,<sup>3</sup> or which his trustee in bankruptcy had recovered as transferred in fraud of creditors,<sup>4</sup> or as a preference.<sup>5</sup>

<sup>10</sup> *In re Sullivan* (C. C. A. 8th Cir.), 148 Fed. Rep. 815, 78 C. C. A. 505, 17 Am. B. R. 578; *In re Hoag*, 97 Fed. Rep. 543, 3 Am. B. R. 290; *In re Coffman*, 93 Fed. Rep. 422, 1 Am. B. R. 530; *In re Daubner*, 96 Fed. Rep. 805, 3 Am. B. R. 368.

<sup>12</sup> *In re Baker* (C. C. A. 6th Cir.), 182 Fed. Rep. 392, 104 C. C. A. 602, 24 Am. B. R. 411; *In re Luby*, 155 Fed. Rep. 659, 18 Am. B. R. 801; *In re Sharp* (Ref.), 15 Am. B. R. 491; *In re Meriwether*, 107 Fed. Rep. 102, 5 Am. B. R. 435; *In re Buckingham*, 102 Fed. Rep. 972.

<sup>13</sup> *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 17 Am. B. R. 641; *In re Campbell*, 124 Fed. Rep. 417, 10 Am. B. R. 723.

<sup>1</sup> *In re Sale* (C. C. A. 6th Cir.), 143 Fed. Rep. 310, 74 C. C. A. 448, 16 Am. B. R. 235.

<sup>2</sup> *In re Falconer* (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 49 C. C. A. 50, 6 Am. B. R. 557; *Bashinski v. Talbott* (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 56 C. C. A. 241, 9 Am. B. R. 513; *In re Kaufman*, 142 Fed. Rep. 898, 16 Am. B. R. 118; *In re Thompson*, 140 Fed. Rep. 257, 15 Am. B. R. 283.

<sup>3</sup> *In re Kaufman*, 142 Fed. Rep. 898, 16 Am. B. R. 118; *In re Marquette*, 103 Fed. Rep. 777, 4 Am. B. R. 623.

<sup>4</sup> *In re Thompson*, 140 Fed. Rep. 257, 15 Am. B. R. 283; *In re Tollett* (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 46 C. C. A. 11, 5 Am. B. R. 405.

<sup>5</sup> *In re Falconer* (C. C. A. 8th

In some states a "family" homestead is exempt whether the title is held by the husband or wife.<sup>6</sup>

A homestead owned by a bankrupt may be exempt, though it was purchased by him, while insolvent, from the proceeds of nonexempt property.<sup>7</sup>

A remainderman is not entitled to a homestead during the life of the life tenant.<sup>8</sup>

In some states a homestead which has not been paid for, or paid for with proceeds of the sale of other property not paid for, can not be set aside as exempt, although the bankrupt holds the legal title to it.<sup>9</sup> In other states it may be.<sup>10</sup>

#### § 421. Occupancy of premises as a homestead.

The occupancy of the premises as a family residence is usually necessary to create a homestead exemption.<sup>1</sup>

When a dwelling is occupied as a family residence, the homestead exemption regularly includes the appurtenances of the family dwelling as barn, stables, shop of an artisan, studio of an artist, office of a lawyer or doctor, or any like appendage used by the head of the family in the pursuit of his calling.

Cir.), 110 Fed. Rep. 111, 49 C. C. A. 50, 6 Am. B. R. 557; *Bashinski v. Talbott* (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 56 C. C. A. 241, 9 Am. B. R. 513, affirming *In re Talbott*, 116 Fed. Rep. 417, 8 Am. B. R. 427; *In re Soper*, 173 Fed. Rep. 116, 22 Am. B. R. 868.

But see *In re Long*, 116 Fed. Rep. 113, 8 Am. B. R. 591; *In re Evans*, 116 Fed. Rep. 909, 8 Am. B. R. 730; *In re White*, 109 Fed. Rep. 635, 6 Am. B. R. 451.

<sup>6</sup> *In re Maxson*, 170 Fed. Rep. 356, 22 Am. B. R. 424; *In re Rafferty*, 112 Fed. Rep. 512, 7 Am. B. R. 415.

<sup>7</sup> *In re Letson* (C. C. A. 8th Cir.), 157 Fed. Rep. 78, 84 C. C. A. 582, 19 Am. B. R. 506; *In re*

*Wood*, 147 Fed. Rep. 877, 17 Am. B. R. 93.

<sup>8</sup> *In re Sale* (C. C. A. 6th Cir.), 143 Fed. Rep. 310, 74 C. C. A. 448, 16 Am. B. R. 451.

<sup>9</sup> *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 17 Am. B. R. 641; *Cannon v. Dexter Broom & Mattress Co.* (C. C. A. 4th Cir.), 120 Fed. Rep. 657, 57 C. C. A. 119, 9 Am. B. R. 724; *In re Campbell*, 124 Fed. Rep. 417, 10 Am. B. R. 723; *In re Schechter*, 9 Am. B. R. 729.

<sup>10</sup> *In re Butler*, 120 Fed. Rep. 100, 9 Am. B. R. 539; *In re Wells*, 105 Fed. Rep. 762, 5 Am. B. R. 308.

<sup>1</sup> *In re Buelow*, 98 Fed. Rep. 86, 3 Am. B. R. 389; *In re Gibbs*, 103 Fed. Rep. 782, 4 Am. B. R. 619.

Where occupancy is essential to create a homestead it has been held that such occupancy may be constructive as well as actual.<sup>2</sup> It is not necessary to occupy the premises for any particular length of time to entitle a bankrupt to declare a homestead.<sup>3</sup>

A bankrupt has been allowed a homestead exemption in a house which he rented to another as a boarding house and lived there with his wife as boarders,<sup>4</sup> a store building occupied as a home,<sup>5</sup> a farm on which he had taken up his residence shortly before bankruptcy.<sup>6</sup> He has been denied a homestead where he occupied a room in a house merely to store household goods and lived elsewhere.<sup>7</sup>

In some states occupancy is not essential.<sup>8</sup> A homestead exemption may be allowed in unimproved property,<sup>9</sup> or the bankrupt may hold as exempt in lieu of a homestead real or personal property in a limited amount.<sup>10</sup>

<sup>2</sup> *In re Malloy* (C. C. A. 8th Cir.), 188 Fed. Rep. 788, 109 C. C. A. —, 26 Am. B. R. 31, the court said: "We are of the opinion that it was not necessary for both or even that one of the parties should, after their marriage, actually go upon the land to impress it with the character of a homestead. It being at that time his home, he being then the head of a family, it was his homestead, exempt from execution or attachment, and could not thereafter be conveyed or incumbered by him alone."

<sup>3</sup> *In re Irvin* (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 57 C. C. A. 147, 9 Am. B. R. 689; *In re Johnson*, 118 Fed. Rep. 312, 9 Am. B. R. 257; *Huenergardt v. Brittain Dry Goods Co.* (C. C. A. 8th Cir.), 116 Fed. Rep. 31, 53 C. C. A. 505, 8 Am. B. R. 341.

<sup>4</sup> *In re Presnall*, 167 Fed. Rep. 406, 21 Am. B. R. 905.

<sup>5</sup> *In re Irvin* (C. C. A. 8th Cir.),

120 Fed. Rep. 733, 57 C. C. A. 147, 9 Am. B. R. 689.

*In re McCrary Bros.*, 169 Fed. Rep. 485, 22 Am. B. R. 161, it was held that a partner living in the store building of the firm could not hold it as exempt.

<sup>6</sup> *Huenergardt v. Brittain Dry Goods Co.*, 116 Fed. Rep. 31, 53 C. C. A. 505, 8 Am. B. R. 341.

<sup>7</sup> *In re Dawley*, 94 Fed. Rep. 795, 2 Am. B. R. 496.

<sup>8</sup> *In re Tollett* (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 46 C. C. A. 11, 5 Am. B. R. 404, Judge Lurton said: "Neither does the right of homestead depend upon occupancy since the Tennessee act of 1879."

<sup>9</sup> *In re Baker* (C. C. A. 6th Cir.), 182 Fed. Rep. 392, 104 C. C. A. 602, 24 Am. B. R. 411.

<sup>10</sup> *In re Baker* (C. C. A. 6th Cir.), 182 Fed. Rep. 392, 104 C. C. A. 602, 24 Am. B. R. 411; *In re Luby*, 155 Fed. Rep. 659, 18 Am.

Where the homestead character is once established it is not lost by the removal of the husband and his family to live elsewhere, when there is an intention to return later and make it their home.<sup>11</sup>

A "business" homestead was held not to be abandoned, where the building burned and pending reconstruction the bankrupt leased it, reserving desk room and certain space for storage of goods which he used as a broker.<sup>12</sup> A merchant failing in business has a reasonable time for settling up his old and to engage in new business, during which interval the exemption is not lost. Thus where a bankrupt made an assignment of his nonexempt property, he may convey his business homestead within five days.<sup>13</sup> A general assignment with no present intention of resuming business has been held to be an abandonment of a business homestead.<sup>14</sup>

#### § 422. Family headship.

Family headship is generally essential to entitle a bankrupt to hold a homestead or other property to be exempt.<sup>1</sup> But this rule is not universal.<sup>2</sup>

B. R. 801; *In re Sharp* (Ref.), 15 Am. B. R. 491; *In re Meriwether*, 107 Fed. Rep. 102, 5 Am. B. R. 435.

<sup>11</sup> *In re Malloy* (C. C. A. 8th Cir.), 188 Fed. Rep. 788, 109 C. C. A. —, 26 Am. B. R. 31; *In re Schulz*, 135 Fed. Rep. 228, 14 Am. B. R. 317; *In re Thompson*, 140 Fed. Rep. 251, 15 Am. B. R. 283; *In re Johnson*, 118 Fed. Rep. 312, 9 Am. B. R. 257.

*In re Harrington*, 99 Fed. Rep. 390, 3 Am. B. R. 639, this rule was applied to a business homestead.

<sup>12</sup> *Duncan v. Ferguson-McKinney Dry Goods Co.* (C. C. A. 5th Cir.), 150 Fed. Rep. 269, 80 C. C. A. 157, 18 Am. B. R. 155.

<sup>13</sup> *McCarty v. Coffin* (C. C. A. 5th Cir.), 150 Fed. Rep. 307, 80 C. C. A. 195, 18 Am. B. R. 148.

<sup>14</sup> *In re Flannagan*, 117 Fed. Rep. 695, 9 Am. B. R. 140.

<sup>1</sup> *In re McGowan*, 170 Fed. Rep. 493, 22 Am. B. R. 469; *In re Dawley*, 94 Fed. Rep. 795, 2 Am. B. R. 496; *In re Finklea*, 153 Fed. Rep. 492, 18 Am. B. R. 738.

<sup>2</sup> *In re Maxson*, 170 Fed. Rep. 356, 22 Am. B. R. 424, and *In re Rafferty*, 112 Fed. Rep. 512, held that in Iowa any member of the family who continued to occupy the homestead as a home may assert his or her right to hold it.

The head of a family is one who has living with him and is supporting some person whom it is either his moral or legal duty to support.<sup>3</sup> The word "family" usually includes members related to each other by blood or affinity and living together. It does not include servants or employees. The family relation is one of social status and not of contract.

The husband and father is usually considered the head of a family. A married woman has been held to be the head of a family when living with her husband and trading as a *femme sole*,<sup>4</sup> or when she has been deserted by her husband.<sup>5</sup> It has been held that a homestead set apart as alimony for the benefit of a wife and child can not be distributed among her creditors in bankruptcy.<sup>6</sup> In some states the husband and wife constitute a joint head of the family for the purpose of homestead exemptions.<sup>7</sup>

The head of a family is not limited to married persons. An unmarried or a divorced person, providing for dependent relations, has been recognized as the head of a family.<sup>8</sup> A widower or widow may acquire a homestead in behalf of himself or herself and children.<sup>9</sup>

A person is not the head of a family when he merely pays board and expenses of a sister at school,<sup>10</sup> or where he lives alone without a family.<sup>11</sup> A mother will not be allowed ex-

<sup>3</sup> *In re Morrison*, 110 Fed. Rep. 734, 6 Am. B. R. 488; *In re McGowan*, 170 Fed. Rep. 493, 22 Am. B. R. 469; *In re Glisson*, 182 Fed. Rep. 287, 25 Am. B. R. 911.

<sup>4</sup> *Richardson v. Woodward* (C. C. A. 4th Cir.), 104 Fed. Rep. 873, 44 C. C. A. 235, 5 Am. B. R. 94.

<sup>5</sup> *In re Youngstrom* (C. C. A. 8th Cir.), 153 Fed. Rep. 98, 82 C. C. A. 232, 18 Am. B. R. 572.

<sup>6</sup> *In re Le Claire*, 124 Fed. Rep. 654, 10 Am. B. R. 733.

<sup>7</sup> *In re McCutchen*, 100 Fed. Rep. 779, 4 Am. B. R. 81.

<sup>8</sup> *In re Morrison*, 110 Fed. Rep.

734, 6 Am. B. R. 488; *In re Giles* (C. C. A. 6th Cir.), 158 Fed. Rep. 596, 85 C. C. A. 418, 19 Am. B. R. 306; *In re Rhodes*, 109 Fed. Rep. 117, 6 Am. B. R. 173; *In re Glisson*, 182 Fed. Rep. 287, 25 Am. B. R. 911.

<sup>9</sup> *In re Parschen*, 119 Fed. Rep. 976, 9 Am. B. R. 389.

<sup>10</sup> *In re McGowan*, 170 Fed. Rep. 493, 22 Am. B. R. 469.

<sup>11</sup> *In re Finklea*, 153 Fed. Rep. 492, 18 Am. B. R. 738; *In re Dawley*, 94 Fed. Rep. 795, 2 Am. B. R. 496.

emptions from stock in a business conducted in the name of her son.<sup>12</sup>

### § 423. Exemptions in partnership property.

The general rule is that an individual partner can not claim exemptions out of undivided firm property as against a partnership debt.<sup>1</sup>

If separate exemptions to individual partners may be claimed out of firm property under the state law, a bankrupt may hold the same exemption in a bankruptcy proceeding.<sup>2</sup> But a court of bankruptcy will not allow such exemptions outside of the particular states in which that rule prevails.

The ground for denying exemptions to individual partners is that the different exemption statutes contemplate only individuals and have no reference to partners. The exemption is several, personal and individual, as well in regard to the property to which it applies as to the right conferred. Property belonging to a firm can not be said to be the separate property of any member of it. One partner has no exclusive interest in it. It belongs to the other partner or partners as much as it does to him, and can not in whole or in part be appropriated (so long as it remains undivided) to the benefit of

<sup>12</sup> *In re Williamson*, 114 Fed. Rep. 690, 8 Am. B. R. 42.

<sup>1</sup> *In re Scheier*, 188 Fed. Rep. 744, 26 Am. B. R. 739; *In re McCrary Bros.*, 169 Fed. Rep. 485, 22 Am. B. R. 161; *In re Jennings & Co.*, 166 Fed. Rep. 639; *In re Beauchamp*, 101 Fed. Rep. 106, 4 Am. B. R. 151; *In re Lentz*, 97 Fed. Rep. 486; *In re Mosier*, 112 Fed. Rep. 138, 7 Am. B. R. 268; *In re Demarest*, 110 Fed. Rep. 638, 6 Am. B. R. 232; *In re Floyd & Co.*, 154 Fed. Rep. 757, 18 Am. B. R. 827; *In re Monroe & Co.*, 155 Fed. Rep. 216, 19 Am. B. R. 255; *In re Novak*, 150 Fed. Rep. 602, 18 Am. B. R. 236.

<sup>2</sup> *In Wisconsin. In re Friedrich*, 100 Fed. Rep. 284, 3 Am. B. R. 801, affirming 95 Fed. Rep. 282.

*In North Carolina. In re Wilson*, 101 Fed. Rep. 571, 4 Am. B. R. 260; *In re Gartner Hancock Lumber Co.*, 173 Fed. Rep. 153, 22 Am. B. R. 898; *In re Stevenson*, 93 Fed. Rep. 789, 2 Am. B. R. 230; *In re Duguid*, 100 Fed. Rep. 274, 3 Am. B. R. 794; *In re Grimes*, 94 Fed. Rep. 800, 2 Am. B. R. 160; *In re Seabolt*, 113 Fed. Rep. 766, 8 Am. B. R. 57.

*In Georgia. In re Camp*, 91 Fed. Rep. 745, 1 Am. B. R. 165. But see *In re Jennings & Co.*, 166 Fed. Rep. 639, 22 Am. B. R. 161.

his family. It may be wholly contingent and uncertain whether any of it will belong to him in the winding up of the business and the settlement of his separate account.

Property purchased with partnership funds is partnership property, although it may be occupied by one of the partners as a home.<sup>3</sup>

A bankrupt conducting a business in the name of a partnership, but which is in fact owned by him exclusively, is entitled to claim an exemption out of the merchandise in his store.<sup>4</sup>

#### **§ 424. Exemptions in property fraudulently conveyed.**

May a bankrupt claim an exemption in property which he had conveyed in fraud of creditors or as a preference, prior to the commencement of bankruptcy proceedings, and which the trustee subsequently recovered for the benefit of the estate? There is a conflict of authority on this point. The better reason seems to support the rule that the bankrupt does not waive his right to claim a homestead exemption in lands so conveyed and recovered.<sup>1</sup>

The argument in favor of this rule may be briefly stated. Homestead laws are favorably construed by the courts in the interest of the debtor's family. It is true that the debtor may have conveyed his homestead right and would be estopped to claim it as against his grantee or any person claiming under him. The trustee does not claim under the deed of convey-

<sup>3</sup> *In re McCrary Bros.*, 169 Fed. Rep. 485, 22 Am. B. R. 161; *In re Parks*, No. 10765 Fed. Cas., 9 N. B. R. 270.

<sup>4</sup> *In re Meriwether*, 107 Fed. Rep. 102, 5 Am. B. R. 435.

<sup>1</sup> *In re Tollett* (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 46 C. C. A. 11, 5 Am. B. R. 404; *In re Falconer* (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 49 C. C. A. 50, 6 Am. B. R. 557; *Bashinski v. Talbott*

(C. C. A. 5th Cir.), 119 Fed. Rep. 337, 56 C. C. A. 241, 9 Am. B. R. 513, affirming *In re Talbott*, 116 Fed. Rep. 417, 8 Am. B. R. 427; *In re Thompson*, 140 Fed. Rep. 257, 15 Am. B. R. 283; *In re Park*, 102 Fed. Rep. 602, 4 Am. B. R. 432.

As to the effect of a fraudulent conveyance upon the right of dower, see *Scribner on Dower*, Chap. IX.

ance, but in hostility to it. The property is recovered by the trustee as representative of the creditors. When so recovered the deed is declared to be null and void as between the bankrupt and the trustee. Surely the trustee can not claim to be subrogated to any rights of the grantee. His rights are the same that they would have been, had the deed never been made. If the bankrupt had the right of exemption as against creditors before the deed was made, he is not estopped, as against the trustee, to claim the right to the homestead or the value to the extent given by the statute. It does not make the estate any less than if the fraudulent conveyance had not been made. An opposite view would give the creditors a profit out of the attempted fraud at the expense of the bankrupt's family.

There are cases, however, which hold that the bankrupt waives<sup>2</sup> his right to an exemption in property fraudulently conveyed by him.<sup>2</sup> The argument in favor of this position is substantially as follows: The deed is valid between the bankrupt and his grantee. He thereby extinguishes his homestead interest. Whatever passed to the grantee remains subject to the creditors' demands. The grantee can not hold against adjudged fraud. The grantor can not reclaim his grant. The annihilation of the homestead by the bankrupt leave the premises like any other realty owned by the grantor to which no pretense of a homestead interest ever obtained. It inures to the benefit of the creditors whom it was sought to defraud.

There seem to be two principal objections to this rule. *First*, The creditors are benefited by a provision of a deed which must be held invalid as between the bankrupt and the creditors in order that the property may be recovered at all profit out of the attempted fraud at the expense of the family, by the trustee; and, *second* because it gives the creditors a

<sup>2</sup> *In re* Long, 116 Fed. Rep. 113, 8 Am. B. R. 591; *In re* Evans, 116 Fed. Rep. 909, 8 Am. B. R. 730; *In re* White, 109 Fed. Rep. 635, 6 Am. B. R. 451; *In re* Coddington, 126 Fed. Rep. 891, 11 Am. B. R. 122.



for whose benefit the exemption is mainly, if not wholly, provided. If the law gave to a single man the right to this exemption, it might accord with the natural desire to punish fraud to visit a penalty upon him; but to denounce a forfeiture of the homestead where there is a family subverts the policy on which the exemption is provided and allowed.

A bankrupt will not usually be deemed to have waived his right to a homestead exemption by previously waiving his homestead rights in mortgaged property in favor of a particular creditor.<sup>3</sup> The reason for this is that the waiver only applies to persons claiming under the instrument in which the waiver was made, and does not inure to the benefit of the trustee in bankruptcy for the creditors.

#### **§ 425. Exemptions in property acquired on the eve of bankruptcy.**

Whether property which would ordinarily be exempt from seizure on attachment or execution is liable to be administered for the payment of the debts of the bankrupt when such property was purchased on the eve of bankruptcy, depends upon the law of the state of the bankrupt's domicile.

In some states it has been held that a bankrupt is not entitled to claim as exempt property which has not been paid for or which has been paid for with the proceeds of nonexempt property prior to the time of bankruptcy.<sup>1</sup> In some states the

<sup>3</sup> *In re Poleman*, No. 11247 Fed. Cas., 5 Biss. 526; *Rix v. Capitol Bank*, No. 11869 Fed. Cas., 2 Dill. 367. See *In re Garner*, 115 Fed. Rep. 200, 8 Am. B. R. 263.

<sup>1</sup> *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 7 Am. B. R. 641; *Cannon v. Dexter Broom & Mattress Co.* (C. C. A. 4th Cir.), 120 Fed. Rep. 657, 57 C. C. A. 119, 9 Am. B. R. 724; *In re Campbell*, 124 Fed. Rep. 417, 10 Am. B. R. 723; *In re Schechter* (D. Ct.), 9

Am. B. R. 729; *In re Boyd*, 120 Fed. Rep. 999, 10 Am. B. R. 337; *In re Boothroyd*, No. 1652 Fed. Cas., 14 N. B. R. 223; *In re Parker*, No. 10724 Fed. Cas., 5 Sawy. 58; *In re Wright*, No. 18067 Fed. Cas., 3 Biss. 359; *Brackett v. Watkins*, 21 Wend. 68; *Pratt v. Burr*, No. 11372 Fed. Cas., 5 Biss. 36; *In re Lammer*, No. 8031 Fed. Cas., 7 Biss. 269; *In re Sauthoff*, No. 12380 Fed. Cas., 8 Biss. 35; *Long v. Murphy*, 27 Kan. 375.

bankrupt has been allowed an exemption out of such property.<sup>2</sup> The fact that the property was paid for by the bankrupt with borrowed money, which he still owes, is no bar to his exemption.<sup>3</sup>

It has been held that a bankrupt may claim a homestead exemption in property where he moved into the house shortly before bankruptcy and while insolvent, for the purpose of claiming it as exempt.<sup>4</sup>

A bankrupt is not entitled to claim as exempt property he has acquired by fraud just before bankruptcy.<sup>5</sup>

### § 426. Dower.

The bankrupt statute expressly provides that in case of the death of the bankrupt the widow and the children are entitled to all rights of dower and allowances fixed by the laws of the state of the bankrupt's residence.<sup>1</sup>

<sup>2</sup> *In re* Letson (C. C. A. 8th Cir.), 157 Fed. Rep. 78, 84 C. C. A. 582, 19 Am. B. R. 506; *In re* Wells, 105 Fed. Rep. 762, 5 Am. B. R. 308; *In re* Butler, 120 Fed. Rep. 100, 9 Am. B. R. 539; *In re* Henkel, No. 6362 Fed. Cas., 2 Sawy. 305; Kelly v. Sparks, 54 Fed. Rep. 70; Comstock v. Bechtel, 63 Wis. 656; Jacoby v. Distilling Co., 41 Minn. 227, at p. 230; O'Donnell v. Segar, 25 Mich. 366.

<sup>3</sup> *In re* Bailes, 136 Fed. Rep. 460, 23 Am. B. R. 789.

<sup>4</sup> *In re* Irvin (C. C. A. 8th Cir.), 120 Fed. Rep. 733, 57 C. C. A. 147, 9 Am. B. R. 689; Huenergardt v. Brittain Dry Goods Co. (C. C. A. 8th Cir.), 116 Fed. Rep. 31, 53 C. C. A. 505, 8 Am. B. R. 341; *In re* Johnson, 118 Fed. Rep. 312, 9 Am. B. R. 257.

<sup>5</sup> *In re* Woolcott, 140 Fed. Rep. 460, 15 Am. B. R. 386; *In re* Hennis (Ref.), 17 Am. B. R. 889.

<sup>1</sup> B. A. 1898, Sec. 8; *In re* Hays (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669; Thomas v. Woods (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132; *In re* McKenzie (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 73 C. C. A. 483, 15 Am. B. R. 679; *In re* Slack, 111 Fed. Rep. 523, 7 Am. B. R. 121.

The act of 1867 contained no such provision. The act of August 19, 1841, Sec. 2 (5 Stat. at L.), contained a provision similar to the present act, viz.: "Nothing in this act contained shall be construed to annul, destroy or impair any lawful rights of married women, which may be vested by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." See also Worcester v. Clark, 2 Grant (Pa.), 84.

This is only declaratory of an interpretation which the act would have received, and which was given to the act of 1867, without this provision.<sup>2</sup> The reason is that the wife's right of dower does not pass to the trustee as a part of her husband's estate.<sup>3</sup> He could not sell it and it could not have been levied upon under judicial process against him prior to the filing of the petition.

This provision applies only in case of the death of the bankrupt after bankruptcy. Its effect is to give to the widow and children the same share of the estate that they would have received had the bankrupt died before a petition in bankruptcy had been filed.<sup>4</sup>

It has been held that the widow's right of dower in real estate is governed by the law of the state in which such property is situated.<sup>5</sup> The allowances to the family out of the personal estate is fixed by the laws of the state of the bankrupt's residence.<sup>6</sup>

The court of bankruptcy has power and regularly assigns dower in case the husband dies pending bankruptcy proceedings,<sup>7</sup> or in case property is sold subject to the wife's inchoate

<sup>2</sup> *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669.

<sup>3</sup> *Porter v. Lazear*, 109 U. S. 89, 27 L. Ed. 865, affirming 87 Pa. St. 513; *Speake v. Kinard*, 4 S. C. 54; *In re Angier*, No. 388 Fed. Cas., 4 N. B. R. 619; *In re Bartenbach*, No. 1068 Fed. Cas., 11 N. B. R. 61; *Dwyer v. Garlough*, 31 Ohio St. 158; *Warford v. Noble*, 2 Fed. Rep. 202; *Worcester v. Clark*, 2 Grant (Pa.), 84.

*In re McKenzie* (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 73 C. C. A. 483, 15 Am. B. R. 679; *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669.

<sup>4</sup> *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132;

*In re Slack*, 111 Fed. Rep. 523, 7 Am. B. R. 121; *In re Buckingham*, 102 Fed. Rep. 972; *In re Seabolt*, 113 Fed. Rep. 766, 8 Am. B. R. 57.

<sup>5</sup> *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132; *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669; *In re Slack*, 111 Fed. Rep. 523, 7 Am. B. R. 121.

<sup>6</sup> *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132; *In re Seabolt*, 113 Fed. Rep. 766, 8 Am. B. R. 57.

<sup>7</sup> *In re Seabolt*, 113 Fed. Rep. 766, 8 Am. B. R. 57; *In re Slack*, 111 Fed. Rep. 523, 7 Am. B. R. 121; *Hurley v. Devlin*, 151 Fed. Rep. 919, 18 Am. B. R. 627.

right of dower.<sup>8</sup> It has been held that the right of allowance to the family for a year's support is exclusively within the jurisdiction of the state court.<sup>9</sup>

In those states in which the wife is entitled to dower only in real or personal property that her husband was seized and possessed of at the time of his death, her right of dower will attach to such property as remains in the hands of the trustee at the time of the death of the bankrupt.<sup>10</sup> A fair construction of the proviso of section 8 of the act, is that the bankrupt is not deemed disseized until the land has gone out of the estate.<sup>11</sup> The wife has no contingent right of dower in lands of the bankrupt prior to his death. The bankrupt could have sold them free of dower and the trustee is in the same position.<sup>12</sup>

In those states in which the wife is entitled to dower in all lands owned by her husband during coverture, her contingent or inchoate right of dower attaches to property in the hands

<sup>8</sup> *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669; *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132.

<sup>9</sup> *In re Seabolt*, 113 Fed. Rep. 766, 770, 8 Am. B. R. 57, the court said: "So far as the right of allowance for year's support to the widow is concerned, this court has no power to administer it, it being exclusively within the state jurisdiction. \* \* \* Therefore, when the administrator of Seabolt has in hand the money paid to him by the trustee for the personal exemption, so much of it as it necessary can be set apart as a year's support to the widow by a proceeding in the state court under the statute providing for such cases."

<sup>10</sup> *In re Slack*, 111 Fed. Rep. 523, 7 Am. B. R. 121.

But see *In re McKenzie* (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 73 C. C. A. 483, 15 Am. B. R. 679, and the dissenting opinion of Judge Adams.

<sup>11</sup> *In re Slack*, 111 Fed. Rep. 523, 7 Am. B. R. 121; *In re Seabolt*, 113 Fed. Rep. 766, 8 Am. B. R. 57.

This was the view of Judge Adams, dissenting, in the case of *In re McKenzie* (C. C. A. 8th Cir.), 142 Fed. Rep. 383, 389, 73 C. C. A. 483, 15 Am. B. R. 679, and is approved by the circuit court of appeals for the eighth circuit in *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132. But the majority of the court in the *McKenzie* case held that the bankrupt was disseized by the trustee.

<sup>12</sup> *Kelly v. Strange*, No. 7676 Fed. Cas., 3 N. B. R. 8.

of the trustee.<sup>13</sup> The trustee may sell the land free of dower only when the wife consents to the sale and asks to have an equivalent for her contingent right of dower set off to her in money.<sup>14</sup> The value of her contingent interest or inchoate right of dower may be computed by tables for finding the present value of such interest.<sup>15</sup> If the wife refuses to consent, the property can be sold only subject to her right of dower.<sup>16</sup>

Where a wife relinquishes dower in property mortgaged and the property is sold with her consent, her inchoate right of dower extends to the surplus after paying the mortgagee and not to the entire proceeds of the sale.<sup>17</sup> A transfer on account of the dower of the wife is only good to the extent of the dower relinquished and the excess stands for the benefit of the estate.<sup>18</sup>

<sup>13</sup> *Thomas v. Woods* (C. C. A. 8th Cir.), 173 Fed. Rep. 585, 97 C. C. A. 535, 23 Am. B. R. 132; *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669; *Porter v. Lazear*, 109 U. S. 84, 27 L. Ed. 865; *In re Shaeffer*, 105 Fed. Rep. 352, 5 Am. B. R. 248.

<sup>14</sup> *In re Bartenbach*, No. 1068 Fed. Cas., 11 N. B. R. 61; *In re Forbes* (Ref.), 7 Am. B. R. 42; *In re Hawkins* (Ref.), 9 Am. B. R. 598.

*In Savage v. Savage* (C. C. A. 4th Cir.), 141 Fed. Rep. 346, 72 C. C. A. 494, 15 Am. B. R. 599, the court say: "It is nearly always desirable, in making sale of a bankrupt's real estate, if the wife will consent, to sell free from her inchoate right of dower, and to compensate her by a fair allowance out of the proceeds for her release of that right. It is common prac-

tice to do so when it is possible, and we think the practice is to be approved, as it gives the purchaser an unincumbered title, and ordinarily results in advantage to creditors by obtaining a better price for a clear title than can be obtained for property the title to which is clouded by such a possible incumbrance."

<sup>15</sup> Consult *Giauque & McClure's Present Value Tables*.

<sup>16</sup> *Porter v. Lazear*, 109 U. S. 84, 27 L. Ed. 865; *In re Shaeffer*, 105 Fed. Rep. 352, 5 Am. B. R. 248.

<sup>17</sup> *In re Hays* (C. C. A. 6th Cir.), 181 Fed. Rep. 674, 104 C. C. A. 656, 24 Am. B. R. 669.

<sup>18</sup> *Moore v. Green* (C. C. A. 4th Cir.), 145 Fed. Rep. 472, 72 C. C. A. 242, 16 Am. B. R. 648; *Gorvilla v. Wilcombe* (C. C. A. 5th Cir.), 151 Fed. Rep. 470, 81 C. C. A. 268, 18 Am. B. R. 145.

### § 427. Liens on exempt property.

A lien upon exempt property by way of contract, mortgage or for purchase money, which is valid under the state law, is not affected by bankruptcy proceedings.<sup>1</sup>

The reason is that the title to exempt property does not pass to the trustee. It remains in the bankrupt subject to such encumbrances as he has lawfully put upon it. The fact that the exempt property is subject to the claims of certain creditors does not make it assets to be administered in bankruptcy.<sup>2</sup>

A creditor holding a note containing a waiver as to exempt property may enforce his claim against the exempt property of a bankrupt.<sup>3</sup>

A mortgage including both exempt and nonexempt property may remain a valid mortgage as to the exempt property, although voidable as a preference or fraudulent transfer as to the nonexempt property.<sup>4</sup>

A lien created by legal proceedings, as by a levy of execution, attachment, garnishment, or a judgment, within four

<sup>1</sup> Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; *In re* National Grocer Co. (C. C. A. 6th Cir.), 181 Fed. Rep. 33, 104 C. C. A. 47, 24 Am. B. R. 36; Fenley v. Poor (C. C. A. 6th Cir.), 121 Fed. Rep. 739, 58 C. C. A. 21, 10 Am. B. R. 377; *In re* Lantzenheimer, 124 Fed. Rep. 716, 10 Am. B. R. 720; *In re* Driggs, 171 Fed. Rep. 897, 22 Am. B. R. 621; *In re* Little, 110 Fed. Rep. 621, 6 Am. B. R. 681.

<sup>2</sup> Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; *In re* Nye (C. C. A. 8th Cir.), 133 Fed. Rep. 33, 66 C. C. A. 39, 13 Am. B. R. 142; *In re* Paramore & Ricks, 156 Fed. Rep. 211, 19 Am. B. R. 130; *In re*

Bailey, 176 Fed. Rep. 990, 24 Am. B. R. 201.

<sup>3</sup> Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; Bell v. Dawson Grocery Co., 120 Ga. 628, 12 Am. B. R. 159; Roden Grocery Co. v. Bacon (C. C. A. 5th Cir.), 133 Fed. Rep. 515, 66 C. C. A. 667, 13 Am. B. R. 231.

<sup>4</sup> *In re* Tollett (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 46 C. C. A. 11, 5 Am. B. R. 404; *In re* Bailey, 176 Fed. Rep. 990, 24 Am. B. R. 201; *In re* Eash, 157 Fed. Rep. 996, 19 Am. B. R. 738; Vitzthum v. Large, 162 Fed. Rep. 685, 20 Am. B. R. 666; *In re* Thomas, 96 Fed. Rep. 828, 3 Am. B. R. 99.

But see *In re* Soper, 173 Fed. Rep. 116, 22 Am. B. R. 868.

months of bankruptcy, remains in force upon so much of the property as is exempt from those proceedings.<sup>5</sup> The reason for this is that section 67*f*, annulling liens obtained by legal proceedings, deals with liens on property which passes to the trustee for the benefit of the creditors of the bankrupt, but does not effect liens on property, which is not a part of the estate. The title to exempt property remains in the bankrupt subject to liens valid under the state law. It has been held that a judicial lien on property of a bankrupt coming into the custody of the court is dissolved by section 67*f*, and property thereafter set apart as exempt is free from that lien.<sup>6</sup> But where a judicial lien, valid under the state law, is fixed upon a particular property, as a homestead, which is sold in the bankruptcy proceedings to obtain the excess over the exemption for the creditors, the lien on the exempt portion is not dissolved. The reason is that section 67*f* does not disturb liens on property which do not pass to the trustee. The proceeds take the place of the property charged with the lien. This differs from the case of a lien on property out of which the bankrupt is to select property to a certain amount free of the claim of creditors.

Where property to a certain value, to be selected by the debtor, is exempted, it is set off to the bankrupt free from all claims of creditors.<sup>7</sup> Where the selection is properly and

<sup>5</sup> *In re* Durham, 104 Fed. Rep. 231, 4 Am. B. R. 760; *McKenney v. Cheney*, 118 Ga. 387, 11 Am. B. R. 54; *Robinson v. Wilson*, 15 Kan. 595; *First Nat. Bank v. Bartlett*, 35 Pa. Super. Ct. Rep. 593, 21 Am. B. R. 88; *Sharpe v. Woodslare*, 25 Pa. Super. Ct. Rep. 251, 12 Am. B. R. 396; *Jewett Bros. v. Huffman*, 14 N. D. 110, 13 Am. B. R. 738; *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, 7 Am. B. R. 506; *In re* Driggs, 171 Fed. Rep. 897, 22 Am. B. R. 621; *In re* Cale, 182 Fed. Rep. 439, 25 Am. B. R. 367.

<sup>6</sup> *In re* Forbes (C. C. A. 9th Cir.), 186 Fed. Rep. 79, 108 C. C. A. 191, 26 Am. B. R. 355; *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Beals, 116 Fed. Rep. 530, 8 Am. B. R. 639; *In re* Downing, 139 Fed. Rep. 560, 15 Am. B. R. 423; *In re* Arnold, 94 Fed. Rep. 1001, 2 Am. B. R. 185; *In re* Sorg, 155 Fed. Rep. 550.

<sup>7</sup> *In re* Falconer (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 49 C. C. A. 50, 6 Am. B. R. 557; *Bashinski v. Talbott* (C. C. A. 5th Cir.), 119 Fed. Rep. 337, 56 C. C. A. 241, 9 Am. B. R. 513; *In re* Soper, 173

duly made and the property is encumbered by liens, the court may order the property sold. The bankrupt will then be entitled to claim exemptions out of the fund arising from the sale of the equity of redemption, or to select property to the value allowed by the state law.<sup>8</sup>

Liens on property, which has been set apart as exempt, remain unimpaired and unaffected by bankruptcy proceedings.<sup>9</sup> Rights of lienholders are a special property which the bankrupt law does not take away. Such liens are not enforceable in the court of bankruptcy,<sup>10</sup> but may be enforced in the state courts against such property.<sup>11</sup>

The court of bankruptcy may postpone granting the discharge of the bankrupt in order to allow the institution in the state court of such proceedings as may be necessary to make

Fed. Rep. 116, 22 Am. B. R. 868; *In re* Buckingham, 102 Fed. Rep. 972; *In re* Sloan, 135 Fed. Rep. 873, 14 Am. B. R. 435.

<sup>8</sup> *In re* Kane (C. C. A. 7th Cir.), 127 Fed. Rep. 552, 62 C. C. A. 616, 11 Am. B. R. 533; *In re* Oderkirk, 103 Fed. Rep. 779, 4 Am. B. R. 617; *In re* Paramore & Ricks, 156 Fed. Rep. 208, 19 Am. B. R. 196; *In re* MacKissic, 171 Fed. Rep. 259, 22 Am. B. R. 817.

<sup>9</sup> *In re* Lantzenheimer, 124 Fed. Rep. 716, 10 Am. B. R. 720; *In re* Cale, 182 Fed. Rep. 439, 25 Am. B. R. 367; *In re* Seydel, 118 Fed. Rep. 207, 9 Am. B. R. 255; *In re* Hatch, 102 Fed. Rep. 280, 4 Am. B. R. 349.

<sup>10</sup> *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; *In re* Ingram (C. C. A. 8th Cir.), 125 Fed. Rep. 913, 50 C. C. A. 618, 11 Am. B. R. 192; *Woodruff v. Cheeves* (C. C. A. 5th Cir.), 105 Fed. Rep. 601, 44 C. C.

A. 631, 5 Am. B. R. 296; *In re* Seydel, 118 Fed. Rep. 207, 9 Am. B. R. 255; *In re* Edwards, 156 Fed. Rep. 794, 19 Am. B. R. 632; *In re* Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 204.

But see *In re* Gordon, 115 Fed. Rep. 445, 8 Am. B. R. 255.

<sup>11</sup> *Roden Grocery Co. v. Bacon* (C. C. A. 5th Cir.), 133 Fed. Rep. 515, 66 C. C. A. 667, 13 Am. B. R. 231; *In re* Cale, 182 Fed. Rep. 439, 25 Am. B. R. 367; *In re* Edwards, 156 Fed. Rep. 794, 19 Am. B. R. 632; *Rix v. Capitol Bank*, No. 11869 Fed. Cas., 2 Dill. 367; *Schlitz v. Schatz*, No. 12459 Fed. Cas., 2 Biss. 248; *Fowler v. Wood*, 26 S. C. 169; *Haworth v. Travis*, 67 Ill. 301; *Jackson v. Allen*, 30 Ark. 110; *Cumming v. Clegg*, 52 Ga. 605; *Hatcher v. Jones*, 53 Ga. 208; *In re* Lambert, No. 8026 Fed. Cas., 2 N. B. R. 426; *Tuesley v. Robinson*, 103 Mass. 558.



effective the rights possessed by the creditor.<sup>12</sup> If a debtor obtains a discharge he may plead it in bar of a suit on a debt released by it. The debt can not then be enforced against property set apart as exempt in the bankruptcy proceedings.<sup>13</sup> The discharge will not release a valid lien fastened on exempt property prior to bankruptcy.<sup>14</sup>

Exempt property in the hands of the trustee has been held subject to seizure under a judgment containing a waiver of exemption.<sup>15</sup> The creditor may proceed by a suit in equity in which a receiver may be appointed who may obtain the property from the trustee upon application to the bankruptcy court.<sup>16</sup>

It is necessary to the enforcement of a lien against exempt property that the bankrupt claim his exemption.<sup>17</sup> If the bankrupt does not do so, there is no exempt property, because all of his property will pass to the trustee as a part of his estate.<sup>18</sup> If the creditor's claim is valid against the estate he may enforce it in the bankruptcy proceedings. If it is limited to exempt property he loses it.

<sup>12</sup> Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; *In re* Brumbaugh, 128 Fed. Rep. 971, 12 Am. B. R. 204; *In re* Allen & Co., 134 Fed. Rep. 620, 13 Am. B. R. 518; *In re* Tiffany, 147 Fed. Rep. 314, 17 Am. B. R. 296; *In re* Castleberry, 143 Fed. Rep. 1018, 16 Am. B. R. 159.

<sup>13</sup> Bowen & Thomas v. Keller, 130 Ga. 31, 22 Am. B. R. 727; Groves v. Osburn, 46 Ore. 173; *In re* Sisler, 96 Fed. Rep. 402, 2 Am. B. R. 769.

<sup>14</sup> *In re* Driggs, 171 Fed. Rep. 897, 22 Am. B. R. 621; *In re* Edwards, 156 Fed. Rep. 794, 19 Am. B. R. 632; *In re* Weaver, 144 Fed. Rep. 229, 16 Am. B. R. 265.

<sup>15</sup> *In re* MacKissic, 171 Fed. Rep. 259, 22 Am. B. R. 817; Zumpfe v. Schultz, 35 Pa. Super. Ct. 106, 20 Am. B. R. 916.

<sup>16</sup> Bell v. Dawson Grocery Co., 120 Ga. 628, 12 Am. B. R. 159; *In re* Meredith, 144 Fed. Rep. 230, 16 Am. B. R. 331; *In re* Ogilvie (Ref.), 5 Am. B. R. 374.

<sup>17</sup> *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278.

<sup>18</sup> *In re* Donahey, 176 Fed. Rep. 458, 23 Am. B. R. 975; *In re* Von Kerm, 135 Fed. Rep. 447, 14 Am. B. R. 403; *In re* Wunder, 133 Fed. Rep. 821, 13 Am. B. R. 701; *In re* Haskin, 109 Fed. Rep. 789, 6 Am. B. R. 485; *In re* Prince & Walter, 131 Fed. Rep. 546, 12 Am. B. R. 675; *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278; *In re* Duffy, 118 Fed. Rep. 926, 9 Am. B. R. 358; *In re* West, 116 Fed. Rep. 767, 8 Am. B. R. 564; *In re* Stephens, 114 Fed. Rep. 192, 8 Am. B. R. 53; *In re* Boorstin, 114 Fed. Rep. 696, 8 Am. B. R. 89.

**§ 428. The power of the bankruptcy court over exempt property.**

The statute expressly authorizes a court of bankruptcy to determine all claims of bankrupts to their exemptions.<sup>1</sup>

It is made the duty of the bankrupt to assert in his schedules a claim for such exemptions as he may be entitled to,<sup>2</sup> and imposes on the trustee the duty to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after his appointment.<sup>3</sup>

It is well settled that the power of a court of bankruptcy to determine all claims of a bankrupt to his exemptions is exclusive.<sup>4</sup> In order that the court may exercise that power, exempt property regularly passes into the possession and control of the trustee.

When the exemption consists of one article to be selected from many or of property of a certain valuation to be set apart from a large quantity, the trustee must have temporary dominion over it in order that the exemption may be measured and set apart. It may never be selected or set apart as an exemption. If the bankrupt abandons his right to claim an exemption, or the court finds that he is not entitled to hold the

<sup>1</sup> B. A. 1898, Sec. 2, clause 11; *Lucius v. Cawthon-Coleman Co.*, 196 U. S. 149, 49 L. Ed. 425, 13 Am. B. R. 696; *Smalley v. Langelour*, 196 U. S. 93, 49 L. Ed. 400, 13 Am. B. R. 692; *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 7 Am. B. R. 641; *In re McCrary Bros.*, 169 Fed. Rep. 485, 22 Am. B. R. 161.

<sup>2</sup> B. A. 1898, Sec. 7, clause 8. See Sec. 176, *ante*; *In re Friedrich* (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 40 C. C. A. 378, 3 Am. B. R. 801; *Lucius v. Cawthon-Coleman Co.*, 124 Fed. Rep. 455, 10 Am. B. R.

653, and 196 U. S. 149, 49 L. Ed. 425, 13 Am. B. R. 696.

<sup>3</sup> B. A. 1898, Sec. 47, clause 11; *In re Friedrich* (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 40 C. C. A. 378, 3 Am. B. R. 801.

<sup>4</sup> *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 7 Am. B. R. 641; *In re McCrary Bros.*, 169 Fed. Rep. 485, 22 Am. B. R. 161; *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, 7 Am. B. R. 506; *Lucius v. Cawthon-Coleman Co.*, 124 Fed. Rep. 455, 10 Am. B. R. 653 and 196 U. S. 149, 49 L. Ed. 425, 13 Am. B. R. 696.

particular property as exempt, it passes to the trustee as a part of the estate to be administered.<sup>5</sup>

In case the exemption is of some specific chattel of chattels, where neither selection nor valuation is required, there is not an equal reason for the trustee to have possession.

The jurisdiction of the court of bankruptcy in regard to exempt property is limited to determining the claims and designating and setting apart such property.<sup>6</sup> This may include a determination of liens and claims of creditors in the property out of which the exemption is to come.<sup>7</sup> To do this in order to set property aside, if exempt, and to exclude it from the assets of the bankrupt estate, is not administering upon exempt property as though it were an asset of the estate.

Where the right of exemption extends to a part in value of the property coming into the actual possession of a receiver or trustee, the court may settle the rights of the parties in the property, part of which is claimed as exempt and part by the trustee for the creditors. If the property is encumbered by liens the court may order it sold and assign exemptions out of the fund arising from the sale of the property.<sup>8</sup>

<sup>5</sup> *In re Donahey*, 176 Fed. Rep. 458, 23 Am. B. R. 975; *In re Von Kerm*, 135 Fed. Rep. 447, 14 Am. B. R. 403; *In re Wunder*, 133 Fed. Rep. 821, 13 Am. B. R. 701; *In re Haskin*, 109 Fed. Rep. 789, 6 Am. B. R. 485; *In re Prince & Walter*, 131 Fed. Rep. 546, 12 Am. B. R. 675; *In re Schuller*, 108 Fed. Rep. 591, 6 Am. B. R. 278; *In re Duffy*, 118 Fed. Rep. 926, 9 Am. B. R. 358; *In re West*, 116 Fed. Rep. 767, 8 Am. B. R. 564; *In re Stephens*, 114 Fed. Rep. 192, 8 Am. B. R. 53; *In re Boorstin*, 114 Fed. Rep. 696, 8 Am. B. R. 89.

<sup>6</sup> *Lockwood v. Exchange Nat. Bank*, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. 107; *In re Swords*, 112 Fed. Rep. 661, 7 Am. B. R. 436; *In re Camp*, 91 Fed. Rep. 745, 1

Am. B. R. 165; *In re Hill*, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re Culwell*, 165 Fed. Rep. 828, 21 Am. B. R. 614; *In re Jackson*, 116 Fed. Rep. 46, 8 Am. B. R. 594.

<sup>7</sup> *Lucius v. Cawthon-Coleman Co.*, 124 Fed. Rep. 455, 10 Am. B. R. 653, and 196 U. S. 149, 49 L. Ed. 425, 13 Am. B. R. 696; *In re O'Connor*, 146 Fed. Rep. 998, 16 Am. B. R. 784; *In re Highfield*, 163 Fed. Rep. 924, 21 Am. B. R. 92; *In re Coddington*, 126 Fed. Rep. 891, 11 Am. B. R. 122; *In re Sloan*, 135 Fed. Rep. 873, 14 Am. B. R. 435.

<sup>8</sup> *In re Kane* (C. C. A. 7th Cir.), 127 Fed. Rep. 552, 62 C. C. A. 616, 11 Am. B. R. 533; *In re Oderkirk*, 103 Fed. Rep. 779, 4 Am. B. R. 617; *In re Paramore & Ricks*, 156 Fed. Rep. 208, 19 Am. B. R.

The court has power to inquire and decide whether by reason of fraud or otherwise the bankrupt has forfeited his right to hold as exempt property claimed by liens, and has frequently done so.<sup>9</sup>

The proper way to determine whether or not disputed property is exempt is for the trustee to report it to the referee as exempt or not exempt, to which report the aggrieved party should take exceptions.<sup>10</sup> A state court can not review the decision of a court of bankruptcy as to what property is exempt by the state law.<sup>11</sup>

When property has been designated and set apart it does not pass to the trustee, nor is it subject to be administered by the court as a part of the bankrupt's estate.<sup>12</sup> The trustee and

196; *In re MacKissic*, 171 Fed. Rep. 259, 22 Am. B. R. 817; *In re Sloan*, 135 Fed. Rep. 873, 14 Am. B. R. 435.

<sup>9</sup> *In re Dobbs*, 172 Fed. Rep. 682, 23 Am. B. R. 569; *In re Cochran*, 185 Fed. Rep. 913, 26 Am. B. R. 459; *In re Alex*, 141 Fed. Rep. 483; *In re Schafer*, 151 Fed. Rep. 505, 18 Am. B. R. 361; *In re Duffy*, 118 Fed. Rep. 926, 9 Am. B. R. 358; *In re Ansley*, 153 Fed. Rep. 983, 18 Am. B. R. 457; *In re Waxelbaum*, 101 Fed. Rep. 228, 4 Am. B. R. 120; *In re Williamson*, 114 Fed. Rep. 190, 8 Am. B. R. 42; *In re Stephens*, 114 Fed. Rep. 192, 8 Am. B. R. 53; *In re Boorstin*, 114 Fed. Rep. 696, 8 Am. B. R. 89. In the *Castleberry Case*, 143 Fed. Rep. 1018, 16 Am. B. R. 159.

<sup>10</sup> *In re Smith*, 93 Fed. Rep. 791, 2 Am. B. R. 190; *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 7 Am. B. R. 641.

<sup>11</sup> *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, 7 Am. B. R. 506; *Maxwell v. McCune*, 37 Tex. 515; *Woolfolk v. Murray*, 44 Ga. 133.

In *Smalley v. Langenour*, 196 U. S. 93, 49 L. Ed. 400, 13 Am. B. R. 692, the court said: "Plaintiffs in error were notified of the proceedings in bankruptcy, as provided by the bankruptcy act, and, if they had desired to contest the claim to exemption, they might have done so, or could have invoked the supervision and revision of the order by the circuit court of appeals, but they did not do that, and could not question its validity in the state courts, unless, indeed, it were absolutely void, which is not and could not be pretended."

<sup>12</sup> B. A. 1898, Sec. 70a; *Lockwood v. Exchange Nat. Bank*, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. —; *In re Hatch*, 102 Fed. Rep. 280, 4 Am. B. R. 349; *In re Camp*, 91 Fed. Rep. 745, 1 Am. B. R. 165; *In re Hill*, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re Gibbs*, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re Wells*, 105 Fed. Rep. 762, 5 Am. B. R. 308; *In re Edwards*, 156 Fed. Rep. 794, 19 Am. B. R. 632; *In re Little*, 110 Fed. Rep. 621, 6 Am. B. R. 681.

the creditors have no further concern with it. The court has no jurisdiction to defend such property from adverse claims or liens that may or may not be extinguished by the bankruptcy proceedings<sup>13</sup> nor to order the sale of a bankrupt's homestead.<sup>14</sup> It will not entertain a proceeding to enforce a lien upon such property,<sup>15</sup> nor has it jurisdiction to determine the effect of waiver notes and the rights of creditors holding such obligations.<sup>15</sup>

The decision of the rights of creditors having claims against a bankrupt's exempt property properly belongs to the tribunals of the state under the laws of which they are claimed.<sup>16</sup> The court of bankruptcy may postpone the granting of a discharge until a person who claims the property as against the bankrupt can settle his rights in a state court<sup>17</sup> or may restrain its own officials or persons subject to its jurisdiction from interfering with the exempt property. It will not, however, assist the bankrupt in enforcing his rights to such property beyond preventing such interference with it. Such questions are, as has been stated above, left to the state courts.

<sup>13</sup> *Lockwood v. Exchange Nat. Bank*, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. 107; *Jeffries v. Bartlett*, 20 Fed. Rep. 496; *In re Little*, 110 Fed. Rep. 621, 6 Am. B. R. 762; *In re Seydel*, 118 Fed. Rep. 207, 9 Am. B. R. 255; *In re Parmore & Ricks*, 156 Fed. Rep. 211, 19 Am. B. R. 130.

<sup>14</sup> *Ingram v. Wilson*, (C. C. A. 8th Cir.), 125 Fed. Rep. 913, 60 C. C. A. 618, 11 Am. B. R. 192.

But see *In re Gordon*, 115 Fed. Rep. 445, 8 Am. B. R. 255.

<sup>15</sup> *Lockwood v. Exchange Nat. Bank*, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. 107; *In re Gibbs*, 109 Fed. Rep. 627, 6 Am. B. R. 485; *In re Wells*, 105 Fed. Rep. 762, 5 Am. B. R. 308, 233; *In re Grimes*,

96 Fed. Rep. 529, 2 Am. B. R. 730; *In re Hill*, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re Camp*, 91 Fed. Rep. 745, 1 Am. B. R. 165.

But see *In re Sisler*, 96 Fed. Rep. 402, 2 Am. B. R. 760; *In re Woodruff*, 96 Fed. Rep. 317, 2 Am. B. R. 678; *In re Garden*, 93 Fed. Rep. 423, 1 Am. B. R. 582.

<sup>16</sup> *In re Strickland*, 167 Fed. Rep. 867, 21 Am. B. R. 734; *In re Ogilvie* (Ref.), 5 Am. B. R. 374; *In re Maxson*, 170 Fed. Rep. 356, 22 Am. B. R. 424.

<sup>17</sup> *Lockwood v. Exchange Nat. Bank*, 190 U. S. 294, 47 L. Ed. 1161, 10 Am. B. R. 107; *In re Brumbaugh*, 128 Fed. Rep. 971, 12 Am. B. R. 782.

**§ 429. Who may claim exemptions.**

The right to claim exemptions is personal to the bankrupt and his family.

The claim is regularly made by the bankrupt himself. He may, however, claim his exemptions through his agent or attorney, where the state law permits it.<sup>1</sup> In the absence or disability of the husband, the wife or children may present the claim.<sup>2</sup>

No other person can assert the right of exemption. A mortgagee of exempted property, where the exemption is waived in or by the mortgage can not usually do so,<sup>3</sup> he may when authorized by the state law.<sup>4</sup>

Neither a bankrupt nor his wife can claim exemptions by curtesy or dower in the lifetime of the other.<sup>5</sup>

It should be borne in mind that the court is to look to the laws of the several states and territories for the description of the person who may claim exemptions.

**§ 430. Waiver of exemption.**

The statute expressly makes it the duty of the bankrupt to claim such exemptions as he may be entitled to in his schedule.<sup>1</sup> This he should do. If the bankrupt fails to make a claim for his exemptions in his schedule, does he thereby waive his right to claim them?

<sup>1</sup> *In re* National Grocer Co. (C. C. A. 6th Cir.), 181 Fed. Rep. 33, 104 C. C. A. 47, 24 Am. B. R. 36; *Regan v. Zeeb*, 28 Ohio St. 483; *Wilson v. McElroy*, 32 Pa. St. 82.

<sup>2</sup> *Smith v. Kehr*, No. 13071 Fed. Cas., 2 Dill. 50, affirmed, 20 Wall. 31, 22 L. Ed. 313; *In re* Pratt, No. 11370 Fed. Cas., 1 Flap. 353; *In re* Maxson, 170 Fed. Rep. 356, 22 Am. B. R. 424.

*In re* Youngstrom (C. C. A. 8th Cir.), 153 Fed. Rep. 98, 82 C. C. A. 232, 18 Am. B. R. 572, the wife

of an absconding bankrupt was permitted to make claim for exemptions, which were denied.

<sup>3</sup> *In re* Schuller, 108 Fed. Rep. 591, 6 Am. B. R. 278.

<sup>4</sup> *In re* National Grocer Co. (C. C. A. 6th Cir.), 181 Fed. Rep. 33, 104 C. C. A. 47, 24 Am. B. R. 36; *Edmondson v. Hyde*, No. 4285 Fed. Cas., 2 Saw. 205.

<sup>5</sup> *In re* McKenna, 9 Fed. Rep. 27; *Kelly v. Strange*, No. 7676 Fed. Cas., 3 N. B. R. 8.

<sup>1</sup> B. A. 1898, Sec. 7, clause 8.

A bankrupt does not waive his right to claim exemptions out of property to be selected by him by simply failing to make the claim in his schedule. If the claim is not made in the schedule an amendment will usually be allowed, if an application is seasonably made. It has been denied where the avowed purpose is to pay creditors against whom he has waived exemption.<sup>3</sup>

There are cases which hold that where the bankrupt files no schedule and makes no request upon the trustee to set aside specific articles of exemption until after a sale, he must be regarded as having waived his right of exemption.<sup>4</sup> Where, however, a bankrupt claims his exemptions in his schedules as required by the bankrupt act, the mere fact that the goods themselves have been sold by a receiver under direction of the court as perishable, will not deprive him of the right to come in upon the proceeds.<sup>5</sup>

He must make the claim in a court of bankruptcy before his discharge.<sup>6</sup> He will not be permitted to assert such a claim in

*Goodman v. Curtis* (C. C. A. 5th Cir.), 174 Fed. Rep. 644, 98 C. C. A. 398, 23 Am. B. R. 504; *In re Falconer* (C. C. A. 8th Cir.), 110 Fed. Rep. 111, 49 C. C. A. 50, 6 Am. B. R. 557; *In re White*, 128 Fed. Rep. 513, 11 Am. B. R. 556; *In re Tollett* (C. C. A. 6th Cir.), 106 Fed. Rep. 866, 46 C. C. A. 11, 5 Am. B. R. 404; *In re Duffy*, 118 Fed. Rep. 926, 9 Am. B. R. 358; *In re Berman*, 140 Fed. Rep. 761, 15 Am. B. R. 463; *In re Fisher*, 142 Fed. Rep. 205, 15 Am. B. R. 652.

<sup>3</sup> *Moran v. King*, 111 Fed. Rep. 730, 7 Am. B. R. 176.

<sup>4</sup> *In re Gerber* (C. C. A. 9th Cir.), 186 Fed. Rep. 693, 108 C. C. A. 511, 26 Am. B. R. 608; *In re Donahey*, 176 Fed. Rep. 458, 23 Am. B. R. 975; *In re Von Kerm*, 135 Fed. Rep. 447, 14 Am. B. R.

403; *In re Manning*, 112 Fed. Rep. 949, 7 Am. B. R. 571; *In re Wunder*, 133 Fed. Rep. 821, 13 Am. B. R. 701; *In re Prince & Walter*, 131 Fed. Rep. 546, 12 Am. B. R. 675; *In re Haskins*, 109 Fed. Rep. 789, 6 Am. B. R. 485.

<sup>5</sup> *Lipman v. Stein* (C. C. A. 3d Cir.), 134 Fed. Rep. 235, 67 C. C. A. 17, 14 Am. B. R. 30, affirming 130 Fed. Rep. 629, 12 Am. B. R. 384; *In re Kane* (C. C. A. 7th Cir.), 127 Fed. Rep. 552, 62 C. C. A. 616, 11 Am. B. R. 533; *In re LeVay*, 125 Fed. Rep. 990, 11 Am. B. R. 114; *In re Bolinger*, 108 Fed. Rep. 374, 6 Am. B. R. 171; *In re Sloan*, 135 Fed. Rep. 873, 14 Am. B. R. 435.

<sup>6</sup> *In re Irwin* (C. C. A. 3d Cir.), 174 Fed. Rep. 642, 98 C. C. A. 396, 23 Am. B. R. 487; *In re Kean*, No. 7630 Fed. Cas., 2 Hughes, 322.



a state court subsequent to his discharge.<sup>7</sup> The right to claim exemption has been denied a bankrupt after being a fugitive from justice for ten years.<sup>8</sup>

As a general rule it may be stated that where a debtor would be held to have waived his right to exemptions in a proceeding in a state court he will probably be held to have waived it in a court of bankruptcy. The general doctrine is recognized in most states that an exemption is a personal privilege and that debtors may waive it by contract or surrender or by neglecting to claim it before the sale.<sup>9</sup> Where no claim for an exemption is made in the progress of a case and before there is judgment, execution and a sale, the debtor is usually deemed to have waived his right of exemption in the property sold. He may, however, assert his claim at any time before the sale of the property.<sup>10</sup>

A waiver in favor of some particular creditors can not be made to inure to the benefit of the general creditors.<sup>11</sup> A debtor may waive his exemption in favor of one creditor and insist upon it as against another. The creditor in whose favor the exemption is waived may proceed in the state court against

<sup>7</sup> *Steele v. Moody*, 53 Ala. 418; *Gayle v. Randall*, 71 Ala. 469; *Woolfolk v. Murray*, 44 Ga. 133; *Maxwell v. McCune*, 37 Tex. 515.

<sup>8</sup> *In re Moyer*, 15 Fed. Rep. 598.

<sup>9</sup> Consult *Spitley v. Frost*, 15 Fed. Rep. 304 (this case was reversed on another point in 121 U. S. 552, 30 L. Ed. 1010; *Green v. Blunt*, 50 Ia. 79; *Pond v. Kimball*, 101 Mass. 105; *Wicker v. Comstock*, 52 Wis. 315; *People v. Palmer*, 46 Ill. 398; *Clapp v. Thomas*, 5 Allen (Mass.), 158; *Hewes v. Parkman*, 20 Pick. (Mass.) 90; *McKinney v. Reader*, 6 Watts, 34; *Hutchinson v. Campbell*, 25 Pa. St. 273; *Lauck's Appeal*, 24 Pa. St. 426; *Hammer v. Freese*, 19 Pa. St. 255; *Bowyer's Appeal*, 21 Pa. St. 210; *Case v. Dunmore*, 23

Pa. St. 93; *Brackett v. Watkins*, 21 Wend. (N. Y.) 68.

<sup>10</sup> *Bartholomew v. West*, No. 1071 Fed. Cas., 2 Dill. 290; *Slaughter v. Detiney*, 15 Ind. 49; *McClusky v. McNeely*, 8 Ill. 578; *Shepherd v. Murrill*, 90 N. C. 208. See also *Weaver's Appeal*, 18 Pa. St. 307; *Yost v. Heffner*, 69 Pa. St. 68; *Toenes v. Moog*, 78 Ala. 558.

<sup>11</sup> *In re Bolinger*, 108 Fed. Rep. 374, 6 Am. B. R. 171, 447; *In re Black*, 104 Fed. Rep. 289, 4 Am. B. R. 776; *In re Osborn*, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re Camp*, 91 Fed. Rep. 745, 1 Am. B. R. 165.

But see *In re Garner*, 115 Fed. Rep. 200, 8 Am. B. R. 263; *In re Nye* (C. C. A. 8th Cir.), 133 Fed. Rep. 33, 66 C. C. A. 139, 13 Am. B. R. 142.



the exempt property after it is set apart to the bankrupt.<sup>12</sup> In such cases the bankruptcy court will usually withhold a discharge until such suits are ended, where a discharge would bar the debt.

A bankrupt may forfeit his right to an exemption by fraud. Thus where a bankrupt gave a deed of trust as security for money then loaned to him and for future advances, and afterwards declared a homestead on one of the lots so conveyed in trust, and subsequently obtained further advances without disclosing the fact that he had declared a homestead on the premises, he was not allowed to claim his exemption.<sup>13</sup> Where a bankrupt conceals a part of his property, he can not claim exemptions out of his remaining property.<sup>14</sup> A bankrupt may forfeit his right to exemptions by making a fraudulent statement of his financial condition.<sup>15</sup>

Under the statute of Washington, which in case of a sale in bulk of a stock of merchandise makes the purchaser responsible for the application of the purchase price on the seller's debts, the seller by making such a sale must be deemed to have assented to such application, and on his adjudication as a bankrupt can not claim his statutory exemptions out of the money due from the purchaser.<sup>16</sup> Nor do the creditors waive their rights in such fund by instituting involuntary proceedings in bankruptcy against him.<sup>16</sup>

When there are no other assets the bankrupt must pay costs out of exempt property.<sup>17</sup>

<sup>12</sup> *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. Ed. 1061, 10 Am. B. R. 107; *Roden Grocery Co. v. Bacon* (C. C. A. 5th Cir.), 133 Fed. Rep. 515, 66 C. C. A. 667, 13 Am. B. R. 231; *Bell v. Dawson Grocery Co.*, 120 Ga. 628, 12 Am. B. R. 159; *McKenney v. Cheney*, 118 Ga. 387.

<sup>13</sup> *In re Haake*, No. 5883 Fed. Cas., 2 Saw. 231.

<sup>14</sup> *In re Cochran*, 185 Fed. Rep. 913, 26 Am. B. R. 459; *In re Taylor*, 115 Fed. Rep. 607, 7 Am. B. R. 410.

<sup>15</sup> *In re Dobbs*, 172 Fed. Rep. 682, 23 Am. B. R. 569.

<sup>16</sup> *In re Connor*, 146 Fed. Rep. 998.

<sup>17</sup> *In re Hines*, 117 Fed. Rep. 790, 9 Am. B. R. 27; *In re Collier*, 93 Fed. Rep. 191, 1 Am. B. R. 182; *In re Bean*, 100 Fed. Rep. 262, 4

**§ 431. How to set apart exemptions.**

The exemptions provided by the law of the state are allowed by the bankruptcy act, but the manner of claiming such exemptions and of setting apart and awarding them is regulated by the bankruptcy act.<sup>1</sup>

It is made the duty of the bankrupt to claim such exemptions as he may be entitled to in his schedule.<sup>2</sup> This may be done by amendment to the original schedule if application is reasonably made.<sup>2\*</sup>

It devolves upon the trustee, and it is his duty, to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court within twenty days after receiving notice of his appointment.<sup>3</sup> Where no trustee has been appointed the court may set apart the exemptions.<sup>4</sup> The trustee has no discretion with reference to what property shall be exempt. The right of the bankrupt is absolute and fixed by the law of the state in which he has his domicile for the greater part of the six months immediately preceding the filing of the petition.<sup>5</sup>

Am. B. R. 53; *In re* Castleberry, 133 Fed. Rep. 821, 16 Am. B. R. 430.

But see *Dunlap Hardware Co. v. Huddleston* (C. C. A. 5th Cir.), 167 Fed. Rep. 433, 93 C. C. A. 69, 21 Am. B. R. 731.

<sup>1</sup> *In re* Gerber (C. C. A. 9th Cir.), 186 Fed. Rep. 693, 108 C. C. A. 511, 26 Am. B. R. 608; *In re* Kane (C. C. A. 7th Cir.), 127 Fed. Rep. 552, 62 C. C. A. 616, 11 Am. B. R. 533; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 40 C. C. A. 378, 3 Am. B. R. 801; *Lipman v. Stein* (C. C. A. 3d Cir.), 134 Fed. Rep. 235, 67 C. C. A. 17, 14 Am. B. R. 30; *Burke v. Guarantee Title & Trust Co.* (C. C. A. 3d Cir.), 134 Fed. Rep. 562, 14 Am. B. R. 31.

<sup>2</sup> B. A. 1898, Sec. 7, clause 8; *In re* Friedrich (C. C. A. 7th Cir.),

100 Fed. Rep. 284, 40 C. C. A. 378, 3 Am. B. R. 801; *In re* Lucius, 124 Fed. Rep. 455, 10 Am. B. R. 653.

<sup>2\*</sup> See Waiver of Exemption, Sec. 430, *ante*, where the cases are cited.

<sup>3</sup> B. A. 1898, Sec. 47, clause 11; Gen. Ord. 17; *In re* Friedrich (C. C. A. 7th Cir.), 100 Fed. Rep. 284, 40 C. C. A. 378, 3 Am. B. R. 801; *In re* Hill, 96 Fed. Rep. 185, 2 Am. B. R. 798; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432.

<sup>4</sup> *In re* Smalley v. Laugenour, 196 U. S. 93, 49 L. Ed. 400, 13 Am. B. R. 692, and *In re* Allen & Co., 134 Fed. Rep. 620, 13 Am. B. R. 518, a homestead exemption was allowed by a referee.

<sup>5</sup> B. A. 1898, Sec. 6.

The trustee regularly allows the claim of the bankrupt to and sets apart such articles as are specifically exempted by the statute of that state, regardless of their value or the situation of the bankrupt. He should also set apart the homestead, or the value thereof, and such articles as the bankrupt may be entitled to select under the state law.

The trustee should, as soon thereafter as possible, file with the referee an itemized report of the property thus set apart.<sup>6</sup> General Order 17 requires the specification of the separate articles and their separate appraisement.<sup>7</sup>

The act of setting off the exemptions claimed is ministerial, and no issue on the question of the bankrupt's right to them is raised until his report is filed.<sup>8</sup> The creditors may then raise this issue by taking exceptions to the report within twenty days.<sup>9</sup> A creditor who has received notice of the filing of the petition and that he is a scheduled creditor is charged with notice of whatever transpires in the administration of the estate and a failure to contest the bankrupt's claim for exemptions is such laches as will deprive him of the right to reopen the matter.<sup>10</sup>

The burden of showing that an article alleged to be exempt is within the provisions of the statute rests on the bankrupt.<sup>11</sup> The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report within five days after the same shall be due, it is the duty of the referee to make an order requiring the trustee to show cause before the judge at a time specified in the order why he should not be removed from office.<sup>12</sup>

<sup>6</sup> Official Form No. 47; see Form No. 91, *post*.

<sup>7</sup> *In re Manning*, 112 Fed. Rep. 948, 7 Am. B. R. 571.

<sup>8</sup> *In re Campbell*, 124 Fed. Rep. 417, 10 Am. B. R. 723.

<sup>9</sup> Gen. Ord. 17. *In re Campbell*, 124 Fed. Rep. 417, 10 Am. B. R. 723; *In re Smith*, 93 Fed. Rep. 791, 2 Am. B. R. 190.

<sup>10</sup> *In re Reese*, 115 Fed. Rep. 993, 8 Am. B. R. 411.

<sup>11</sup> *McGahan v. Anderson* (C. C. A. 4th Cir.), 113 Fed. Rep. 115, 51 C. C. A. 92, 17 Am. B. R. 641; *In re Campbell*, 124 Fed. Rep. 417, 10 Am. B. R. 723; *In re Turnbull*, 106 Fed. Rep. 667, 5 Am. B. R. 549.

<sup>12</sup> Gen. Ord. 17. See Removal of Trustees, Sec. 363, *ante*.

Ordinarily exemptions can not be set off until after the trustee is appointed, but where no creditors appear at the first meeting and no trustee is appointed the court can probably allow the exemptions on satisfactory proof.<sup>13</sup> A bankrupt may be allowed to take property claimed to be exempt, before it is set apart by the trustee, upon giving a forthcoming bond for its return.<sup>14</sup> The more usual practice in such cases is to put in the claim for exemptions and allow the property to be sold and have the exemptions set apart out of the proceeds of the sale.<sup>15</sup> The costs of such sale could not be deducted from exemptions.<sup>16</sup>

If it becomes necessary to appraise exempt property for the purpose of setting it off it may be appraised like other property of the bankrupt by three disinterested appraisers appointed by the court.<sup>17</sup> In some cases the trustee has appointed appraisers who have appraised the property claimed to be exempt and reported to the court. In other cases the trustee has followed the practice of the state in this respect. In one case it was held that there was no authority for an appraisal and that the allotment must be made by the trustee without the assistance of appraisers.<sup>18</sup> When, however, a homestead has been set off under a state law, the court of

<sup>13</sup> *In re* Smith, 93 Fed. Rep. 791, 2 Am. B. R. 190; *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730; *In re* Allen & Co., 134 Fed. Rep. 620, 13 Am. B. R. 518.

<sup>14</sup> *In re* Shaffer & Son, 128 Fed. Rep. 986, 11 Am. B. R. 717.

<sup>15</sup> *Lipman v. Stein* (C. C. A. 3d Cir.), 134 Fed. Rep. 235, 67 C. C. A. 17, 14 Am. B. R. 30, affirming 130 Fed. Rep. 629, 12 Am. B. R. 384; *In re* Kane (C. C. A. 7th Cir.), 127 Fed. Rep. 552, 62 C. C. A. 616, 11 Am. B. R. 533; *In re* LeVay, 125 Fed. Rep. 990, 11 Am. B. R. 114; *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171; *In re*

Sloan, 135 Fed. Rep. 873, 14 Am. B. R. 435.

<sup>16</sup> *Dunlap Hardware Co. v. Huddleston* (C. C. A. 5th Cir.), 167 Fed. Rep. 433, 93 C. C. A. 69, 21 Am. B. R. 731; *In re* LeVay, 125 Fed. Rep. 990, 11 Am. B. R. 114.

<sup>17</sup> B. A. 1898, Sec. 70b, *In re* Columbia Iron Works, 142 Fed. Rep. 234, 14 Am. B. R. 526.

*In re* McCutchen, 100 Fed. Rep. 779, 4 Am. B. R. 81, the court directed the appraisers to be appointed, one to be selected by the bankrupt, one by the trustees and one by the creditors.

<sup>18</sup> *In re* Grimes, 96 Fed. Rep. 529, 2 Am. B. R. 730.

bankruptcy may adopt it without a new appraisalment.<sup>19</sup> When the property can not be divided it may be sold and the exemption allowed out of the proceeds.<sup>20</sup> Where the exempted property has been sold by the trustee the proceeds may be given to the bankrupt.<sup>21</sup>

If any controversy arises with the bankrupt with reference to what property is exempt the court should decide the controversy. A practical method for the determination of disputes arising from valuation of property claimed to be exempt is to order the property in question sold, and the trustee to set apart to the bankrupt the proceeds to the extent of the amount allowed as exemption by the state laws.<sup>22</sup> Homesteads where practicable should be set apart in kind, so where the value of the homestead is in excess of the exemption allowed, the bankrupt should be allowed to keep the property on paying the difference.<sup>23</sup>

Where exempt property has been set apart as exempt, the bankrupt is entitled to be placed in possession of it.<sup>24</sup> The

<sup>19</sup> *In re* Hall, No. 5921 Fed. Cas., 2 Hughes, 411; *In re* Vogler, No. 16986 Fed. Cas., 2 Hughes, 297; *In re* Rhodes, 109 Fed. Rep. 117, 6 Am. B. R. 173.

A new allotment may be ordered. *In re* McBryde, 99 Fed. Rep. 686, 3 Am. B. R. 729.

<sup>20</sup> *In re* Brown, No. 1980 Fed. Cas., 3 N. B. R. 250.

<sup>21</sup> *In re* Dunlap Hardware Co. v. Huddleston (C. C. A. 5th Cir.), 167 Fed. Rep. 433, 93 C. C. A. 69, 21 Am. B. R. 731; *In re* Paramore & Ricks, 156 Fed. Rep. 211, 19 Am. B. R. 130; *In re* Soper, 173 Fed. Rep. 116, 22 Am. B. R. 868; *In re* Jones, No. 7445 Fed. Cas., 2 Dill. 343; *In re* Welch, No. 17366 Fed. Cas., 5 Ben. 230; *In re* Ellis, No. 4400 Fed. Cas., 1 N. B. R. 555.

In some states where the exempt property had not actually been set aside before sale, the bankrupt is not entitled to claim from fund. *In re* Haskin, 109 Fed. Rep. 789, 6 Am. B. R. 485; *In re* Woodard, 95 Fed. Rep. 955, 2 Am. B. R. 692.

<sup>22</sup> *In re* Lynch, 101 Fed. Rep. 579, 4 Am. B. R. 262; *In re* Richard, 94 Fed. 633, 2 Am. B. R. 506; *In re* Osborn, 104 Fed. Rep. 780, 5 Am. B. R. 111; *In re* Bolinger, 108 Fed. Rep. 374, 6 Am. B. R. 171; *In re* Park, 102 Fed. Rep. 602, 4 Am. B. R. 432; *In re* Brown, 100 Fed. Rep. 441, 4 Am. B. R. 46; *In re* Diller, 100 Fed. Rep. 931, 4 Am. B. R. 45.

<sup>23</sup> *In re* Manning, 123 Fed. Rep. 180, 10 Am. B. R. 498.

<sup>24</sup> *In re* Soper, 173 Fed. Rep. 116, 22 Am. B. R. 868; *In re* Para-

court will not order the bankrupt to restore the property in order that it may be sold for the benefit of a mortgagee.<sup>25</sup> Where the bankrupt claims property as a homestead and proceedings are taken before the referee to subject it to the payment of a prior debt the bankrupt should be allowed an opportunity to set up defenses against such debt.<sup>26</sup>

more & Ricks, 156 Fed. Rep. 211,  
19 Am. B. R. 130.

<sup>26</sup> *In re* Bean, 100 Fed. Rep. 262,  
4 Am. B. R. 63.

<sup>25</sup> *In re* Hatch, 102 Fed. Rep.  
280, 4 Am. B. R. 349.

## CHAPTER XXV.

## LIENS.

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| <p><b>SEC.</b><br/> 432. Liens defined and classified.<br/> 433. The bankrupt act and amendments not retroactive.<br/> 434. The state law governs.<br/> 435. Valid liens generally.<br/> 436. Rights of trustee.<br/> 437. Voidable liens in bankruptcy.<br/> 438. Liens avoided only as to trustee and privies.<br/> 439. Bona fide purchaser protected.<br/> 440. Subrogation of trustee; preserving liens for creditors.<br/> 441. Necessity of record of a lien.<br/> 442. Effect of unrecorded liens in various jurisdictions.<br/> 443. Fraudulent withholding from record.<br/> 444. Taking possession equivalent to record.<br/> 445. Rights of trustee against unrecorded liens.<br/> 446. Whether rights under unrecorded liens are fixed at the date of the filing of the petition or of the adjudication.<br/> 447. Liens obtained by judgment lien, attachment, etc.<br/> 448. "Obtained through legal proceedings."<br/> 449. Time lien attaches depends on state law.<br/> 450. Creation of lien and not enforcement must be within four months.<br/> 451. Lien created after the filing of the petition.<br/> 452. Discharge of liens.<br/> 453. Enforcement of liens.<br/> 454. Admiralty lien.<br/> 455. Assignment or lien on future earnings.<br/> 456. Attachments.</p> | <p><b>SEC.</b><br/> 457. Attorney's lien.<br/> 458. Auctioneer's lien.<br/> 459. Creditor's bill.<br/> 460. Equitable lien.<br/> 461. Proceedings supplementary to execution.<br/> 462. Garnishment.<br/> 463. Judgments—in general.<br/> 464. Effect of invalidity of judgment.<br/> 465. Dissolution of judgment lien by payment before bankruptcy.<br/> 466. Landlord's lien.<br/> 467. Mechanics' liens.<br/> 468. Enforcement of a mechanic's lien.<br/> 469. Mortgages—in general.<br/> 470. Mortgages made in good faith for a present consideration.<br/> 471. What mortgages invalid.<br/> 472. Unrecorded, fraudulent or void under state law.<br/> 473. When trustee takes only rights of bankrupt.<br/> 474. Avoiding mortgages binding on bankrupt.<br/> 475. Enforcing rights of mortgagee.<br/> 476. Pledges.<br/> 477. Governed by what law.<br/> 478. Contract to pledge.<br/> 479. Possession—warehousing.<br/> 480. Stock brokers as pledgees.<br/> 481. Trustee's rights where no pledge created.<br/> 482. Pledgee holding two securities.<br/> 483. Pledge void as preferential.<br/> 484. Termination of possession—exchange.<br/> 485. Redemption.<br/> 486. Power of attorney.<br/> 487. Vendor's lien.</p> |
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## § 432. Liens defined and classified.

Liens, as used in the bankrupt law relate to charges upon the property of the bankrupt.<sup>1</sup> An insolvent debtor may have

<sup>1</sup> As to liens on the exempt property of a bankrupt, see Sec. 413, *ante*.

Section 67 as to the invalidity of liens and other incumbrances refers to the property of the bank-

rupt, and not to that of third persons, so where claimant took bankrupt's property before bankruptcy, by action giving a bond, the bond is still valid. *Ehrlich v. Sklamberg*, 116 N. Y. Suppl. 602.

a lien upon the property of another, who may be either solvent or insolvent. The present inquiry is confined to liens against property of a person subsequently adjudged to be bankrupt.

A lien, as used in the bankruptcy statute, includes a hold or claim which one person has upon the property of another as a security for some debt or charge.<sup>2</sup>

Liens may be divided into four classes:

*First.* Judicial liens, or those created by legal proceedings, as by judgment, attachment, garnishment, execution, and the like.<sup>3</sup>

*Second.* Common-law or retaining liens, such as the lien of tradesmen upon the specific goods in their hands, for their labor and expense in improving or altering them,<sup>4</sup> livery-stable keepers for care and keep of horses;<sup>5</sup> common carriers of goods, for their services and expenditure with reference to carriage of goods,<sup>6</sup> or inn-keepers, upon the luggage, carriage or horses of a guest, for debts incurred while in their keeping,<sup>7</sup> etc., etc.

*Third.* Liens created by statute, such as mechanics' liens, which will be further considered hereafter.<sup>8</sup>

*Fourth.* Equitable liens. The term "lien" is especially applicable to the common-law lien, but it has by analogy been applied to other cases where a right to prepayment exists out of the particular property, or a particular estate or interest in property, either by contract express or implied by the implication of a trust or statute, although the property

Under Sec. 67*f* the validity of a lien of a judgment on real estate more than four months' old is preserved though the lien is on land fraudulently conveyed. *Hillyer v. LeRoy*, 179 N. Y. 369, 103 Am. St. Rep. 919, 72 N. E. 237.

<sup>2</sup> See Sec. 447, *post*.

<sup>3</sup> *In re Maher*, 169 Fed. Rep. 997, 22 Am. B. R. 290.

<sup>4</sup> *Ex parte Deeze*, 1 Atk. 228; *Franklin v. Hosier*, 4 B. & Ald. 341.

<sup>5</sup> *Jackson v. Cummins*, 5 M. & W. 342; *Judson v. Etheridge*, 1 Cr. & M. 743.

<sup>6</sup> *Aspinwall v. Pickford*, 3 B. & P. 44 n.; *Rushforth v. Hadfield*, 6 East. 519; *Wright v. Snell*, 5 B. & Ald. 350.

<sup>7</sup> *Mulliner v. Florence*, 3 Q. B. Div. 484; *Turrill v. Crawley*, 13 Ad. and El. (N. S.) 197.

<sup>8</sup> Sec. 467, *et seq.*; *In re J. B. Hopkins*, 1 Am. B. R. 209 (referee).



itself may not be in the possession of or vested in the person claiming the lien.<sup>9</sup> Liens of this description are in the nature of equitable charges.

**§ 433. The bankrupt act and amendment not retroactive.**

The provisions of the act and its amendments are not retroactive. Where transfer and record and bankruptcy all took place in 1902, the amendment of 1903 does not apply as it is not retroactive,<sup>1</sup> but where an attachment was levied August 24, 1898, and involuntary proceedings began December 9, 1898, the attachment was void although the involuntary proceedings could not be begun when the attachment was levied.<sup>2</sup>

The amendment of 1910 is not intended to be retroactive.<sup>3</sup> So a lien vested against a corporation which could not be made bankrupt under the act of 1903, in force at the time the lien was created, gave an unconditional right of payment out of the property levied on, an actual lien not subject to defeat by bankruptcy adjudication of any sort. As the act of 1910 is not retrospective in its operation, therefore such a lien against a corporation not included in the act of 1903 can not be affected by proceedings in bankruptcy against it under the act of 1910.<sup>4</sup>

<sup>9</sup> See Sec. 460, *post*; *Chattanooga Nat. Bank v. Rome Iron Co.*, 102 Fed. Rep. 755, 4 Am. B. R. 441; *McDonald v. Daskam* (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 53 C. C. A. 554, 8 Am. B. R. 543; *In re Elm Brewing Co.*, 132 Fed. Rep. 299, 12 Am. B. R. 623; 3 Pomeroy Eq. Jur., Sec. 1235; *Walker v. Brown*, 165 U. S. 654, 41 L. Ed. 865.

<sup>1</sup> *Murphy v. W. T. Murphy & Co.*, 126 Iowa, 57, 101 N. W. 486.

<sup>2</sup> *Kosches v. Libowitz* (Tex. 1900), 56 S. W. 613. (The court holds that the act of 1898 was in force when the attachment was levied and that the result does not render that act retrospective.)

<sup>3</sup> *In re New Amsterdam Motor Co.*, 180 Fed. Rep. 943, 24 Am. B. R. 757.

<sup>4</sup> *In re New Amsterdam Motor Co.*, 180 Fed. Rep. 943, 24 Am. B. R. 757.

### § 434. The state law governs.

The validity and extent of a lien on the property of a bankrupt is determined by the local law as construed by the highest court of the state.<sup>1</sup>

To the extent that a lien is valid under the state law, if not forbidden by the bankrupt act, it will be sustained in bankruptcy.<sup>2</sup> No lien which is invalid under the state law will be enforced in bankruptcy.<sup>3</sup> Liens created by legal proceedings or preferential transfers of property within four months are invalidated by the bankrupt act, although they may be valid under the state law.<sup>4</sup> The bankrupt act is binding on the state as well as the federal courts.<sup>5</sup>

The effect of a legal proceeding to create a lien and the time at which it attaches is determined by the state law, as construed by the highest court of the state, in which the legal proceedings are had.<sup>6</sup>

<sup>1</sup> *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 596, 14 Am. B. R. 74; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *Walter A. Wood Co. v. Eubanks* (C. C. A. 4th Cir.), 169 Fed. Rep. 929, 95 C. C. A. 273, 22 Am. B. R. 307.

<sup>2</sup> B. A. 1898, Sec. 67*d*.

<sup>3</sup> B. A. 1898, Secs. 67*a*, 67*e* and 70*e*, as amended by the act of Feb. 5, 1903, 32 Stat. at L. 797, and act of June 25, 1910, 36 Stat. at L. 838.

<sup>4</sup> B. A. 1898, Secs. 60*b* and 67*f*, as amended by the act of Feb. 3, 1903, 32 Stat. at L. 797, and act of June 25, 1910, 36 Stat. at L. 838.

<sup>5</sup> *Thompson v. Ragan*, 117 Ky. 577, 25 Ky. Law Rep. 1684.

*In Claffin v. Houseman*, 93 U. S. 130, 136, the supreme court said: "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are."

<sup>6</sup> *First Nat. Bank v. Guaranty Title & Trust Co.* (C. C. A. 3d Cir.), 178 Fed. Rep. 187, 101 C. C. A. 507, 24 Am. B. R. 330; *Reardon v. Rock Island Plow Co.* (C. C. A. 7th Cir.), 168 Fed. Rep. 654, 94 C. C. A. 118, 22 Am. B. R. 26; *In re Darwin* (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 54 C. C. A. 581, 8 Am. B. R. 703; *In re Blair*, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re Johnson*, 108 Fed. Rep. 373, 6 Am. B. R. 202; *In re Wilkes*, 112 Fed. Rep. 975, 7 Am. B. R. 574; *London Guaranty & Accident Co. v. Mossness*, 108 Ill. App. 440.

The validity and extent of a lien created by a transfer of property by way of mortgage, deed, bill of sale, conditional sale, pledge, or otherwise presents a question of local law.<sup>7</sup>

It is well settled that the courts of bankruptcy are bound by the local law as declared by the highest court of each state with respect to the validity and extent of a lien created in this way on property in that state.<sup>8</sup> The reason for this is that instruments creating a lien by the transfer of property are subject to state regulation. Although they are of general use, "each state has a right to determine for itself under what

<sup>7</sup> *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 596, 14 Am. B. R. 74; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *Bryant v. Swofford Bros.*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Mattley v. Wolfe*, 175 Fed. Rep. 619, 23 Am. B. R. 673; *Deland v. Miller & Chaney Bank*, 117 Iowa, 368, 93 N. W. 304; *Godwin v. Murchison National Bank*, 145 N. C. 320, 59 S. E. 154; *Eason v. Garrison & Kelly*, 36 Tex. Civ. App. 578, 82 S. W. 800; *Walter A. Wood Co. v. Eubanks* (C. C. A. 4th Cir.), 169 Fed. Rep. 929, 95 C. C. A. 273, 22 Am. B. R. 307; See *In re W. W. Mills Co.*, 162 Fed. Rep. 42, 20 Am. B. R. 501.

<sup>8</sup> *In re First Nat. Bank* (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180; *Dugan v. Beckett* (C. C. A. 5th Cir.), 129 Fed. Rep. 56, 63 C. C. A. 498; *In re Shirley* (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 50 C. C. A. 252, 7 Am. B. R. 299; *In re Reynolds*, 153 Fed. Rep. 295, 18 Am.

B. R. 666; *Dodge v. Norlin* (C. C. A. 8th Cir.), 133 Fed. Rep. 363, 66 C. C. A. 425, 13 Am. B. R. 176; *In re Gilligan* (C. C. A. 7th Cir.), 152 Fed. Rep. 605, 81 C. C. A. 595; *In re Josephson*, 116 Fed. Rep. 404, 8 Am. B. R. 423; *Hamilton v. Beggs Co.*, 179 Fed. Rep. 949; *Etheridge v. Sperry*, 139 U. S. 276, 35 L. Ed. 171.

But see *In re Hull*, 115 Fed. Rep. 858, 8 Am. B. R. 302; *Crooks v. Stuart*, 7 Am. B. R. 80.

*In re Southern Textile Co.* (C. C. A. 2d Cir.), 174 Fed. Rep. 523, 98 C. C. A. 305, 23 Am. B. R. 172, the court said: "The claimants contend that the agreement is neither a deed of trust nor a chattel mortgage, but simply written evidence of an agreement between them and the company, giving them an 'equitable lien' upon the goods produced from their advances until the same were repaid. In order to determine whether it is of such character, reference should be had to the law of North Carolina; if such a contract would there be held a chattel mortgage to be recorded as such, it is not material that in other states it would not be so considered."

circumstances they may be executed, the extent of the rights conferred thereby and the conditions of their validity.”<sup>9</sup>

There is so much of a local nature entering into such transactions that they present questions of rights of property and not of general commercial law.

### § 435. Valid liens generally.

The bankrupt act recognizes and preserves valid liens.<sup>1</sup> It provides for avoiding a lien tainted with fraud or because made fraudulent by the provisions of the bankrupt statute although otherwise unobjectionable.<sup>2</sup>

The bankrupt law recognizes and preserves liens given or accepted in good faith, and not in contemplation of, or in fraud upon the act, and for a present consideration which have been recorded according to law, if record thereof is necessary to impart notice.<sup>3</sup>

<sup>9</sup> In *Etheridge v. Sperry*, 139 U. S. 276, 277, 35 L. Ed. 171, Mr. Justice Brewer defined the attitude of federal courts as to chattel mortgage laws as follows: “The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property, are, primarily, at least, a matter of state regulation. We are aware that there is a great diversity in the rulings on this question by the courts in the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of

each state as decisive in respect to any case arising therein. *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223 [10 Sup. Ct. 1013, 34 L. Ed. 341].”

<sup>1</sup> B. A. 1898, Sec. 67*d*; *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437.

<sup>2</sup> See Sec. 437, *post*.

<sup>3</sup> B. A. 1898, Sec. 67*d*; *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *In re Lillington Lumber Co.*, 132 Fed. Rep. 886, 13 Am. B. R. 153; *In re Standard Laundry Co.*, 112 Fed. Rep. 126, 7 Am. B. R. 254; *Chattanooga Nat. Bank v. Rome Iron Co.*, 102 Fed. Rep. 755, 4 Am.

A lien created to secure a present loan and a pre-existing debt may be sustained to the extent of the loan made at the time and be invalid to the extent of the pre-existing debt secured thereby.<sup>4</sup>

A lien created more than four months prior to bankruptcy, if valid under the state law, is valid in bankruptcy. Thus a lien created more than four months before the petition is filed by a judgment, attachment, garnishment or execution is not affected by an adjudication in bankruptcy.<sup>5</sup>

B. R. 441; *McDonald v. Daskam* (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 53 C. C. A. 554, 8 Am. B. R. 543; *First National Bank v. Pennsylvania Trust Co.* (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 60 C. C. A. 100, 10 Am. B. R. 782; *In re Hanna*, 105 Fed. Rep. 587, 5 Am. B. R. 127; *In re Graff*, 177 Fed. Rep. 343, 8 Am. B. R. 744; *In re Nicholas*, 122 Fed. Rep. 299, 10 Am. B. R. 291; *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122; 9 Am. B. R. 36; *In re Goldsmith*, 118 Fed. Rep. 763, 9 Am. B. R. 419; *In re Mitchell*, 116 Fed. Rep. 87, 8 Am. B. R. 324; *Merrill v. Hussey*, 101 Me. 439, 64 A. 819.

Where the creditor within four months took property in excess in value of his debt and accounted for the excess to the debtor, he can not be held to the trustee accountable for it. *McElvain v. Hardesty* (C. C. A. 8th Cir.), 169 Fed. Rep. 31, 94 C. C. A. 399, 22 Am. B. R. 320.

Where creditors within four months took property at a fair value in discharge of a lien four months' old, this is no preference. *Eason v. Garrison & Kelly*, 36 Tex. Civ. App. 574, 82 S. W. 800.

Section 67*d* can be invoked by a lienholder only when there was present consideration for the lien.

So the giving and accepting of a judgment lien for an antecedent debt, defendant being insolvent at the time, can not be in good faith. *Ferguson v. Greth*, 195 Pa. St. 272, 45 A. 735.

<sup>4</sup> B. A. 1898, Sec. 67*d*, as amended by the act of June 25, 1910, 36 Stat. at L. 838; *City National Bank v. Bruce* (C. C. A. 4th Cir.), 109 Fed. Rep. 69, 48 C. C. A. 236, 6 Am. B. R. 311; *Stedman v. Bank of Monroe*, 117 Fed. Rep. 237, 9 Am. B. R. 4; *In re Durham*, 114 Fed. Rep. 750, 8 Am. B. R. 115; *In re Dismal Swamp Construction Co.*, 135 Fed. Rep. 415, 14 Am. B. R. 175; *In re Sawyer*, 130 Fed. Rep. 384, 12 Am. B. R. 269; *In re Hull*, 115 Am. B. R. 858, 8 Am. B. R. 302; *In re Wolf*, 98 Fed. Rep. 84, 3 Am. B. R. 555; *In re Furse & Co.* (C. C. A. 4th Cir.), 127 Fed. Rep. 690, 62 C. C. A. 446, 11 Am. B. R. 733.

A post-nuptial settlement made in behalf of the wife in consideration of her relinquishment of dower is only valid to the extent of the dower released. *Moore v. Green* (C. C. A. 4th Cir.), 145 Fed. Rep. 472, 76 C. C. A. 242, 16 Am. B. R. 648.

<sup>5</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R.

A lien created more than four months prior to bankruptcy by contract with the bankrupt, as by mortgage, conditional sale, pledge, etc., if valid under the state law, is valid in bankruptcy.<sup>6</sup>

A lien created by statute which attaches prior to bankruptcy is not affected by an adjudication. Thus a mechanic's lien,<sup>7</sup> or a landlord's lien for rent,<sup>8</sup> or an attorney's lien,<sup>9</sup> are valid liens in bankruptcy, although created within four months of bankruptcy. There is no four months' limitation to liens created other than by transferring property or through legal proceedings.

A common-law lien may be valid in bankruptcy.<sup>10</sup>

It is immaterial on the question of the validity of a lien whether the creditor's claim is provable and dischargeable or not.<sup>11</sup> So the lien acquired by a state within four months is avoided by section 67*f*, although the lien is on a judgment and execution for a fine for illegal liquor selling.<sup>12</sup>

Where the petition in bankruptcy is dismissed the lien stands.<sup>13</sup>

36; *Pickens v. Roy*, 187 U. S. 177, 49 L. Ed. 128, 9 Am. B. R. 47; *Doyle v. Heath*, 22 R. I. 213; *In re Snell*, 125 Fed. Rep. 154, 11 Am. B. R. 135; *In re Beaver Coal Co.*, 110 Fed. Rep. 630, 6 Am. B. R. 404; *In re Koslowski*, 153 Fed. Rep. 823, 18 Am. B. R. 723; *Armour Packing Co. v. Wynn*, 119 Ga. 683, 43 S. E. 685; *Bank of Commerce v. Elliott*, 109 Wis. 648, 6 Am. B. R. 409; *In re Swift*, 111 Fed. Rep. 503, 7 Am. B. R. 117; *Owen v. Brown* (C. C. A. 6th Cir.), 120 Fed. Rep. 812, 57 C. C. A. 180, 9 Am. B. R. 717; *Hillyer v. LeRoy*, 179 N. Y. 369.

<sup>6</sup> *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*,

198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *Frank v. Vollkommer*, 205 U. S. 521, 51 L. Ed. 911, 17 Am. B. R. 806.

<sup>7</sup> See Sec. 467, *post*.

<sup>8</sup> See Sec. 466, *post*.

<sup>9</sup> See Sec. 457, *post*.

<sup>10</sup> See Sec. 432, *ante*; *In re Corn* (C. C. A. 2d Cir.), 179 Fed. Rep. 481, 103 C. C. A. 384, 24 Am. B. R. 681.

<sup>11</sup> *In re Green*, 179 Fed. Rep. 180, 24 Am. B. R. 665.

<sup>12</sup> *In re Green*, 179 Fed. Rep. 180, 24 Am. B. R. 665.

<sup>13</sup> *Sullivan v. King*, 31 Tex. Civ. App. 432, 72 S. W. 207.

### § 436. Rights of trustee.

Property upon which there is a valid lien passes to the trustee, if he elects to take it, subject to such equities, liens or incumbrances, whether created by operation of law or by the act of the bankrupt.<sup>1</sup>

The amendatory act of 1910<sup>2</sup> attempts to avoid the effect of the York Manufacturing Company case,<sup>3</sup> by providing in section 8 that the trustee shall have all the rights, remedies and powers of a lien creditor over property in the custody of the bankruptcy court and have all the rights, remedies and powers of a judgment creditor against property not in the custody of the bankruptcy court. The result of the York Manufacturing case was to allow the trustee merely the title of the bankrupt except as to property fraudulently transferred or seized by a creditor within the four months' period or preferentially transferred. This gave holders of unrecorded liens a great advantage, and worked an injustice on creditors who relied upon the debtor's apparent ownership.

### § 437. Voidable liens in bankruptcy.

A lien may be avoided in bankruptcy if invalid under the state law,<sup>1</sup> or because prohibited by the bankrupt act, although it may be valid under the state law.<sup>2</sup>

<sup>1</sup> York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; Hewit v. Berlin Machine Works, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; Metcalf v. Barker, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; Yeatman v. New Orleans Savings Institution, 95 U. S. 764, 24 L. Ed. 589; Cook v. Tullis, 18 Wall. 332, 21 L. Ed. 933; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; Thompson v. Fairbanks, 196 U. S. 516, 526, 49 L. Ed. 577, 13 Am. B. R. 437; *In re* Platteville, 147 Fed. Rep. 828, 17 Am. B. R. 291; Lindeke v. Associates Realty Co., 146 Fed. Rep. 630, 77 C. C. A. 56, 17 Am. B. R. 215; Bassett v. Thakara, 72 N. J.

L. 81, 60 A. 39 (except in cases where there has been a conveyance or incumbrance which is void as against the trustee, under some positive provision of the act).

<sup>2</sup> Statute, June 25, 1910, 36 Stat. at L. 838. As to the effect of this amendment, see Sec. 372, *ante*.

<sup>3</sup> York Manufacturing Co. v. Cassell, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

<sup>1</sup> B. A. 1898, Secs. 67a, 67e and 70e; see Sec. 385, *ante*; Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; Security Warehousing Co. v. Hand, 206 U. D. 415, 51 L. Ed. 1117, 19 Am. B. R. 291.

<sup>2</sup> B. A. 1898, Secs. 60b and 67f.

All liens which are invalid under the state law are invalid in bankruptcy.<sup>3</sup> Claims which for want of record<sup>4</sup> or for other reasons would not have been valid liens as against the claims of the creditor of the bankrupt are not liens against his estate in bankruptcy.<sup>5</sup> In addition to these any lien which is tainted with fraud is in itself void, irrespective of the provisions of the bankrupt act. These liens will be more fully considered in connection with the treatment of the particular subjects following.

Section 67f provides "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged or released from the same, and shall pass to the trustee as a part of the estate of the bankrupt."<sup>6</sup>

In order to avoid or dissolve a levy, judgment, attachment or other lien under section 67f of the bankrupt act, three things must concur. *First*, a lien must be created through legal proceedings; *second*, it must be created within four

<sup>3</sup> B. A. 1898, Sec. 67a and e, last clause.

<sup>4</sup> *First Nat. Bank v. Connett* (C. C. A. 8th Cir.), 142 Fed. Rep. 33, 73 C. C. A. 219, 15 Am. B. R. 662; *Lozier v. Savings Deposit Bank & Trust Co.* (C. C. A. 6th Cir.), 148 Fed. Rep. 975, 78 C. C. A. 597, 17 Am. B. R. 628; *Bank v. Herbert*, 8 Cranch, 36, 3 L. Ed. 479; *In re Brunquest*, No. 2055 Fed. Cas., 7 Biss. 208.

<sup>5</sup> B. A. 1898, Sec. 67a; *Spencer v. Duplan Silk Co.*, 112 Fed. Rep. 638, 7 Am. B. R. 563; *In re Garcewich* (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 53 C. C. A. 510, 8 Am. B. R. 149; *In re New York Economical*

*Printing Co.* (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615; *Chesapeake Shoe Co. v. Seldner* (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 58 C. C. A. 261, 10 Am. B. R. 466; *In re Hull*, 115 Fed. Rep. 858, 8 Am. B. R. 302; *In re Andrae Co.*, 117 Fed. Rep. 561, 9 Am. B. R. 135.

<sup>6</sup> This provision was inserted in the bill for the first time by the conference committee, just before its passage. See statement of conference committee reported to the House of Representatives, June 28, 1898, paragraph XIX, 31 Cong. Record, p. 7205.



months before a petition in bankruptcy is filed, and, *third*, the debtor must be insolvent at the time. If any one of these elements is absent the judgment, levy, attachment or lien is valid and will be so recognized by the courts of bankruptcy.<sup>7</sup>

The act further provides<sup>8</sup> in section 67c, that a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon *mesne* process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt, if, *first*, it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference;<sup>9</sup> or, *second*, the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent,<sup>10</sup> and in contemplation

<sup>7</sup> Under Sec. 67f only the fact of insolvency and the subsequent adjudication need be shown. The intentions of the debtor, the knowledge of the creditor, his motives and the effect of the lien are immaterial. *Severin v. Robinson*, 27 Ind. App. 55, 60 N. E. 966. While Sec. 67f discharges a lien of attachment, it does not vacate the writ. *King v. Block Amusement Co.*, 111 N. Y. S. 102, 20 Am. B. R. 784.

<sup>8</sup> *In re Dougherty*, 109 Fed. Rep. 480, 6 Am. B. R. 457.

<sup>9</sup> *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Watson v. Taylor*, 21 Wall. 378, 22 L. Ed. 576; *Little v. Alexander*, 21 Wall. 500, 22 L. Ed. 625; *National Bank v. Warren*, 96 U. S. 539, 24 L. Ed. 640; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; *Buchanan*

*v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392; *In re Kerr*, No. 7728 Fed. Cas., 2 N. B. R. 388; *In re Campbell*, No. 2349 Fed. Cas., 1 Abb. U. S. 185; *In re Schnepf*, No. 12471 Fed. Cas., 2 Ben. 72.

As to judgment notes and judgment by confession, see *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Watson v. Taylor*, 21 Wall. 378, 22 L. Ed. 576; *Haughey v. Albin*, No. 6222 Fed. Cas., 2 Bond. 244; *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389; *Street v. Dawson*, No. 13533 Fed. Cas., 4 N. B. R. 207; *Balfour v. Wheeler*, 18 Fed. Rep. 893; *In re Baxter*, 25 Fed. Rep. 703.

<sup>10</sup> As to what constitutes a reasonable cause to believe the defendant was insolvent, etc., see *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Grant v. First National Bank*, 97 U. S. 80, 24 L. Ed. 971; *Merchants National Bank v. Cook*,

of bankruptcy;<sup>11</sup> or, *third*, that such lien was sought and permitted in fraud of the provisions of the act. The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and

95 U. S. 342, 24 L. Ed. 412; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478; *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Stuckey v. Masonic Savings Bank*, 108 U. S. 74, 27 L. Ed. 640; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Foster v. Hackley*, No. 4971 Fed. Cas., 2 N. B. R. 406; *In re Wright*, No. 18071 Fed. Cas., 2 N. B. R. 490; *Scammon v. Cole*, No. 12432 Fed. Cas., 3 Clif. 472; *Peckham v. Burrows*, No. 10897 Fed. Cas., 3 Story, 544; *Burpee v. National Bank*, No. 2185 Fed. Cas., 5 Biss. 405; *Forbes v. Howe*, 102 Mass. 427; *Otis v. Hadley*, 112 Mass. 100; *Graham v. Stark*, No. 5676 Fed. Cas., 3 Ben. 520; *Castle v. Lee*, No. 2506 Fed. Cas., 11 B. R. 80; *Haskell v. Ingalls*, No. 6193 Fed. Cas., 1 Hask. 341; *In re Walton*, No. 17128 Fed. Cas., Deady, 442.

"When the condition of a debtor's affairs is known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business [see, however, Sec. 1a (15) under the present act], there is reasonable cause to believe him to be insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe." Per Hunt, J., in *Merchants' National Bank v. Cook*, 95 U. S. 342.

As to meaning of "reasonable cause to believe" the debtor was

insolvent under the sections relating to preferences, see Sec. 505, *post*.

<sup>11</sup> As to the meaning of the words "in contemplation of bankruptcy," see *Buckingham v. McLean*, 13 How. 167, 14 L. Ed. 91; *In re Craft*, No. 3316 Fed. Cas., 2 Ben. 214, affirmed in No. 3317 Fed. Cas., 6 Blatch. 177; *Ashby v. Steere*, No. 576 Fed. Cas., 2 Woodb. & M. 347; *Robson's Bankruptcy*, 166.

To the effect that actual bankruptcy must be contemplated by the debtor at the time of the transaction, see *Morgan v. Brundrett*, 5 B. & Ad. 296; *Atkinson v. Brindall*, 2 Bing. N. C. 225; *Abbott v. Burbage*, 2 Scott, 656; *Strachan v. Barton*, 11 Ex. 647.

To the effect that the circumstances and not the actual intent of the debtor at the time of the transaction are such as to make his bankruptcy a probable or inevitable event, is a sufficient contemplation of bankruptcy, see *Gibson v. Boutts*, 4 M. & G. 169; *Gibson v. Muskett*, 4 M. & G. 160; *Poland v. Glyn*, 12 J. B. Moore, 109; *Ex parte Simpson*, De Gex, 9; *Alfred v. Constable*, 4 Ad. and El. N. S. 674.

The phrase "in contemplation of bankruptcy" as used in the act of 1841, was construed strictly as confined to actual bankruptcy proceedings, and not to mere insolvency or inability to pay debts. Even a merchant, it was said, may contemplate insolvency and the breaking up of

any judicial lien, obtained with a view to secure the property or any part of it to one, and thus prevent such equal distribution, is a lien sought and permitted in fraud of the provisions of this act.<sup>12</sup>

Sections 67*c* and 67*f* are probably not inconsistent,<sup>13</sup> although it has been held that section 67*c* was destroyed by the subsequent introduction of section 67*f* into the bill before enactment.<sup>14</sup>

Judicial liens obtained within four months of the filing of the petition are null and void.

Voluntary as well as involuntary proceedings have the effect to dissolve judicial liens created within four months on the property of the bankrupt to be administered,<sup>15</sup> but not such liens on exempt property.<sup>16</sup>

his business, and yet not contemplate bankruptcy. *Buckingham v. McLean*, 13 How. (U. S.) 150, 168, citing *Morgan v. Brundrett* (Eng.), 5 B. & Ald. 297; *Belcher v. Prittie*, 10 Bing. 408.

The debtor must have contemplated bankruptcy when he did the act complained of as a preference under the act of 1841. This was held to be the time when he executed a certain power of attorney and not when it was made use of by creditors. *Buckingham v. McLean*, 13 How. 150, 169, 14 L. Ed. 91.

A transfer to a creditor in contemplation of an act of bankruptcy is opposed to the policy of the bankruptcy law and so void. *Locke v. Winning*, 3 Mass. 325.

<sup>12</sup> See observations of Mr. Justice Field, with reference to transfers, in *Toof v. Martin*, 13 Wall. 40, 51, 20 L. Ed. 481.

The elements of (1), (2) and (3), under Sec. 67*c*, need not concur. *Ferguson v. Greth*, 195 Pa. St. 272, 45 A. 735.

<sup>13</sup> B. A. 67*c* and *f* may be reconciled by reading the particular or special provisions contained in subdivision *c* as an exception to the general provisions in subdivision *f*. Hence, attachments against an insolvent within four months of bankruptcy where the attaching creditor had knowledge or reason to believe in the debtor's insolvency should not be set aside solely under the provisions of 67*f* without regard to 67*c*. *Ex parte Chase*, 62 S. C. 353, 38 S. E. 718.

See *First National Bank v. Guarantee Title & Trust Co.* (C. C. A. 3d Cir.), 178 Fed. Rep. 187, 101 C. C. A. 507, 24 Am. B. R. 330.

<sup>14</sup> *In re Tune*, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re Richards*, 96 Fed. Rep. 935, 37 C. C. A. 634; *In re Rhoads*, 98 Fed. Rep. 399, 3 Am. B. R. 380.

<sup>15</sup> *In re Richards* (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 37 C. C. A. 634, 3 Am. B. R. 145; *In re Blair*, 108 Fed. Rep. 529, 6 Am. B. R. 206; *Wilson v. Nelson*, 183 U. S. 191, 197; *In re Vaughan*, 97 Fed. Rep.

Whenever a lien which is declared fraudulent or invalid under the bankrupt act has been placed upon property, the trustee takes such property discharged and released from such lien or preference. The trustee is authorized to reclaim and recover such property or its value.<sup>17</sup>

**§ 438. Liens avoided only as to trustee and privies.**

Section 67*f* does not avoid the levies and liens therein referred to against all the world, but only against the trustee in bankruptcy and those claiming under him, so that the property may pass to and be distributed by him among the creditors of the bankrupt.<sup>55</sup>

A creditor can not attach within four months property covered by a mortgage void as unrecorded—only the trustee can avail himself of the want of record.<sup>56</sup> Hence in a writ of entry where the demandants claim under a sale on execution the fact that the judgment debtor went into bankruptcy within four months of the levy is immaterial where the trustee or

560, 3 Am. B. R. 362; *In re* Dobson, 98 Fed. Rep. 86; 3 Am. B. R. 420; *In re* Lesser, 100 Fed. Rep. 433; *In re* McCartney, 109 Fed. Rep. 621; Longley Bros. v. McCann (Ark.), 119 S. W. 268; Gebriel v. Tanner, 138 Cal. 63, 70 P. 1021; McKenney v. Cheney (Ga. 1903), 45 S. E. 433; Severin v. Robinson, 27 Ind. App. 55, 60 N. E. 966; Jones v. Stevens, 94 Me. 582; Brown v. Case, 180 Mass. 45, 61 N. E. 279, 6 Am. B. R. 744; Cavanaugh v. Fenley, 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382; *In re* Benedict, 37 Misc. (N. Y.) 230, 75 N. Y. Suppl. 165; National Bank & Loan Co. v. Spencer, 53 N. Y. App. Div. 547, 65 N. Y. Suppl. 1001; Mencke v. Rosenberg, 202 Pa. St. 131, 90 Am. St. Rep. 618, 51 A. 767; Farrell v. W. B.

Lockett & Co., 115 Tenn. 494, 91 S. W. 209.

The following early cases taking the opposite view are now generally discredited as inadvertent; *In re* DeLue, 91 Fed. 510, 1 Am. B. R. 387; *In re* Easley, 93 Fed. 419, 1 Am. B. R. 715; *In re* O'Connor, 95 Fed. 943, 2 N. B. N. 90.

<sup>16</sup> As to liens on exempt property. see Sec. 413, *ante*.

<sup>17</sup> See authority to sue, Sec. 535, *post*.

<sup>55</sup> McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Frazee v. Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391; Hutchins v. Cantu (Tex. 1902), 66 S. W. 38.

<sup>56</sup> Dunn Salmon Co. v. Pillmore, 55 Misc. (N. Y.) 546, 106 N. Y. Suppl. 88.

his privies are not parties.<sup>57</sup> So the failure of the trustee to assert title to property covered by an attachment within four months of bankruptcy gives the bankrupt no rights superior to those of the attaching creditor.<sup>58</sup> Where an attachment is levied and the defendants become bankrupt, adverse claimants to the property are not entitled to it on the ground that the bankruptcy dissolved the attachment as the trustee is in privity with the attaching creditor.<sup>59</sup>

**§ 439. Bona fide purchaser protected.**

The act expressly protects the title obtained by such void levy, judgment, attachment or other lien of a *bona fide* purchaser for value without notice or reasonable cause for inquiry.<sup>60</sup>

The proviso in section 67*f* affects only a *bona fide* purchaser and not the parties who made the sale,<sup>61</sup> and does not apply to shield a sheriff who has assigned goods under an attachment.<sup>62</sup> Plaintiff in an attachment within four months, where judgment is rendered just before bankruptcy is not a *bona fide* purchaser, although by state statute the attaching creditor is to be deemed as against third persons a purchaser in good faith and for a valuable consideration of the property attached.<sup>63</sup>

**§ 440. Subrogation of trustee—Preserving liens for creditors.**

Judicial liens are not necessarily held null and void. The court may preserve them, if to destroy the lien would militate against the best interests of the estate.\*

<sup>57</sup> *Frazee v. Nelson*, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

<sup>58</sup> *Rochester Lumber Co. v. Locke*, 72 N. H. 22, 54 A. 705.

<sup>59</sup> *New Orleans Acid Fertilizer Co. v. Grissom*, 79 Miss. 662, 31 S. 336.

<sup>60</sup> B. A. 1898, Sec. 67*f*; *State Bank v. Monroe*, 109 Ill. App. 34, under sheriff's sale within four months.

One who buys with notice of a

prior general assignment was found not to be a *bona fide* purchaser, in *Brown v. Case*, 180 Mass. 45, 61 N. E. 279.

<sup>61</sup> *Stickney & Babcock Coal Co. v. Goodwin*, 95 Me. 246, 49 A. 1039, 85 Am. St. Rep. 408.

<sup>62</sup> *Jones v. Stevens*, 94 Me. 582, 48 A. 170.

<sup>63</sup> *In re Kaupisch Creamery Co.*, 107 Fed. Rep. 93, 5 Am. B. R. 790.

\* B. A. 1898, Secs. 67*b*, *c* and *f*.

A familiar example is where there are subordinate valid liens which would take precedence if the judicial lien be null and void.<sup>64</sup> Where the property passed to the trustee in any event there is no reason for preserving the lien.<sup>65</sup> It is possible that if the lien be avoided the whole property to which the lien attached might be exhausted by claims, which should justly be paid after the judicial lien.

In such cases the court may, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and be preserved by the trustee for the benefit of the estate.<sup>66</sup>

"This clause [section 67f] contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a lien thereon."<sup>67</sup> In other words, the trustee is subrogated to the rights of a particular creditor for the benefit of all the creditors. The court is authorized to order such conveyance as may be necessary to carry the purpose of this section into effect.

Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of

<sup>64</sup> *First National Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *Reardon v. Rock Island Plow Co.* (C. C. A. 7th Cir.), 168 Fed. Rep. 654, 94 C. C. A. 118, 22 Am. B. R. 26; *First Nat. Bank v. Guarantee Title & Trust Co.* (C. C. A. 3d Cir.), 178 Fed. Rep. 187, 101 C. C. A. 507, 24 Am. B. R. 330.

<sup>65</sup> *Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. Rep. 940, 22 Am. B. R. 803.

<sup>66</sup> B. A. 1898, Sec. 67f; *In re*

*Moore*, 107 Fed. Rep. 234, 6 Am. B. R. 175; *First National Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639, affirming (C. C. A. 4th Cir.), 133 Fed. Rep. 717, 66 C. C. A. 547, 13 Am. B. R. 281, affirming *In re Baird*, 126 Fed. Rep. 845, 11 Am. B. R. 435; *In re Merrow*, 131 Fed. Rep. 993, 12 Am. B. R. 615.

<sup>67</sup> *Brown, J.*, in *First National Bank v. Staake*, 202 U. S. 141, 146, 50 L. Ed. 967, 15 Am. B. R. 639.

the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.<sup>68</sup> Section 67*b* does not abate a suit by creditor's bill under which an equitable lien has been acquired and does not of itself transfer to the trustee the sole right to prosecute such bill.<sup>69</sup>

Subrogation to liens created within four months is also provided for under section 67*c* which has been sometimes thought to be in conflict with and therefore superseded by section 67*f*. The effect of both sections in the act has been fully considered by the circuit court of appeals for the third circuit.<sup>70</sup>

The trustee may intervene as plaintiff under section 67*b* without an order of the bankruptcy court,<sup>71</sup> but not if he is acting under section 67*f*.<sup>72</sup>

A trustee has been subrogated to a lien acquired by a general assignee for creditors.<sup>72\*</sup>

The trustee can not be subrogated to a lien on exempt property,<sup>73</sup> but may intervene on proving that part of the property covered by the lien was not exempt.<sup>74</sup>

<sup>68</sup> B. A. 1898, Secs. 67*b* and 67*f*; First Nat. Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re* New York Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615; Patten v. Carley (Sup. Ct. N. Y. App. Div.), 8 Am. B. R. 482; *In re* Beede, 138 Fed. Rep. 441, 14 Am. B. R. 697; Watschke v. Thompson, 85 Minn. 105, 7 Am. B. R. 504, where lien dissolved by adjudication.

<sup>69</sup> Taylor v. Taylor, 59 N. J. Eq. 86, 45 A. 440.

<sup>70</sup> Laning, J., in First Nat. Bank v. Guarantee Title & Trust Co. (C. C. A. 3d Cir.), 178 Fed. Rep. 187, 101 C. C. A. 507, 24 Am. B. R. 330.

<sup>71</sup> Patten v. Carley, 69 N. Y. App. Div. 423, 74 N. Y. Suppl. 993.

<sup>72</sup> First National Bank v. Guarantee Title & Trust Co., 178 Fed. 187, 101 C. C. A. 507, 24 Am. B. R. 330; Watsche v. Thompson, 85 Minn. 105, 88 N. W. 263, 7 Am. B. R. 504, order of bankruptcy court must be obtained and pleaded.

<sup>72\*</sup> *In re* Fish Bros. Wagon Co. (C. C. A. 8th Cir.), 164 Fed. Rep. 553, 90 C. C. A. 427, 21 Am. B. R. 149.

<sup>73</sup> *In re* Jackson, 116 Fed. Rep. 46, 8 Am. B. R. 594. As to lien on exempt property, see Sec. 413, *ante*.

<sup>74</sup> Jewett Bros. v. Huffman (N. Dakota, 1909), 13 Am. B. R. 738.



### § 441. Necessity of record of a lien.

A mortgage, conditional sale or other claim to property may be avoided as a lien for want of record if it would not have been a valid lien as against the claims of creditors.<sup>75</sup>

In such cases the trustee, prior to the amendment of 1910 was vested not only with the title of the bankrupt, but also the rights of the creditors at the date when his title accrues.<sup>76</sup>

As a general rule the failure to record or register a mortgage does not invalidate it as a lien, but merely postpones it to superior claims; thus, an unrecorded mortgage is subordinate to a subsequent mortgage which has been duly recorded, but it may be valid as to general creditors or antecedent creditors or subsequent creditors with notice.

The amendment of 1910, provided in section 8 that the trustee takes all the rights of a lien creditor over property in the custody of the bankruptcy court and the rights of judgment creditors over property not in the custody of the bankruptcy court.

The recording or registering laws of the several states are not alike. The effect of failing to record a security varies according to these statutes as construed by the local courts.<sup>77</sup>

<sup>75</sup> B. A. 1898, Sec. 67a. See also act of June 25, 1910, Secs. 8 and 11, 36 Stat. at L. 838.

<sup>76</sup> B. A. 1898, Sec. 47a, as amended June 25, 1910, 36 Stat. at L. 838; *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re Lukens*, 138 Fed. Rep. 188, 14 Am. B. R. 683; *In re New York Economical Printing Co.* (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615; *1st Nat'l Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re Beede*, 138 Fed. Rep. 441, 14 Am. B. R. 697.

<sup>77</sup> See Sec. 434, *ante*; *Bryant v. Swofford*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111; *York Mfg.*

*Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *In re International Mahogany Co.* (C. C. A. 2d Cir.), 147 Fed. Rep. 147, 78 C. C. A. 58, 16 Am. B. R. 797; *In re Shirley* (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 50 C. C. A. 252, 7 Am. B. R. 299; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437.

A contract by which the purchaser agrees to hold goods and their proceeds as collateral security for the purchase price, was held to be neither a mortgage nor a conditional sale. Under North Carolina decisions it was held to be a contract which creates a trust, and



It is necessary to consult the law as declared by the statutes and decisions of the state, which control in the particular case, to determine whether a mortgage or other lien is invalid for want of record as against creditors in such state. If so, it is invalid to the same extent in case of the bankruptcy of the mortgagor or lienor. The invalidity of liens for want of record depends upon the law of the state where the property is located.<sup>80</sup>

The right to cut and remove standing timber is regarded as an assignment which is valid without deed and record although incidentally it is a contract for an interest in land.<sup>81</sup>

#### **§ 442. Effect of unrecorded liens in various jurisdictions.<sup>82</sup>**

In some states an unrecorded mortgage or conditional sale contract is invalid as a lien, as against the claims of general creditors of the mortgagor or vendor.<sup>83</sup> In such states the owner of the unrecorded security ranks with and has no priority over the claims of the other creditors.

An agreement by a bankrupt that all its goods should be subject to a factor's lien in favor of the parties who ad-

therefore does not require to be registered. *Walter A. Wood & Co. v. Eubanks* (C. C. A. 4th Cir.), 169 Fed. Rep. 929, 95 C. C. A. 273, 22 Am. B. R. 307.

The Illinois statute which requires a mortgage to be recorded "as against the rights and interest of any third person," includes within the terms "third person" a simple contract creditor, and everybody else outside of the immediate parties to the instrument and their privies. *In re Beckhaus* (C. C. A. 7th Cir.), 177 Fed. Rep. 141, 100 C. C. A. 561, 24 Am. B. R. 380.

<sup>80</sup> *In re Greene*, 134 Fed. Rep. 137, 13 Am. B. R. 504; *In re Legg*, 96 Fed. Rep. 326; *In re Andrae Co.*, 117 Fed. Rep. 561, 9 Am. B. R. 135.

<sup>81</sup> *Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. Rep. 940, 22 Am. B. R. 803.

<sup>82</sup> See Statute, June 25, 1910, Sections 8 and 11, 36 Stat. at L. 838. See Sec. 372, *ante*.

<sup>83</sup> *In re Andrae Co.*, 117 Fed. Rep. 561, 9 Am. B. R. 135; *English v. Ross*, 140 Fed. Rep. 630, 15 Am. B. R. 370; *In re Lukens*, 138 Fed. Rep. 188, 14 Am. B. R. 683; *In re Montague*, 143 Fed. Rep. 428, 16 Am. B. R. 18; *Railton v. Chicago Title & Trust Co.*, 224 Ill. 485, 79 N. E. 600 (affirming 125 Ill. App. 617); *Gove v. Morton Trust Co.*, 96 N. Y. App. Div. 177, 89 N. Y. Supp. 247, as void against judgment creditors.

vanced money to carry on the business, was held to be a chattel mortgage, and therefore void for want of record under the state law. The court remarks that, "the fewer secret trusts or liens there are the better. It may fairly be presumed that, if they had been notified by the record of this document that the bankrupt had practically transferred everything to Blythe & Corr, the present creditors of the Textile company would not have extended credit to it."<sup>84</sup>

In some states an unrecorded mortgage or conditional sale contract is invalid as a lien only as against the claims of creditors who have actually seized the property under the legal process, as by levy of execution or an attachment.<sup>85</sup> Where property is sold, price paid and possession taken under a contract of sale, but the deed is not executed or recorded until after a judgment creditor levies on the property, the judgment creditor's rights are superior to those of the grantee under the unrecorded deed and they may be enforced by the trustee of the grantor.<sup>86</sup>

In some states a mortgage or conditional sale contract is invalid as a lien, as against the claims of subsequent contract creditors without notice.<sup>87</sup> It may be a valid lien as to the claims of antecedent creditors or subsequent creditors with notice. It has been held that where the assets of the bankrupt covered by such a mortgage were not sufficient to pay

<sup>84</sup> *In re* Southern Textile Co., (C. C. A. 2d Cir.), 174 Fed. Rep. 523, 98 C. C. A. 305, 23 Am. B. R. 172.

<sup>85</sup> *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *In re Beede*, 138 Fed. Rep. 441, 14 Am. B. R. 697; *In re Shirley* (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 50 C. C. A. 252, 7 Am. B. R. 299; *Asbury Park Building & Loan Association v. Shepherd* (N. J. Ch. 1901), 50 A. 65; *Hall v. Keating Implements & Machine Co.*, 33 Tex. Civ. App. 526, 77 S. W. 1054.

<sup>86</sup> *First Nat'l Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639.

<sup>87</sup> *Simmons v. Greer* (C. C. A. 4th Cir.), 174 Fed. Rep. 654, 98 C. C. A. 408, 23 Am. B. R. 443; *In re Ducker* (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 13 Am. B. R. 760; *In re Sewell*, 111 Fed. Rep. 791, 7 Am. B. R. 133; *In re Cannon*, 121 Fed. Rep. 582, 10 Am. B. R. 64; *In re Cavagnaro*, 143 Fed. Rep. 668, 16 Am. B. R. 320.

subsequent creditors, they take the whole fund to the exclusion of antecedent creditors.<sup>88</sup> The reason for this is that as the mortgage is valid as to the antecedent creditors, all claims of the antecedent creditors are extinguished by the mortgage, and as between the mortgagee and subsequent creditors, the rights of the latter must prevail.

Where the state law provides that creditors who become such between the date of the mortgage and the date of its record are not affected by it, such mortgagee is not entitled to share ratably with such creditors.<sup>89</sup> In some states a conditional sale or mortgage is valid without record.<sup>89\*</sup>

#### § 443. Fraudulent withholding from record.

The mere fact of failing to record a mortgage or conditional sale contract or to take possession of the property is not sufficient to render it invalid, but if the mortgagee or vendee withholds the instrument from record by a deliberate agreement for the purpose of aiding the credit of the mortgagor or vendor, or to allow the four months to run so as to defeat the provisions of the bankruptcy act relating to preferences and intending so to do when he took it, such acts constitute a fraud upon the creditors and render the mortgage or conditional sale contract invalid.<sup>90</sup>

Moreover, a failure to record an instrument, whether innocent or not, may be in effect a fraud on creditors who

<sup>88</sup> *In re Cannon*, 121 Fed. Rep. 582, 10 Am. B. R. 64.

<sup>89</sup> *Simmons v. Greer* (C. C. A. 4th Cir.), 174 Fed. Rep. 654, 98 C. C. A. 408, 23 Am. B. R. 443.

<sup>89\*</sup> *Bryant v. Swofford*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111; *In re McDonald*, 173 Fed. Rep. 99, 23 Am. B. R. 51.

<sup>90</sup> *Bennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Clayton v. Exchange Bank* (C. C.

A. 5th Cir.), 121 Fed. Rep. 630, 57 C. C. A. 656, 10 Am. B. R. 173; *Rogers v. Page*, 140 Fed. Rep. 596, 15 Am. B. R. 502, and 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *In re Duggan*, 182 Fed. Rep. 252, 25 Am. B. R. 105; *In re Noel*, 137 Fed. Rep. 694, 14 Am. B. R. 715; *In re Ewald & Brainard*, 135 Fed. Rep. 168, 14 Am. B. R. 267; *Texas Brewing Co. v. Mallette*, 28 Tex. Civ. App. 461, 67 S. W. 441.

extended credit on the faith of a clear title as disclosed by the record.<sup>91</sup>

"The mortgagee, by leaving the property in the possession of the bankrupt and withholding the mortgage from the record, invited others to deal with the bankrupt on the assumption of his ownership of an unencumbered title to the property conveyed. Whether those so dealing with him were actually deceived or not, is immaterial. The inevitable tendency was to mislead and deceive and the presumption must be indulged that they were misled to their injury \* \* \* as between the mortgagor and those dealing with and extending credit to the mortgagor subsequent to the date of the mortgage and prior to the recording of it, there is an obvious equity in favor of the latter."<sup>92</sup>

"The act is a national act. It practically supplants the state insolvency laws. We think it clear that Congress recognized the vast sweep of interstate commerce and meant to free interstate traders from the confusion and harassment attendant upon a multiplicity of variant local laws. Therefore the act in all its parts ought to be interpreted in a national view, doing away as far as possible with the variances in the local laws. To release an insolvent debtor from his debts is an act of grace. Through the whole law runs the clear purpose of extending grace only to honest debtors. Honesty, fairness, equity is the whole spirit of the law. Nothing is more abhorrent to equity than deceitful appearances covering secret preferences. So the diligent creditor who obtains security must not help the debtor to be dishonest, unfair, secretive; he can hold his security only on

<sup>91</sup> *In re* Southern Textile Co. (C. C. A. 2d Cir.), 174 Fed. 523, 98 C. C. A. 305, 23 Am. B. R. 172.

All persons who extended credit to the bankrupt, between the dates of the giving of the mortgages and their filing for record, have an equity superior to the mortgagee, as they will be presumed to have

extended credit on the faith of an unencumbered title as disclosed by the record. *Post v. Berry* (C. C. A. 8th Cir.), 175 Fed. Rep. 564, 99 C. C. A. 186, 23 Am. B. R. 699.

<sup>92</sup> *In re* Bothe (C. C. A. 8th Cir.), 173 Fed. Rep. 597, 97 C. C. A. 547, 23 Am. B. R. 151.

condition that he give his fellow-creditors a four months' opportunity to determine whether or not they will file a petition in bankruptcy against the debtor. The openness and fairness of the preferred creditor are made the terms upon which he may retain his preference."<sup>94</sup>

It should be observed that a failure to record an instrument or the recording of it within four months may render it invalid as a preference, provided the other elements necessary to constitute a preference exist.<sup>95</sup>

#### § 444. Taking possession equivalent to record.

The taking possession by a mortgagee under a chattel mortgage or conditional sale is equivalent to recording.

The effect of such taking possession is to be determined by the state law and the courts of bankruptcy will follow the decisions of the state courts as to the effect of such proceeding.<sup>96</sup> Where either by the terms of the unrecorded mortgage or by an understanding with the mortgagee, the mortgagor is permitted to sell the mortgaged goods in the ordinary course of trade, for his own benefit, the mortgage is fraudulent as to creditors who have fastened a lien upon the property before the mortgagee takes possession.<sup>97</sup> Where the insolvent made a bill of sale of horses and wagons for an express consideration of \$1.00 and on the same day the creditor made a lease of this same property to the debtor at a nominal rental, the transaction was held to be in effect a mortgage invalid for want of delivery.<sup>98</sup> A parol mort-

<sup>94</sup> *In re Beckhaus* (C. C. A. 7th Cir.), 177 Fed. Rep. 141, 100 C. C. A. 561, 24 Am. B. R. 380.

<sup>95</sup> As to the effect of failing to record, see Sec. 443, *ante*. As to the elements necessary to constitute a preference, see Sec. 494, *post*.

<sup>96</sup> *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Fisher v. Zollinger* (C.

C. A. 6th Cir.), 149 Fed. Rep. 54, 79 C. C. A. 76, 17 Am. B. R. 618; *In re Marine, etc., Dock Co.* (C. C. A. 2d Cir.), 144 Fed. Rep. 649, 75 C. C. A. 451, 16 Am. B. R. 325; *Cornelius v. Boling*, 18 Okl. 469, 90 P. 874 (immediate possession and delivery necessary).

<sup>97</sup> *Mattley v. Wolfe*, 175 Fed. Rep. 619, 23 Am. B. R. 673.

<sup>98</sup> *In re Beihl*, 176 Fed. Rep. 583, 23 Am. B. R. 905.

gage on goods in stock and to be acquired is valid and possession taken dates from the date of the mortgage in Vermont.<sup>99</sup>

#### § 445. Rights of trustee against unrecorded liens.

For a time the courts held that a trustee could avoid any lien for want of record, which was invalidated as to an attachment or execution creditor.<sup>1</sup>

This doctrine was founded upon the observation of the supreme court in *Mueller v. Nugent*,<sup>2</sup> "that the filing of the petition is a *caveat* to all the world and in effect an attachment and injunction." The bankruptcy proceedings were therefore in effect a seizure or attachment by all the creditors. The trustee representing them was held to succeed to their rights as creditors, having fastened upon the property by legal process. When the question was presented to the supreme court it decided that the trustee was not vested with such power.<sup>3</sup>

The effect of this decision was to protect secret liens good against the bankrupt, but ineffective against his creditors,<sup>4</sup> and to avoid this unfortunate result the amendment

<sup>99</sup> *Mower v. McCarthy*, 79 Vt. 142, 64 A. 578, 7 L. R. A. (N. S.), 418.

<sup>1</sup> *In re Ducker* (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 13 Am. B. R. 760; *In re Pekin Plow Co.* (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 50 C. C. A. 257, 7 Am. B. R. 369; *Chesapeake Shoe Co. v. Seldner* (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 58 C. C. A. 261, 10 Am. B. R. 466; *In re First Nat'l Bank* (C. C. A. 6th Cir.), 135 Fed. Rep. 62, 67 C. C. A. 536, 14 Am. B. R. 180; see *French v. White*, 78 Vt. 89, 18 Am. B. R. 905.

<sup>2</sup> 184 U. S. 1, 46 L. Ed. 405, 7 Am. B. R. 224.

<sup>3</sup> *York Mfg. Co. v. Cassell* (C. C. A. 6th Cir.), 201 U. S. 344, 50

L. Ed. 782, 15 Am. B. R. 633.

<sup>4</sup> *Putnam v. Loveland* (C. C. A. 1st Cir.), 155 Fed. Rep. 838, 84 C. C. A. 72, 19 Am. B. R. 18; *Claridge v. Evans*, 137 Wis. 218, 118 N. W. 198; *Cf. Hurley v. Atchison, Topeka & Santa Fe Railway*, 213 U. S. 126, 53 L. Ed. 729, 22 Am. B. R. 17; *Cf. Sexton v. Kessler & Co.*, 172 Fed. 535, 97 C. C. A. 161, 21 Am. B. R. 809, where an attempted pledge void for want of possession was upheld as a declaration of trust.

The evil of secret liens is commented on in *In re Southern Textile Co.* (C. C. A. 2d Cir.), 174 Fed. 523, 98 C. C. A. 305, 23 Am. B. R. 172.

of 1910, section 8, has given the trustee all the rights of a lien creditor as to property in the custody of the bankruptcy court and all the rights of a judgment creditor as to property not in its custody. In this way it is hoped proceedings in bankruptcy will give to creditors all the rights that creditors under the state law might have had if there had been no bankruptcy and from which they are debarred by the bankruptcy.<sup>5</sup>

<sup>5</sup> As to the effect of the amendment of 1910, see Sec. 372, *ante*.

One of the most important decisions under the present law is *York Manufacturing Company v. Cassell* (201 U. S. 344), wherein it was held that property covered by an unrecorded instrument, which would have been void in the state courts had the property been taken by an assignee or receiver or levied upon by attachment or execution, was not void where possession was taken by a receiver or trustee in bankruptcy, the supreme court holding that the trustee stood precisely in the bankrupt's shoes with regard to the unrecorded instrument, even though in the state courts had the seizure been made by an assignee in insolvency or receiver, or by the sheriff under execution or attachment, the unrecorded lien would have been void as against creditors. By this ruling the trustee in bankruptcy is held to be vested solely with the bankrupt's own title, except as to property fraudulently transferred and as to property which (within four months before the bankruptcy) has been seized by a creditor by legal process or voluntarily transferred to him by way of a preference.

"The trustee, under the present law, does not (except as to fraudulently transferred property) take the rights that a creditor under state law might have acquired, but only such as some creditor has actually acquired by levy of process, and then only in the event that such levy has occurred within four months before the bankruptcy and the lien of the levy (otherwise void under Section 67f) been preserved for the benefit of the trustee by order of court. In this way a distinct advantage is given in bankruptcy to the holders of unrecorded liens. The creditors' hands meanwhile are tied from making any levy, because the separate rights of the creditors have become vested in the trustee for all; besides which, as to property already in the custody of the bankruptcy court, of course individual creditors would be in contempt of court should they levy thereon. Thus the evil of secret liens has continued. It is this evil and the injustice worked upon creditors who rely upon the debtors' apparent ownership against which the bankruptcy law has set its face.

"The proposed amendment, whilst correcting the defect named, at the same time carefully guards

**§ 446. Whether rights under unrecorded liens are fixed at the date of the filing of the petition or of the adjudication.<sup>6</sup>**

Whether the date, at which the rights of creditors as to unrecorded liens are fixed, is the date the petition is filed or the date of adjudication, has not been determined by the courts. The title of the trustee vests as of the date of the adjudication,<sup>7</sup> but he takes the class of property which is ordinarily subjected to mortgage and other liens, owned by the bankrupt at the date the petition in bankruptcy is filed.<sup>8</sup> It is fair to conclude that the date of filing the petition in bankruptcy is the date at which the rights of the bankrupt and the creditors are fixed with respect to record.

**§ 447. Liens obtained by judgment lien, attachment, etc.**

Whether a judicial lien may be annulled or dissolved by bankruptcy proceedings depends upon the time when it was created.

the rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas quite distinct: First, that as to the property in the custody of the bankruptcy court, the bankruptcy trustee shall be considered to have the same title as a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; and, second, that as to property not in the custody of the bankruptcy court the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In

this way, in effect, proceedings in bankruptcy will give to creditors all the rights that creditors under the state law might have had had there been no bankruptcy and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee." Report of the Committee on Judiciary on the amendment of 1910.

<sup>6</sup> As to the effect of liens created after the filing of the petition, see Sec. 451, *post*. As to the effect of discharge on judgments obtained after the filing of the petition, see Sec. 758, *post*.

<sup>7</sup> B. A. 1898, Sec. 70a.

<sup>8</sup> B. A. 1898, Sec. 70a, clause 5.



Section 67*f* of the bankrupt act applies only to such liens as are created within four months prior to the filing of the petition in bankruptcy.<sup>1</sup>

It is essential to bring a case within the prohibition that it appear that the lien was obtained against a person who was insolvent at the time. If it does not so appear the lien is valid.<sup>2</sup> It is not sufficient that the levy caused insolvency.<sup>3</sup>

Liens obtained by judgment, levy, attachment, or otherwise, within the four months' period may be dissolved or avoided.<sup>4</sup> Those which are obtained prior to four months before the petition in bankruptcy is filed are valid and enforceable and are so recognized by the courts of bankruptcy.<sup>14</sup>

<sup>1</sup> In *Metcalf v. Barker*, 187 U. S. 165, 174, 47 L. Ed. 122, 9 Am. B. R. 36, the supreme court say: "It is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise."

<sup>2</sup> *Simpson v. Van Etten*, 108 Fed. Rep. 199, 6 Am. B. R. 204; *W. S. Danby Millinery Co. v. Dogan*, 47 Tex. Civ. App. 323, 105 S. W. 337, where lien created within four months was valid as bankrupt was then solvent. *Cf.* effect of amendatory act of 1910, Sec. 11 on voluntary liens. Under the amendment the insolvency may be either at the time of the transfer, or of the entry of judgment or of the record.

<sup>3</sup> *Chicago Title & Trust Co. v. Roebing*, 107 Fed. Rep. 71, 5 Am. B. R. 368.

<sup>4</sup> *Clarke v. Larremore*, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476, affirming *In re Kenney*, 105 Fed. Rep. 897, 5 Am. B. R. 355; *In re Darwin* (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 54 C. C. A. 581, 8 Am. B. R. 703; *In re Richards* (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 37 C. C. A. 634, 3 Am. B. R. 145; *In re Wilkes*, 112 Fed. Rep. 975, 7 Am. B. R. 574; *In re Hymes Buggy & Implement Co.*, 130 Fed. Rep. 977, 12 Am. B. R. 477; *In re Haynes*, 123 Fed. Rep. 1001, 10 Am. B. R. 715; *In re Tune*, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re Kemp*, 101 Fed. Rep. 689, 4 Am. B. R. 242; *Hobbs v. Thompson*, 160 Ala. 360, 49 So. 787, garnishment; *In re C. H. Arnold*, 94 Fed. Rep. 1001, 2 Am. B. R. 180, attachment.

<sup>14</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 36; *Pickens v. Roy*, 187 U. S. 177, 47

The adjudication within four months of an attachment dissolved the lien of it; the plaintiff was bound to take notice of the adjudication though not pleaded, and a judgment ordering levy and sale of the property was beyond the jurisdiction of the court and void.<sup>15</sup>

An attachment obtained more than four months before the filing of the petition is valid although the attachment was made while the debtor was insolvent to the knowledge of both debtor and creditor and the debtor intentionally suffered the judgment to be entered against him by default. After the attachment was four months old the creditors became secured creditors of a different class from other unsecured creditors and hence the effect is not to enable one creditor to obtain more of the debtor's property than another of the same class within section 60.<sup>16</sup>

An attachment taken out within four months is void although the action is commenced before that time.<sup>17</sup>

#### § 448. "Obtained through legal proceedings."

The phrase "legal proceedings" includes any proceeding in a court of justice by which a party pursues a remedy which the law affords him. As used in section 67*f* of the bankrupt act it obviously refers to the use of judicial process.<sup>1</sup>

L. Ed. 128, 9 Am. B. R. 47; *In re* Blumberg, 94 Fed. Rep. 476, 1 Am. B. R. 633; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; *Owen v. Brown* (C. C. A. 8th Cir.), 120 Fed. Rep. 812, 57 C. C. A. 180, 9 Am. B. R. 717; *Snyder v. Smith*, 185 Mass. 58; *In re* Snell, 125 Fed. Rep. 154, 11 Am. B. R. 35; *Tucker v. Denico*, 26 R. I. 560; *Hillyer v. LeRoy*, 179 N. Y. 369; *Camp v. Young*, 119 Ga. 981; *Pratt v. Christie*, 95 N. Y. App. Div. 282, 88 N. Y. Suppl. 585; *Francis Batchelder Co. v. Wedge*, 80 Vt. 353, 67 A. 828, 19 Am. B. R. 268; *In re* Alver-

son Bros. (Referee), 5 Am. B. R. 855; *Pepperdine v. Bank of Seymour*, 10 Am. B. R. 570.

<sup>15</sup> *D. C. Wise Coal Co. v. Columbia Lead & Zinc Co.*, 123 Mo. App. 249, 100 S. W. 680.

<sup>16</sup> *Hurlbutt v. Brown*, 72 N. H. 235, 55 A. 1046.

<sup>17</sup> *In re* Higgins, 97 Fed. Rep. 775, 3 Am. B. R. 364; *contra*, *In re* De Lue, 91 Fed. Rep. 510, 1 Am. B. R. 387.

<sup>1</sup> *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126.

It is not confined to any particular form of writ, execution or attachment. It has been applied to proceedings in attachment<sup>2</sup> and garnishment,<sup>3</sup> to a levy of execution,<sup>4</sup> to a lien created by a judgment,<sup>5</sup> to a seizure of property by a vendor to subject it to the payment of the purchase money,<sup>6</sup> or by a mortgagee through an officer under a mortgage covering after-acquired chattels,<sup>7</sup> to a seizure of property on a writ of replevin,<sup>8</sup> and to proceedings in aid of execution.<sup>9</sup>

Liens created by statute which may be enforced by legal proceedings are not affected by section 67f of the bankrupt act. A mechanic's lien for labor or materials<sup>10</sup> or a livery keeper's lien<sup>11</sup> is not dissolved although legal proceedings are taken within the four months' period to enforce the same.

#### § 449. Time lien attaches depends on state law.

The time a lien attaches depends upon the state law.<sup>18</sup>

The general rule is that a lien is created whenever by the law and the usage of the state the charge created by process of

<sup>2</sup> *In re* Tune, 115 Fed. Rep. 906, 8 Am. B. R. 285; *In re* Moore, 107 Fed. Rep. 234, 6 Am. B. R. 175; *Thompson v. Ragan*, 25 Ky. Law Rep. 1684; *Goodenough Mercantile Co. v. Galloway*, 48 Oreg. 239, 84 P. 1049.

Attachment in state courts, as well as federal courts, is covered by the bankruptcy act. *Wood v. Carr*, 24 Ky. L. Rep. 2144, 73 S. W. 762.

<sup>3</sup> *In re* McCartney, 109 Fed. Rep. 629, 6 Am. B. R. 367; *In re* Beals, 116 Fed. Rep. 530, 8 Am. B. R. 639.

<sup>4</sup> *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 54 C. C. A. 581, 8 Am. B. R. 703.

<sup>5</sup> *In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 37 C. C. A. 634, 3 Am. B. R. 145; *Mohr & Sons v. Mattox*, 120 Ga. 962.

<sup>6</sup> *In re* Wilkes, 112 Fed. Rep. 975, 7 Am. B. R. 574.

<sup>7</sup> *In re* Ball, 123 Fed. Rep. 164, 10 Am. B. R. 564.

<sup>8</sup> *In re* Haynes, 123 Fed. Rep. 1001, 10 Am. B. R. 715; *In re* Hymes Buggy & Imp. Co., 130 Fed. Rep. 977, 12 Am. B. R. 477.

<sup>9</sup> *Rodgers & Son v. Forbes & Schoen*, 23 Ohio Cir. Ct. Rep. 438.

<sup>10</sup> *In re* Emslie (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126; *Fehling v. Goings*, 67 N. J. Ch. 375, 58 Atl. Rep. 642, 13 Am. B. R. 154; *Holland v. Cunniff*, 96 Mo. App. 67, 69 S. W. 737. As to Mechanics' Liens, see further Sec. 467.

<sup>11</sup> *In re* Pratesi, 126 Fed. Rep. 588, 11 Am. B. R. 319; *In re* Mero, 128 Fed. Rep. 630, 12 Am. B. R. 171.

<sup>18</sup> *In re* Darwin (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 54 C. C. A. 581, 8 Am. B. R. 703; *In re* Blair, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re* Johnson, 108 Fed.

law becomes fixed, fastened to the property itself, so as to make it specifically liable for the debt. In various states the property becomes so charged at different stages in the proceedings, as by the rendition of judgment, by the delivery of the execution to the sheriff, by the commencement of the levy or it may relate back to the beginning of the suit or the first day of the term at which the judgment was rendered.<sup>19</sup>

**§ 450. Creation of lien and not enforcement must be within four months.**

It is essential to invalidate a judgment, levy, attachment or other lien under section 67*f* of the bankrupt act that a lien be created through legal proceedings, which may be had within the four months' period. It is not sufficient that merely a judgment or decree be obtained or judicial process issued and served.

It has been expressly ruled by the supreme court that "a judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute which is plainly confined to judgments creating liens."<sup>20</sup> Thus

Rep. 373, 6 Am. B. R. 202; *In re Wilkes*, 112 Fed. Rep. 975, 7 Am. B. R. 574; *London Guaranty & Accident Co. v. Mossness*, 108 Ill. App. 440.

<sup>19</sup> *In re Mencke v. Rosenberg*, 202 Penn. St. Rep. 131, 9 Am. B. R. 373, it was held that a *testatum fi fa* issued within four months on a judgment entered prior to that time was avoided by Sec. 67*f*. *In re Darwin* (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 54 C. C. A. 581, 8 Am. B. R. 703, it was held that a lien of execution could not be relating back to the beginning of the suit antedate the date of acquiring the property seized. In *Waller v. Best*, 3 How. 111, 11 Am. B. R. 518, a lien was held to attach under

the laws of Kentucky upon the delivery of the writ to the sheriff.

*Voyles v. Parker*, 4 Fed. Rep. 210, 9 Biss. 326, where the lien was held to relate back to the beginning of a suit under a local statute.

In *Reed v. McIntyre*, 98 U. S. 507, 25 L. Ed. 171, it was held that a levy on the property of a bankrupt after it had been conveyed to an assignee for the benefit of creditors did not constitute a valid lien, because the title to the property had passed out of the bankrupt before the levy.

<sup>20</sup> *Metcalf v. Barker*, 187 U. S. 165, 174, 47 L. Ed. 122, 9 Am. B. R. 36.

it has been held that judgments to enforce a lien created by the commencement of a judgment creditor's suit,<sup>21</sup> or an attachment lien,<sup>22</sup> or a lien created by garnishment,<sup>24</sup> or by a judgment,<sup>25</sup> or otherwise valid liens existing prior to the four months' period are not affected by an adjudication in bankruptcy. It is equally clear that a judgment to foreclose a valid mortgage given prior to the four months' period would not be invalidated by bankruptcy of the mortgagor,<sup>26</sup> although the judgment was obtained within the four months' period because these liens are not created, but are merely enforced, by the legal proceedings.

An execution levied within four months of bankruptcy upon a judgment obtained prior to that period is annulled by section 67f,<sup>27</sup> but not where the judgment so obtained created a lien on the property of the debtor.<sup>28</sup>

<sup>21</sup> *Metcalf v. Barker*, 187 U. S. 165; 47 L. Ed. 122, 9 Am. B. R. 36; *Pickens v. Roy*, 187 U. S. 177, 47 L. Ed. 128, 9 Am. B. R. 47; *Taylor v. Taylor*, 59 N. J. Eq. 84, 4 Am. B. R. 211; *Frazier v. Southern L. & T. Co.* (C. C. A. 4th Cir.), 99 Fed. Rep. 707, 40 C. C. A. 76, 3 Am. B. R. 710; *Doyle v. Heath*, 22 R. I. 213, 4 Am. B. R. 705; *Nat'l Bank v. Hobbs*, 118 Fed. Rep. 626, 9 Am. B. R. 190; *Snyder v. Smith*, 185 Mass. 58.

The words "all judgments" in Sec. 67f mean "all judgment liens." So where a lien was created by the filing of a creditor's bill more than four months before bankruptcy, a judgment rendered thereon within the four months is valid. *Doyle v. Heath*, 22 R. I. 213, 47 A. 213.

<sup>22</sup> *In re Snell*, 125 Fed. Rep. 154, 11 Am. B. R. 35; *In re Beaver Coal Co.*, 110 Fed. Rep. 630, 6 Am. B. R. 404; *In re Blair*, 108 Fed. Rep. 529, 6 Am. B. R. 206; *In re Koslowski*, 153 Fed. Rep. 823, 18 Am. B. R. 723; *Hurlbutt v. Brown*, 72 N. H. 235, 55 A. 1046.

<sup>24</sup> *Armour Packing Co. v. Wynn*, 119 Ga. 683, 46 S. E. 865. Garnishment held valid in *Bank of Commerce v. Elliott*, 109 Wis. 648, 6 Am. B. R. 409; *In re Swift*, 111 Fed. Rep. 503, 7 Am. B. R. 117.

Garnishment held invalid in *In re McCartney*, 109 Fed. Rep. 629, 9 Am. B. R. 367; *In re Beals*, 116 Fed. Rep. 530, 8 Am. B. R. 639.

As to garnishment, see further *infra*, Sec. 462, *post*.

<sup>25</sup> *Owen v. Brown* (C. C. A. 6th Cir.), 120 Fed. Rep. 812, 57 C. C. A. 180, 9 Am. B. R. 717; *Hillyer v. LeRoy*, 179 N. Y. 369.

<sup>26</sup> *Reed v. Equitable Trust Co.*, 115 Ga. 780, 8 Am. B. R. 242; see further *infra*, Sec. 470, *post*.

<sup>27</sup> *In re Darwin* (C. C. A. 6th Cir.), 117 Fed. Rep. 407, 54 C. C. A. 581, 8 Am. B. R. 703; *Mencke v. Rosenberg*, 202 Penn. St. Rep. 131, 9 Am. B. R. 323.

<sup>28</sup> *Hillyer v. LeRoy*, 179 N. Y. 369.

### § 451. Lien created after the filing of the petition.

Section 67*f* does not apply to judgments, levies or attachments obtained after the petition is filed.<sup>29</sup>

The reason for this is that it is not within the four months' period specified in the act and also that no lien can be created upon the property of the bankrupt by such proceedings after the petition is filed.<sup>30</sup> Such property passes to the trustee unaffected by the legal proceedings<sup>31</sup> on the adjudication.<sup>32</sup>

### § 452. Discharge of liens.

The trustee of course succeeds to the rights of the bankrupt where liens on his property have been released or discharged,<sup>33</sup> and may have rights against a lienor who sur-

<sup>29</sup> *In re Engle*, 105 Fed. Rep. 893, 5 Am. B. R. 372; *Kinmouth v. Braeutigam*, 63 N. J. Eq. 103, 10 Am. B. R. 83; *Kinmouth v. Braeutigam*, 4 Am. B. R. 344; *St. Cyr v. Daignault*, 103 Fed. Rep. 854, 4 Am. B. R. 638; *In re Duble*, 117 Fed. Rep. 794, 9 Am. B. R. 121; *State Bank v. Cox* (C. C. A. 7th Cir.), 143 Fed. Rep. 91, 74 C. C. A. 285, 16 Am. B. R. 32.

<sup>30</sup> See cases cited in note 29, above.

<sup>31</sup> On the filing and adjudication under a voluntary petition, the money due a contractor, a bankrupt, was in *custodia legis*, and liens by materialmen and mechanics could not thereafter be created against it under state law. *Garetson v. Clark*, N. J. Ch. 1904, 57 A. 414.

<sup>32</sup> An action in replevin was properly continued in the state court, where it was begun after the filing of an involuntary petition but before the adjudication. Title only passed on the adjudication, and the state court, having been first to obtain possession, retained jurisdic-

tion. *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641, 74 S. W. 878.

<sup>33</sup> *In re Cullen*, 176 Fed. Rep. 463, 23 Am. B. R. 793; *In re Thackara Mfg. Co.*, 140 Fed. Rep. 126, 15 Am. B. R. 258, in Pennsylvania the lien was abandoned by allowing the execution to be held by the sheriff for several months without action while the debtor was paying other indebtedness to the creditor. *In re Klapholz & Brien*, 113 Fed. Rep. 1002, 7 Am. B. R. 703, lien lost by mixing property covered; see *Long v. Gump* (C. C. A. 6th Cir.), 144 Fed. Rep. 824, 75 C. C. A. 554, 75 C. C. A. 354, 16 Ant. B. R. 501, where lien not lost by new mortgage.

Where creditors were not misled by allowing a mortgage which has been discharged to remain on record, they can not object to other provisions of the contract, as to the right of another creditor to reimbursement out of the proceeds of the farm. *In re McDougall*, 175 Fed. Rep. 400, 23 Am. B. R. 762.

renders his security to aid the bankrupt. For example, where the creditor held a mortgage as security and voluntarily releases it in order that the bankrupt may transfer and sell the property, where the proceeds of the sale are used in part to pay debts upon which the creditor was liable as surety, the creditor is chargeable with the amount lost to the estate by reason of the voluntary release, which consists in the proceeds of the sale which were not used to pay debts.<sup>35</sup>

A valid mortgage may be extinguished by accepting part payment of the debt and releasing the remainder so that it can not be asserted subsequently in bankruptcy proceedings.<sup>36</sup>

Proving a claim on a note does not destroy the right to enforce an equitable lien on the land held as security.<sup>37</sup>

### § 453. Enforcement of liens by the lienor.<sup>38</sup>

The holder of a valid lien may enforce it in the state court,<sup>39</sup> as by selling under attachment.<sup>40</sup>

<sup>35</sup> *In re Stoddard Bros. Lumber Co.*, 169 Fed. Rep. 190, 22 Am. B. R. 435.

<sup>36</sup> *In re Thompson* (C. C. A. 2d Cir.), 128 Fed. Rep. 575, 63 C. C. A. 217, 11 Am. B. R. 719. See *In re Merrill & Baker*, 162 Fed. 590, 19 Am. B. R. 210, mortgage discharged *pro tanto* by payment to the bankrupt who was the agent of the mortgagee.

<sup>37</sup> *Eisman v. Whalen*, 39 Ind. App. 350, 79 N. E. 514, 1072.

<sup>38</sup> Foreclosure of mortgage, see *supra*, Sec. 470, *post*.

<sup>39</sup> *Murphey v. Brown*, 12 Ariz. 268, 100 P. 801; *Smith v. Meisenheimer*, 20 Ky. L. Rep. 954, 47 S. W. 1087, 104 Ky. 753; *Schall v. Kinsella*, 117 La. 687, 42 S. 221; *Meyers v. Smith*, 122 Mo. App. 61, 98 S. W. 104; *Hillyer v. Le Roy*, 84 N. Y. App. Div. 129, 82 N. Y. Suppl. 84, 179 N. Y. 369, 72 N. E.

237, 103 Am. St. Rep. 919; *Beall v. Walker*, 26 W. Va. 741. Where the trustee in bankruptcy disclaims any interest in property the state court retains jurisdiction. *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. 550.

<sup>40</sup> *Wakeman v. Throckmorton*, 74 Conn. 616, 51 Atl. 554; *Sample v. Beasley* (C. C. A. 5th Cir.), 158 Fed. Rep. 607, 85 C. C. A. 429, 20 Am. B. R. 164 (5th Cir.); *In re United States Graphite Co.*, 161 Fed. 583, 20 Am. B. R. 280.

When a sale of attached property was made under a state statute as perishable or likely to be lost, the purchaser takes as a *bona fide* purchaser under Sec. 67*f*, and the trustee must pursue the proceeds of the sale, though made without notice. *Jones v. Springer*, 15 N. M. 98, 103 P. 265.

Or a special judgment to bind a surety under an attachment may be issued,<sup>42</sup> or the lienor may act under the terms of the instrument.<sup>44</sup>

A sale under a power of sale contained in a pledge of securities was upheld where made after the filing of the petition and before the adjudication. The court remarks that under section 70a the trustee takes title only as of the date of the adjudication, that the act was never intended to interfere with the remedies of lienors. Section 57h gives the court power to interfere only where the securities have not been disposed of by the creditor in accordance with his contract.<sup>45</sup>

Where the bankruptcy court has possession it may order a sale and pay the liens from the proceeds of the sale,<sup>46</sup> but it can not without notice take the money for the general creditors.<sup>47</sup>

Where a lienor comes into a court of bankruptcy to enforce his lien is properly chargeable with the costs appropriate to such enforcement, but with no other or for their costs.<sup>48</sup>

<sup>42</sup> *Stickney v. Babcock Coal Co. v. Goodwin*, 95 Me. 246, 49 A. 1039, 85 Am. St. Rep. 408; *American Chemical Co. v. Huntington*, 99 Me. 361, 59 A. 515; *C. D. Smith & Co. v. Lacey*, 86 Miss. 295, 109 Am. St. Rep. 707, 38 S. 311.

Where an attachment creditor has been given bond by the bankrupt, he may be allowed by the bankruptcy court to proceed to judgment, but not to take out execution, merely for the purpose of fulfilling the condition of the bond and so perfecting his right against the surety. *In re Maaget*, 173 Fed. Rep. 232, 23 Am. B. R. 14. See further

<sup>44</sup> *In re Mayer, Leslie & Baylis* (C. C. A. 2d Cir.), 157 Fed. Rep. 836, 85 C. C. A. 200, 19 Am. B. R.

356. Foreclosure of mortgage, see Sec. 470, *post*.

<sup>45</sup> *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1.

<sup>46</sup> *In re Gordon*, 115 Fed. Rep. 445, 8 Am. B. R. 255; *In re Williams Est.* (C. C. A. 9th Cir.), 156 Fed. 934, 84 C. C. A. 434, 19 Am. B. R. 389.

<sup>47</sup> *In re Clark Coal & Coke Co.*, 173 Fed. Rep. 658, 22 Am. B. R. 843.

<sup>48</sup> *In re Williams Estate* (C. C. A. 9th Cir.), 156 Fed. Rep. 932, 84 C. C. A. 434, 19 Am. B. R. 389; *In re Utt* (C. C. A. 7th Cir.), 105 Fed. Rep. 754, 5 Am. B. R. 383; *In re Allison Lumber Co.*, 137 Fed. Rep. 643, 14 Am. B. R. 78; *McNair v. McIntyre* (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 7 Am. B. R. 638.



**§ 454. Admiralty lien.**

There is a class of maritime liens for materials and supplies furnished to vessels. Where such a lien exists a court of bankruptcy will enforce it with the same effect as it would have in admiralty.<sup>1</sup>

A court of bankruptcy may also enforce a lien for supplies and materials furnished to a vessel, founded upon a state statute, and not of a strictly maritime character.<sup>2</sup>

The court of bankruptcy may permit a court of admiralty to have possession of vessels for the purpose of enforcing such liens.<sup>2\*</sup>

**§ 455. Assignment or lien on future earnings.**

An assignment of sums to be earned under an existing contract,<sup>3</sup> or of wages to be earned by virtue of an existing employment,<sup>5</sup> is valid and is protected by section 67*d* as to wages earned up to the date of the filing of the petition.

<sup>1</sup> *The Ironsides*, No. 7069 Fed. Cas., 4 Biss. 518; *In re Scott*, No. 12517 Fed. Cas., 1 Abb. U. S. 336; *In re Kirkland*, No. 7842 Fed. Cas. 12 Am. Law. Reg. 300.

<sup>2</sup> *In re Scott*, No. 12517 Fed. Cas., 1 Abb. U. S. 336. This principle is also recognized in *The Edith*, 94 U. S. 518, 24 L. Ed. 167; *The Belfast*, 7 Wall. 624, 19 L. Ed. 266; *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74.

<sup>2\*</sup> *In re Hughes*, 170 Fed. Rep. 809, 22 Am. B. R. 303; *Matter of Hudson Oil & Supply Co.*, 214 U. S. 487, 53 L. Ed. 1057; *In re McWilliams*, 214 U. S. 488, 53 L. Ed. 1057.

<sup>3</sup> *In re Cincinnati Iron Store Co.* (C. C. A. 6th Cir.), 167 Fed. Rep. 486, 93 C. C. A. 122; *Johnson v. Donohue*, 113 Tenn. 446, 83 S. W. 360.

Where a partnership made an assignment of all its past and future book accounts as security for present and future indebtedness, and one partner dies, the assignee has no right to accounts created after the death of the partner. *First Nat. Bank v. Guarantee & Trust Co.* (C. C. A. 3d Cir.), 178 Fed. Rep. 187, 101 C. C. A. 507, 24 Am. B. R. 330.

<sup>5</sup> *Mallin v. Wenham*, 209 Ill. 252; *Wabash R. Co. v. Meyer*, 119 Ill. App. 104; *Citizens Loan Association v. Boston & Maine Railroad*, 196 Mass. 528, 82 N. E. 696; *contra*, *In re West*, 128 Fed. 205, 11 Am. B. R. 782; *In re Home Discount Co.*, 147 Fed. 538, 17 Am. B. R. 168; *Leitch v. Northern Pacific Railroad*, 95 Minn. 35.

So a lien created by legal proceedings under statute on future wages may have priority over the rights of general creditors up to the date of the filing of the petition.<sup>6</sup>

Where a judgment creditor obtains an order under the statute that a percentage of the salary of the debtor shall be paid to him, this lien on the salary is discharged as to salary earned after the adjudication where the bankrupt obtains his discharge and the execution was for a debt covered thereby. In this case the order was served within one month before the adjudication.<sup>7</sup>

Any wages or salary due to the bankrupt at the date of filing his petition belong to the trustee provided the bankrupt has made no claim for exemption and the judgment creditor must be enjoined from collecting any part of those wages but a bankrupt should not be protected from garnishment complete before petition filed, levied as execution upon exempt property, and therefore the bankrupt will not be protected by injunction from a garnishment on his wages at the suit of a judgment creditor.<sup>8</sup>

An order by the employe accepted by the employer directing the employer to pay wages to the creditor of the employe operates as an assignment and is of no higher dignity than the debt it was given to secure and is avoided by the employe's discharge.<sup>9</sup>

#### § 456. Attachments.

Attachments will be found considered under sections 437 and 447, *ante*.

#### § 457. Attorney's lien.

A valid attorney's lien will be upheld in bankruptcy.<sup>10</sup>

<sup>6</sup> *Mass v. Kuhn*, 130 N. Y. App. Div. 68, 114 N. Y. Suppl. 444; *In re Sims*, 176 Fed. Rep. 645, 23 Am. B. R. 899, to date of bankruptcy.

<sup>7</sup> *In re Ludeke*, 171 Fed. Rep. 292, 22 Am. B. R. 467.

<sup>8</sup> *In re Driggs*, 171 Fed. Rep. 897, 22 Am. B. R. 621.

<sup>9</sup> *Levi v. Loevenhart & Co.* (Ky. 1910), 127 S. W. 748.

<sup>10</sup> *In re Baxter* (C. C. A. 2d Cir.), 154 Fed. Rep. 22, 81 C. C. A.

**§ 458. Auctioneer's lien.**

The lien of an auctioneer may be respected in bankruptcy.<sup>11</sup>

**§ 459. Creditor's bill.**

The lien created by a creditor's bill is valid when four months old<sup>12</sup> and otherwise is void,<sup>13</sup> as it is a lien "by legal proceedings."<sup>14</sup>

**§ 460. Equitable lien.<sup>15</sup>**

An equitable lien enforceable against the trustee in bankruptcy may be created<sup>16</sup> by agreement,<sup>17</sup> to give security<sup>19</sup> on goods to be manufactured<sup>22</sup> or by assignment.<sup>24</sup>

355, 18 Am. B. R. 450; *In re Pennell*, 159 Fed. Rep. 500, 18 Am. B. R. 909; *Matter of Brown & Fleming Co.*, 21 Am. B. R. 662 (Referee); *Kneeland v. Pennell*, 54 Misc. (N. Y.) 43, 104 N. Y. Suppl. 498, 18 Am. B. R. 538. See *In re S. Ah Mi*, 18 Am. B. R. 138 (Hawaii).

<sup>11</sup> An auctioneer who takes property for sale should be given an opportunity to prove that he had a lien thereon. *In re Corn* (C. C. A. 2d Cir.), 179 Fed. 841, 103 C. C. A. 384, 24 Am. B. R. 681.

<sup>12</sup> *Metcalf v. Barker*, 187 U. S. 165, 47 L. Ed. 122, 9 Am. B. R. 35; *Schoenthaler v. Roskam*, 107 Ill. App. 427; *Ninth National Bank v. Moses*, 39 Misc. (N. Y.) 664, 80 N. Y. Suppl. 617; *Doyle v. Heath*, 22 R. I. 213, 47 A. 213.

<sup>13</sup> *Leseure v. Weaver*, 108 Ill. App. 616.

<sup>14</sup> *In re Potee Brick Co.*, 179 Fed. 525.

<sup>15</sup> Property held by bankrupt as trustee. See *ante*, Sec. 408. Pledge distinguished from equitable liens. See Sec. 476, *post*.

<sup>16</sup> *Crosby v. Ridout*, 27 App. D. C. 481; *Eisman v. Whalen*, 39 Ind. App. 350, 79 N. E. 514, 1072, against land.

<sup>17</sup> *Duplan Silk Co. v. Spencer*, 115 Fed. Rep. 689, 8 Am. B. R. 367. See, however, *Mathews v. Hardt*, 79 N. Y. App. Div. 570, 80 N. Y. Suppl. 462 (1902), 37 Misc. 653, affirmed, 76 N. Y. Suppl. 134.

An equitable lien is created where a bank, to enable the bankrupt to proceed with the manufacture of a car contracted for, advanced the full price of the contract to the bankrupt, giving notice of the advancement to the vendee, who promised to pay the bank, and when the vendee refuses the car, the bank may take and hold it for its lien created beyond the four months' period. *In re Pittsburg Industrial*

An agreement to pay out of certain property may be insufficient to create even an equitable lien.<sup>26</sup> In a recent case the

Iron Works, 179 Fed. 151, 25 Am. B. R. 221.

<sup>19</sup> Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. Rep. 940, 22 Am. B. R. 803; *In re* Automobile Livery Service Co., 176 Fed. 792, 23 Am. B. R. 799.

An agreement by a bankrupt to secure a creditor "by the goods themselves" will be carried out in equity, although the agreement is only evidenced by a delivery of an itemized account and assignment, together with a bill of lading and the truckman's receipt. The creditor under such circumstances is entitled to retain the proceeds and have his claim allowed for the balance. *In re* Levin, 173 Fed. Rep. 119, 21 Am. B. R. 665.

Where a bank loans money to a bankrupt to buy cattle on his verbal promise to give it a lien on the proceeds from the sale of those cattle, this creates a lien enforceable in bankruptcy. *Gardner v. Planters' National Bank* (Tex. 1909), 118 S. W. 1146. The contract was more than four months before bankruptcy and the payment within four months.

<sup>22</sup> *In re* Liberty Silk Co., 152 Fed. Rep. 844, 18 Am. B. R. 582; *In re* Muncie Pulp Co. (C. C. A. 2d Cir.), 151 Fed. Rep. 732, 81 C. C. A. 116, 18 Am. B. R. 56 (timber uncut).

An agreement that the creditor should have a present security upon property sold to be manufactured into lumber constituted an equitable lien which attended the property, the logs, and the lumber manufac-

tured from such logs as "equity looks upon things agreed to be done as actually performed." The creditor's lien attends the funds in the hands of the trustee in bankruptcy, and the attachment of another creditor was rendered void by bankruptcy where no attempt was made to preserve it for the estate. *Goodnough Mercantile & Stock Co. v. Galloway*, 171 Fed. Rep. 940, 22 Am. B. R. 803.

<sup>24</sup> *In re* Whittenberg Veneer & Panel Co., 108 Fed. Rep. 593, 6 Am. B. R. 271; *In re* Oliver, 132 Fed. Rep. 588, 12 Am. B. R. 694; *In re* Grandy & Son, 146 Fed. Rep. 318, 17 Am. B. R. 206 (oral assignment of life insurance); *Union Trust Co. v. Bulkeley*, 150 Fed. Rep. 510, 80 C. C. A. 328, 18 Am. B. R. 35 (oral assignment); *Smedley v. Speckman* (C. C. A. 3d Cir.), 157 Fed. Rep. 815, 85 C. C. A. 179, 19 Am. B. R. 694; *Matter of Louis Levin*, 21 Am. B. R. 665 (Referee); *Smith v. Godwin*, 145 N. C. 242, 58 S. E. 1089.

The insolvent, in violation of the sale in bulk law, sold his goods and took a mortgage back on which as collateral A. loaned him money before any creditor had started to avoid the sale. The court holds that A. prevails over the trustee in bankruptcy, as A. acted in good faith on the statement that the sale was legal. *Kelly & Buckley Co. v. Cohen*, 195 Mass. 585, 81 N. E. 297.

<sup>26</sup> *Torrance v. Winfield National Bank*, 66 Kan. 177, 71 P. 235; *Elmore v. Symonds*, 183 Mass. 321, 67 N. E. 314.

claimant was an auctioneer who advanced to the bankrupt corporation money on the security of an order given by the corporation authorizing him to deduct his loan from the proceeds of the sale. The corporation kept possession of the property and within a month a petition in bankruptcy was filed against it and a receiver appointed to take possession but the court held that the auctioneer had no priority as pledgee as there was no change of possession nor as mortgagee for lack of record, nor had he any equitable lien upon the actual proceeds as no fund actually came into existence upon which an equitable lien could be claimed and if a court could impress the proceeds of a sale with an equitable lien such a power would not be exercised to the prejudice of creditors. "In bankruptcy equality is equity."<sup>27</sup>

A familiar example of an equitable lien is that of a vendor for the purchase money<sup>28</sup> and that of a judgment creditor.

It has been held that a vendee under a contract for the sale of land who has recorded a bond for the deed and paid the purchase money is entitled to prove his claim as one secured by an equitable lien on the land, which had not been transferred by the vendor to him prior to the bankruptcy of the vendor.<sup>29</sup>

The owner of property which the bankrupt has wrongfully mingled with his own may be entitled to an equitable lien on the whole mass.<sup>30</sup> So an equitable lien may be created by

<sup>27</sup> *In re Faulhaber Stable Co.* (C. C. A. 2d Cir.), 170 Fed. Rep. 68, 95 C. C. A. 344, 22 Am. B. R. 381.

<sup>28</sup> *In re Portuondo Co.*, 135 Fed. Rep. 592, 14 Am. B. R. 337; *In re Bryan*, No. 2062 Fed. Cas., 3 N. B. R. 110; *Hall v. Scovel*, No. 5945 Fed. Cas., 10 N. B. R. 295; *In re Brooks*, No. 1943 Fed. Cas., 2 N. B. R. 466; *In re Perdue*, No. 10975 Fed. Cas., 2 N. B. R. 183;

*In re Hutto*, No. 6960 Fed. Cas., 3 N. B. R. 787; *Graves v. Constant*, 31 N. J. Eq. 763; *Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113.

<sup>29</sup> *In re Peasley*, 137 Fed. Rep. 190, 14 Am. B. R. 496.

<sup>30</sup> *Smith v. Township of Augres* (C. C. A. 6th Cir.), 150 Fed. Rep. 257, 80 C. C. A. 145, 17 Am. B. R. 745. As to following property into Mass, see 409, *ante*.

injunction <sup>81</sup> by the appointment of a receiver, or by an action to set aside a fraudulent conveyance.<sup>84</sup>

Where prior to the bankruptcy a creditor commenced a suit to have a deed of trust four months old declared to be for the benefit of all the creditors this created a statutory lien unaffected by bankruptcy.<sup>85</sup>

Where an attaching creditor recovers judgment and sells on execution and begins an action in equity to avoid a conveyance as fraudulent years before bankruptcy the discharge in bankruptcy of the judgment debtor does not affect him.<sup>86</sup>

Where a debtor executes a fraudulent conveyance the effect is to raise a resulting trust in favor of creditors who prosecute their claims to judgment and where only one creditor does so he is entitled to have his lien allowed even after bankruptcy where he had bought at execution sale ten months before bankruptcy.<sup>87</sup>

#### § 461. Proceedings supplementary to execution.

Proceedings supplementary to execution may create a valid lien if antedating the four months' period.

<sup>81</sup> Gay v. Ray, 195 Mass. 8, 80 N. E. 693 (temporary injunction). See Bowen & Thomas v. Keller, 130 Ga. 31, 60 S. E. 174.

Where a receiver is appointed, his rights date from the order appointing him, and he acquires a lien which is good when four months old. Pickert v. Eaton, 81 N. Y. App. Div. 423, 81 N. Y. Suppl. 50.

An interlocutory injunction and the appointment of a receiver over exempt property did not fasten an equitable lien on the property. Bowen & Thomas v. Keller, 130 Ga. 31, 60 S. E. 174.

<sup>84</sup> Iselin v. Goldstein, 35 Misc. (N. Y.) 489, 71 N. Y. Suppl. 1069; Arnold v. Treviranus, 78 N. Y. App. Div. 589, 79 N. Y. Suppl. 732.

<sup>85</sup> Moore v. Green (C. C. A. 4th Cir.), 145 Fed. Rep. 472, 76 C. C. A. 242, 16 Am. B. R. 648.

<sup>86</sup> Grandin v. First National Bank, 70 Neb. 730, 98 N. W. 70. As to such actions, see Secs. 438 and 446, *ante*.

<sup>87</sup> Tucker v. Denico, 27 R. I. 239, 61 A. 642 (affirming 26 R. I. 560, 59 A. 920).

A valid lien was created under state law by the service of an order in supplementary proceedings on the bankrupt by a judgment creditor more than four months before bankruptcy.<sup>39</sup> A fund discovered by proceedings in aid of execution should be paid to the trustee and not to the judgment creditors.<sup>40</sup> Where proceedings on execution for examination were begun May 6 and the petition in bankruptcy was filed May 16, the trustee takes what was discovered on the examination.<sup>41</sup>

Proceedings supplementary to execution to enforce it are included within the spirit of section 67*f* and an order to pay money issued within four months of the bankruptcy is barred by the discharge as it would be anomalous to permit one to be adjudged guilty of contempt for failure to pay a judgment that had become void through bankruptcy.<sup>42</sup>

## § 462. Garnishment.

A lien by garnishment may be recognized in bankruptcy<sup>43</sup> when it was created prior to the four months' period,<sup>47</sup> and

<sup>39</sup> *Wrede v. Clark*, 132 N. Y. App. Div. 293, 117 N. Y. Suppl. 5.

<sup>40</sup> *Rogers v. Forbes*, 23 Ohio Cir. Ct. Rep. 438.

<sup>41</sup> *Rodgers v. Forbes*, 23 Ohio Cir. Ct. 438.

<sup>42</sup> *Gardiner v. Ross*, 19 S. D. 497, 104 N. W. 220.

<sup>43</sup> *In re Swift*, 111 Fed. 503, 7 Am. B. R. 117; *In re Maher*, 169 Fed. 997, 22 Am. B. R. 290 (Georgia); *In re Driggs*, 171 Fed. 897, 22 Am. B. R. 621; *W. S. Danby Millinery Co. v. Dogan*, 47 Tex. Civ. App. 323, 105 S. W. 337.

Service in garnishment process creates a "lien." *Bank of Commerce v. Elliott*, 109 Wis. 648, 85

N. W. 417. Mere garnishment does not create a lien in Missouri. *Marceline State Bank v. Smith*, 122 Mo. App. 61, 98 S. W. 104. A lien by judgment against a garnishee was not avoided by the discharge in bankruptcy of the principal debtor. *Marx v. Hart*, 166 Mo. 503, 66 S. W. 260, 89 Am. St. Rep. 715.

<sup>47</sup> *Bloch Bros. v. Moore* (Ala. 1905), 39 S. 1025.

The service of garnishment process creates only a right in the nature of a lien, and not a property right, and is subject to Sec. 67*f*. *Longley Bros. v. McCann*, 90 Ark. 252, 119 S. W. 268.

otherwise is void,<sup>50</sup> but garnishment proceedings are not annulled by the filing of a petition in bankruptcy which is afterwards dismissed.<sup>51</sup>

The proceedings may be dismissed on the petition of the garnishee,<sup>52</sup> or where the creditor's claim was barred by the discharge.<sup>54</sup>

### § 463. Judgments—in general.

Section 67f nullifies the lien<sup>55</sup> of judgments<sup>56</sup> obtained within four months of the filing of the petition,<sup>59</sup> and other judgments remain unaffected.<sup>60</sup> "Judgment" in section 67f

In Illinois, garnishment is an ordinary suit by the defendant for the use of the plaintiff against the garnishee, and is not affected by bankruptcy within four months. It creates no lien whatever. *London Guarantee & Accident Co. v. Mossness*, 108 Ill. App. 440.

<sup>50</sup> *In re McCartney*, 109 Fed. 629, 9 Am. B. R. 367; *In re Beals*, 116 Fed. 530, 8 Am. B. R. 639; *Armour Packing Co. v. Wynn*, 119 Ga. 683, 46 S. E. 865; *Cavanagh v. Fenley*, 94 Minn. 505, 103 N. W. 711, 110 Am. St. Rep. 382.

<sup>51</sup> *Sullivan v. King*, 31 Tex. Civ. App. 432, 72 S. W. 207.

<sup>52</sup> *Hobbs v. Thompson*, 160 Ala. 360, 49 S. 787. Garnishee has no standing to move court to dissolve the attachment where plaintiff and defendant are both bankrupt. *Lamorille v. Nass*, 30 Pa. Super. Ct. 190.

<sup>54</sup> *J. B. Ellis & Co. v. Mobile J. & K. C. R. Co.* (Ala. 1910), 51 So. 860.

<sup>55</sup> *Kinmouth v. Braeutigam*, 63 N. J. Eq. 103, 52 A. 226, 10 Am. B. R. 83; *Davis v. Jewett*, 17 S. D. 410, 97 N. W. 16.

<sup>56</sup> *Mauran v. Crown Carpet Lin-*

*ing Co.*, 23 R. I. 324, 50 A. 331 (judgment of state court appointing a receiver).

Where bankruptcy ensues before any action is taken under an execution which is still in the hands of an officer and the judgment is within the four months' period, the judgment is void. *L. Mohr & Sons v. Mattox*, 120 Ga. 962, 48 S. W. 410. 67f applies to voluntary bankruptcy and applies to a judgment by confession, stipulating for a release of all errors and without stay of execution. This is not an unconstitutional impairment of contract. Congress has the right to impair contracts in bankruptcy. *Rothermel v. Moyer*, 24 Pa. Super. Ct. 325.

<sup>59</sup> Where a writ to enforce a judgment on real estate creates a lien when issued, the bankruptcy avoids it if issued within four months, although the judgment itself may have constituted a valid lien against the personal property. *Mencke v. Rosenberg*, 202 Pa. St. 131, 51 A. 767.

<sup>60</sup> *Kaminsky v. Horrigan*, 2 Ga. App. 332, 58 S. E. 497.



refers to the lien of the judgment only. The judgment itself is not affected as its amount and other incidents remain binding on all parties.<sup>61</sup>

Where property was mortgaged by a corporation five years before bankruptcy and foreclosed two years before bankruptcy, a judgment within four months of bankruptcy became a lien on the property under a state statute excepting certain claims in tort from the operation of mortgages. Section 67*f* of the bankruptcy act did not put this property into the hands of the trustee.<sup>62</sup>

#### **§ 464. Effect of invalidity of judgment.**

When a judgment is rendered null and void because obtained within the four months' period, such nullity and invalidity relate back to the time of the entry of the judgment and affect that and all subsequent proceedings.<sup>63</sup> The property affected by such lien is wholly discharged and released therefrom. If the property has been sold to a *bona fide* purchaser the fund received from such sale takes the place of the property and passes to the trustee.<sup>64</sup>

#### **§ 465. Dissolution of judgment lien by payment before bankruptcy.**

A lien created by a judgment and levy of execution within four months of the filing of a petition in bankruptcy is null and void where the officer has not paid the money collected on the execution to the judgment creditor.<sup>65</sup>

<sup>61</sup> Davis v. Jewett Bros & Jewett, 17 S. D. 410, 97 N. W. 16.

<sup>62</sup> Clement v. King (N. C. 1910), 67 S. E. 1023.

<sup>63</sup> Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476; *In re* Beals, 116 Fed. Rep. 530, 8 Am. B. R. 639.

<sup>64</sup> Clarke v. Larremore, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

<sup>65</sup> Clarke v. Larremore, trustee, 188 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476, affirming *In re* Kenney, 105 Fed. Rep. 897, 5 Am. B. R. 355; *In re* Benedict (Sup. Ct. N. Y.), 8 Am. B. R. 463; *In re* Breslauer, 121 Fed. Rep. 910, 10 Am. B. R. 33, it was held recoverable by trustee where sheriff had notice of bankruptcy before payment to creditor. *Schmilovitz v. Bern-*

It has been intimated by the supreme court<sup>66</sup> and held by other courts<sup>67</sup> that where the money has been collected upon an execution issued upon a judgment obtained against the bankrupt within the four months' period and paid to the judgment creditor before the filing of the petition in bankruptcy that it does not fall within the prohibition of section 67*f*. The reason for this distinction is that section 67 refers to existing liens, and does not cover cases where a lien has been merged in judgment, execution and sale and the money distributed. The lien is thereby extinguished.<sup>68</sup> Property so paid to a judgment creditor might be recovered in a proper case under section 60*b*, as a preference created by a judgment.<sup>70</sup>

stein, 22 R. I. 330, 47 A. 884; *McCord v. McNeil*, No. 8714 Fed. Cas., 4 Dill. 173.

<sup>66</sup> *Clarke v. Larremore*, trustee, 183 U. S. 486, 47 L. Ed. 555, 9 Am. B. R. 476.

<sup>67</sup> *Botts v. Hammond* (C. C. A. 4th Cir.), 99 Fed. Rep. 916, 40 C. C. A. 179, 3 Am. B. R. 775; *Levor v. Seiter* (Sup. Ct. App. Div. N. Y.), 8 Am. B. R. 459; *Peck v. Connell* (Com. Pleas Pa.), 6 Am. B. R. 93; *Davis v. Jewetts Bros.*, 17 S. D. 410; *In re Bailey*, 144 Fed. Rep. 214, 16 Am. B. R. 289; *In re Blair*, 102 Fed. Rep. 987, 4 Am. B. R. 220; *Greene v. Montana Brewing Co.*, 28 Mont. 380, 72 P. 751; *Levor v. Seitor*, 69 N. Y. App. Div. 33, 74 N. Y. Suppl. 499, reversing 34 Misc. 382, 69 N. Y. Suppl. 987; *Starbuck v. Gebo*, 69 N. Y. App. Div. 33, 48 Misc. 333, 96 N. Y. Suppl. 781, 34 Misc. 382, 69 N. Y. Suppl. 987, 74 N. Y. Suppl. 499; *Farrell v. W. B. Lockett & Co.*, 115 Tenn. 494, 91 S. W. 209.

So a trustee's petition to

recover under Sec. 67*f* should contain a statement that the petition in bankruptcy was filed before payment to the attaching creditor. *Johnson v. Anderson*, 70 Neb. 233, 97 N. W. 339.

<sup>68</sup> See *Greene v. Montana Brewing Co.*, 28 Mont. 380, 72 P. 751, where the court says: "When the petition in bankruptcy was filed, then there was no property of the bankrupt estate subject to a judgment lien which could be released from the same, or which could pass to the trustee for the benefit of the bankrupt estate. The judgment had been satisfied, and the matter entirely closed, before any bankruptcy proceedings were initiated, and the provisions of Sec 67*f*, therefore, have no application whatever to the facts of this case."

<sup>70</sup> *Starbuck v. Gebo*, 48 Misc. (N. Y.) 333, 96 N. Y. Suppl. 781, 34 Misc. 382, 69 N. Y. Suppl. 987, 69 N. Y. App. Div. 33, 74 N. Y. Suppl. 499 (only where creditor had reasonable cause to believe that a preference was intended).

### § 466. Landlord's lien.

Where a landlord has a valid lien for rent under state law this is not affected by bankruptcy,<sup>71</sup> even when the lien arises without levy<sup>79</sup> within four months of bankruptcy.<sup>81</sup>

<sup>71</sup>*In re Morris*, 159 Fed. Rep. 591, 19 Am. B. R. 781; *In re Pittsburgh Drug Co.*, 164 Fed. Rep. 482, 20 Am. B. R. 227; *In re Samuel L. Goldstein*, 2 Am. B. R. 603 (Referee); *In re Rubel*, 166 Fed. 131, 21 Am. B. R. 566; *In re Burns*, 175 Fed. Rep. 633, 23 Am. B. R. 640; *In re V. D. L. Co.*, 175 Fed. Rep. 635, 23 Am. B. R. 643 (in Georgia); *Des Moines National Bank v. Council Bluffs Savings Bank*, (C. C. A. 8th Cir.), 80 C. C. A. 189, 150 Fed. Rep. 301, 18 Am. B. R. 108 (the landlord's statutory lien for rent in Iowa on crops).

A levy of distress under the law of Maryland is not a lien by legal proceedings. *In re Potee Brick Co.*, 179 Fed. 525. The landlord has no lien in Maryland for rent before distraint. *In re Southern Co.*, 180 Fed. Rep. 838, 25 Am. B. R. 813; *In re Chaudron & Peyton*, 180 Fed. Rep. 841, 24 Am. B. R. 811. Lien on tenant's goods for rent enforced against proceeds of goods sold by trustee. *In re Mitchell*, 116 Fed. 87, 8 Am. B. R. 324; *Wilson v. Pennsylvania Trust Co.* (C. C. A. 3d Cir.), 114 Fed. 742, 52 C. C. A. 374, 8 Am. B. R. 169.

A lien for rent for the year in which the adjudication took place is valid against the trustee by the lease itself. *Martin v. Orgain* (C. C. A. 5th Cir.), 174 Fed. Rep. 772, 98 C. C. A. 246, 23 Am. B. R. 454. A judgment obtained by a landlord for dispossession of his

tenant, the bankrupt, does not create a lien upon the bankrupt's estate, and the judgment is not affected by the fact that the bankrupt went into insolvency within four months. *Plaut v. Gorham Mfg. Co.*, 174 Fed. Rep. 852, 23 Am. B. R. 42.

The lien of the landlord, in Pennsylvania, upon personal property which is "liable to distress" will be preserved as against the proceeds of such personal property in priority to the general expenses of the administration of the estate, and subject only to the direct expense incurred in realizing the fund liable to such lien. *In re Bayley*, 177 Fed. Rep. 522, 24 Am. B. R. 201.

It is immaterial that the bankrupt uses a part of the leased premises as a residence for himself and family, and a part upon which to conduct his business where upon occupation of the premises the lien for the rent under state law applies to any property not exempt from execution. The rent for the rooms used as a residence by the bankrupt, after the adjudication could not be allowed as an expense of administration. *In re Hersey*, 171 Fed. Rep. 1001, 22 Am. B. R. 856, 860, 863. See *Vollmer, et al., v. McFadgen*, (C. C. A. 3d Cir.), 161 Fed. 914, 88 C. C. A. 605, 20 Am. B. R. 540, lien lost by commingling.

<sup>79</sup> State statute giving lien for rent without levy of distress warrant held constitutional and en-

### § 467. Mechanics' liens.<sup>82</sup>

An artisan's lien based on the common law will be sustained in bankruptcy.<sup>83</sup>

A mechanic's lien is created by a state statute. It gives a lien to materialmen and laborers upon specific property for the payment for materials furnished for and labor performed on that property.

What constitutes a valid mechanic's lien, when it attaches, and what is necessary to be done in order to complete and preserve the lien, varies in different states. Whether a mechanic's lien is a valid claim against the estate of the bankrupt depends upon the local law as construed by the highest court of the state. If a valid lien has attached under the state law before proceedings in bankruptcy have been commenced the lien will be respected by the court of bankruptcy.<sup>84</sup>

Enforceable. *In re McIntire*, 142 Fed. Rep. 593, 16 Am. B. R. 80. Priority allowed landlord in Pennsylvania although no distress warrant levied. *In re Joel J. Gerson*, 2 Am. B. R. 170 (referee's decision).

<sup>81</sup> Lien reserved by privilege of restraint in lease is preserved by Sec. 67*d* though no levy until two days before petition in bankruptcy. *In re Robinson & Smith* (C. C. A. 7th Cir.), 154 Fed. Rep. 343, 83 C. C. A. 121, 18 Am. B. R. 563; *In re West Side Paper Co.* (C. C. A. 3rd Cir.), 162 Fed. Rep. 110, 89 C. C. A. 110, 20 Am. B. R. 660 (accord).

<sup>82</sup> Mechanic's lien not lien created by "legal proceedings." See Sec. 438, *ante*.

<sup>83</sup> *In re Lowensohn*, 100 Fed. Rep. 776, 4 Am. B. R. 79. (Lien for labor remains even on goods left

for examination with the bankrupt.) *In re Rich*, 17 Am. B. R. 893 (referee). (Artisan has lien on automobile. Here repairs enabled machine to be sold for more than it otherwise could have been.)

<sup>84</sup> *In re Grissler* (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 69 C. C. A. 406, 13 Am. B. R. 508; *In re Emslie* (C. C. A. 2d Cir.), 102 Fed. Rep. 291, 42 C. C. A. 350, 4 Am. B. R. 126; *In re Kerby-Dennis Co.* (C. C. A. 7th Cir.), 95 Fed. 116, 36 C. C. A. 677, 2 Am. B. R. 402; *In re Coe-Powers Co.* (C. C. A. 6th Cir.), 109 Fed. Rep. 550, 48 C. C. A. 538, 6 Am. B. R. 1; *In re Falls City Shirt Mfg. Co.*, 98 Fed. Rep. 592, 3 Am. B. R. 437; *In re West Norfolk Lumber Co.*, 112 Fed. Rep. 759, 7 Am. B. R. 648; *In re Georgia Handle Co.* (C. C. A. 5th Cir.), 109 Fed. Rep. 632, 48 C. C. A. 571, 6 Am. B. R. 472;

But if for want of record or for other reasons it would not have been a valid lien as against the claims of the creditors of the bankrupt, it is not a lien against his estate.<sup>86</sup> A collusive assignment of a mechanic's lien will not be enforced in bankruptcy.<sup>87</sup>

Where by statute a lien of an artisan or other person who furnishes labor or materials to improve realty is imposed in certain circumstances on the land from the commencement of the improvement this is not a lien created by legal proceedings, and is not affected by the discharge of the debtor, although the lien was only perfected within four months of the bankruptcy.<sup>88</sup> Where a mechanic's lien is valid as against a debtor or his general assignee under the state law when notice of lien is recorded after bankruptcy, it is valid as against his trustee in bankruptcy,<sup>89</sup> but not where the lien is first created by the filing of the notice after bankruptcy.

*South End Imp. Co. v. Harden* (N. J.), 52 Atl. 1127; *National Fire Proofing Co. v. Daly* (N. J. Ch. 1909), 74 A. 152 (liens on funds due on public buildings); *Felin v. Conway*, 52 Pa. Super. Ct. 171.

A mechanic's lien, in Pennsylvania, takes precedence over a prior mortgage given to secure advances not made until after the mechanic's lien had attached. *In re Clark Coal & Coke Co.*, 173 Fed. Rep. 658, 22 Am. B. R. 843.

<sup>86</sup> B. A. 1898, Sec. 67a; *In re Brunquest*, No. 2055 Fed. Cas., 7 Biss. 208; *Bank v. Herbert*, 8 Cranch, 36, 3 L. Ed. 479; *In re Hobbs*, 145 Fed. 211, 16 Am. B. R. 544; *In re Bennett* (C. C. A. 6th Cir.), 153 Fed. Rep. 673, 82 C. C. A. 551, 18 Am. B. A. 320; *In re Miners' Brewing Co.*, 162 Fed. Rep. 327, 20 Am. B. R. 717; *In re Anderson*, 21 Am. B. R. 413 (referee). Turpentine still not "machinery" within the meaning of Georgia lien law.

The bankrupt was engaged in the business of manufacturing leather goods and was also doing business as a jobber in buying and selling manufactured leather goods, and the court holds that petitioners who sold goods to the bankrupt to be used in the jobbing business did not furnish materials and supplies for carrying on the business of the bankrupt as a manufacturer within the Kentucky statute giving a lien for such business. *In re Stark-Ullman Saddlery Co.* (C. C. A. 6th Cir.), 171 Fed. Rep. 834, 96 C. C. A. 506, 22 Am. B. R. 596.

<sup>87</sup> *In re Kyte*, 182 Fed. Rep. 166, 25 Am. B. R. 337.

<sup>88</sup> *Holland v. Cunliff*, 96 Mo. App. 67, 69 S. W. 737.

<sup>89</sup> *In re Grissler* (C. C. A. 2d Cir.), 136 Fed. Rep. 754, 69 C. C. A. 406, 13 Am. B. R. 508; overruling *In re Roeber* (C. C. A. 2d Cir.), 121 Fed. Rep. 449, 57 C. C. A. 565, 9 Am. B. R. 303; *Mott v.*

A mechanic's lien was not sustained where the claim was not filed till after the filing of the petition, although the work was done within ninety days and the lien is an inchoate right during ninety days, which may be made absolute by filing the notice and although this would prevail against the assignee for creditors. The trustee is different from the assignee, as he takes title freed from all liens except such as are expressly preserved by the act.<sup>92</sup> Where the lien only exists from the filing of a notice, and the notice was not filed till three weeks after the filing of the petition, the lien is void, as the right to acquire a lien is not protected by the bankruptcy act.<sup>93</sup>

The adoption of the state statutes with reference to liens is constitutional.<sup>94</sup> The uniformity required by the constitution relates to national legislation only, and therefore the laws of the several states may be left in force, and to such an extent as Congress may see fit.<sup>95</sup>

#### § 468. Enforcement of a mechanic's lien.

Where the trustee delays in electing to take the property subject to the lien, the holder of such lien may bring a suit

Wissler Mining Co. (C. C. A. 4th Cir.), 135 Fed. Rep. 697, 68 C. C. A. 335, 14 Am. B. R. 321; *In re* West Norfolk Lumber Co., 112 Fed. Rep. 759, 7 Am. B. R. 648; *In re* Lillington Lumber Co., 132 Fed. Rep. 886, 13 Am. B. R. 153.

In the following cases liens were upheld though not perfected till after the petition was filed (*In re* Adam Huston, 7 Am. B. R. 92 (referee); *Matter of* Herman Roeber, 9 Am. B. R. 778); or till after adjudication; *Kane Co. v. Kinney*, 174 N. Y. 69, 9 Am. B. R. 778; *Crane Co. v. Smythe*, 94 (N. Y.) App. Div. 53, 11 Am. B. R. 747. See *Garretson v. Clark* (N. J. Ch. 1904), 57 A. 414 (mechanic's lien can not be created after adjudication).

<sup>92</sup> *Crane Co. v. Smythe*, 94 N. Y. App. Div. 53, 87 N. Y. Suppl. 917, 15 N. Y. Ann. Cas. 75, reversing 42 Misc. 338, 86 N. Y. Suppl. 711; affirmed, 182 N. Y. 545, 75 N. E. 1128.

<sup>93</sup> *Lazzari v. Havens*, 39 Misc. (N. Y.) 255, 79 N. Y. Suppl. 395.

<sup>94</sup> *Darling v. Berry*, 13 Fed. Rep. 668; *In re* Beckerford, No. 1209 Fed. Cas., 1 Dill. 45; *In re* Jordon, No. 7514 Fed. Cas., 8 N. B. R. 180; *In re* Jordan, No. 7515 Fed. Cas., 10 N. B. R. 427; *In re* Kean, No. 7630 Fed. Cas., 2 Hughes, 322.

<sup>95</sup> Compare *Hanover National Bank v. Moyses*, 186 U. S. 181, 46 L. Ed. 1113, 8 Am. B. R. 1, upholding the adoption of state exemptions in the present act.

in the proper state court to foreclose it.<sup>96</sup> The reason for this is, that if the court of bankruptcy should abstain from ascertaining the lien, and from providing for its satisfaction out of the property or proceeds of a sale thereof, the lien might be lost under the state law.<sup>97</sup> Nearly every state, which has a mechanic's lien law, has provided for bringing a suit to enforce the lien within a limited time or the lien is lost.<sup>98</sup>

The trustee in bankruptcy, if one has been appointed, should be made a party to such suit. If the trustee does not appear to contest either the suit or the lien, the lien may be foreclosed and the property sold. If he does appear to contest the suit the state court will ordinarily continue the case to await the action of the bankruptcy court. The lien is preserved by the bringing of the suit in the state court.

The jurisdiction of the court of bankruptcy is sufficient to enforce a mechanic's lien in that court, without any petition being filed or suit instituted in the state court to preserve and continue it, provided the bankruptcy court has lawful custody of the property to which the lien is claimed.<sup>99</sup>

Before beginning a suit in the state court, if bankruptcy proceedings have been commenced, application should be made to the bankruptcy court for leave to foreclose the lien in the state court, because the property of the bankrupt is in *custodia legis*. The court of bankruptcy will regularly stay a suit begun, without leave of court, after bankruptcy, but

<sup>96</sup> Marston v. Stickney, 55 N. H. 383; Clifton v. Foster, 103 Mass. 233; Bryant v. Small, 35 Wis. 205; Douglass v. Zinc Co., 56 Mo. 388; Keller v. Denmead, 68 Penn. St. 449.

<sup>97</sup> In Bryant v. Small, 35 Wis. 209, the court said: "This court has held that the lien exists by virtue of the statute. . . . But, nevertheless, the party must file his petition and commence his action within the period described to enforce it, or it will be lost." This

is the usual rule in this respect.

<sup>98</sup> Bryant v. Small, 35 Wis. 205; Clifton v. Foster, 103 Mass. 233.

<sup>99</sup> B. A. Sec. 2; Chauncey v. Dyke Bros. (C. C. A. 8th Cir.), 119 Fed. Rep. 1, 55 C. C. A. 579, 19 Am. B. R. 444; South End Imp. Co. v. Harden (N. J.), 52 Atl. 1127; *In re* Lemmon v. Gale Co. (C. C. A. 6th Cir.), 112 Fed. Rep. 296, 50 C. C. A. 297, 7 Am. B. R. 291; *In re* Kellogg, 113 Fed. Rep. 120, 7 Am. B. R. 623; *In re* Hobbs & Co., 145 Fed. Rep. 211, 16 Am. B. R. 344.

will not stay a suit begun before the petition in bankruptcy was filed.<sup>1</sup>

**§ 469. Mortgages—in general.**

The law applicable to mortgages is much too extensive to be discussed at length in this treatise. The present inquiry will be confined to what constitutes a preference or fraudulent transfer by way of mortgages under the bankrupt law. A debt may be secured by a mortgage on real estate or personal property. The principles, so far as bankruptcy proceedings are concerned, are substantially the same with reference to real estate and chattel mortgages.

**§ 470. Mortgages made in good faith for a present consideration.**

The bankrupt act expressly recognizes as valid mortgages “given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice.”<sup>2</sup>

It is as much the policy of the bankruptcy act to uphold mortgages when valid, as it is to set them aside when invalid. A mortgage valid under the state law, which is not a violation of any of the provisions of the bankruptcy act, will be respected and enforced by a court of bankruptcy.<sup>3</sup> No express provision appeared for this class of security in the act of 1867, but the supreme court applied this rule in cases arising under that act.<sup>4</sup>

<sup>1</sup> As to staying said suits, see Sec. 58, *ante*.

<sup>2</sup> B. A. 1898, Sec. 67*d*.

<sup>3</sup> B. A. 1898, Secs. 60 and 67*d*; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Crim v. Woodford* (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 68 C. C. A. 584, 14 Am. B. R. 302; *Simmons v. Greer* (C. C. A. 4th Cir.),

174 Fed. Rep. 654, 98 C. C. A. 408, 21 Am. B. R. 34; *In re Farmers' Supply Co.*, 170 Fed. Rep. 502, 22 Am. B. R. 460 (to secure endorsers on corporation notes so notes can be discounted is for a valid present consideration); *Security Savings Bank v. Scott*, 3 Cal. App. 687, 86 P. 903.

<sup>4</sup> In *Tiffany v. Boatman's Institution*, 18 Wallace, 375, 388, 21 L. Ed. 868, the court said:



To come within the protection of section 67*d* of the bankruptcy act it is essential, *first*, that the mortgage be given and accepted in good faith without any fraudulent intent or purpose; *second*, that it be given for a present consideration, and, *third*, that it be recorded if recording is necessary to its validity under the state law.

There is no limitation as to time. It may be made within four months prior to the filing of the petition in bankruptcy.<sup>5</sup>

The fact that the mortgagor was insolvent at the time the mortgage is given, and that the mortgagee knew it does not affect the validity of a mortgage given in good faith and for a present consideration.<sup>6</sup>

The reason is that the debtor's estate is not impaired or diminished in consequence, as he gets a present equivalent for the security pledged for the money borrowed. Nor in doing this does he prefer one creditor over another, which is one of the great objects of the bankrupt law to prevent. A preference can only arise in case of an antecedent debt.

*First.* A mortgage to be sustained under section 67*d* of the bankrupt act must be given and accepted in good faith and not in contemplation of or in fraud upon the bankrupt

"There is nothing in the bankrupt law which interdicts the lending of money to a man in Darby's condition [an insolvent], if the purpose be honest, and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, and without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure the power to raise money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest

one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable."

<sup>5</sup> *Crim v. Woodford* (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 68 C. C. A. 584, 14 Am. B. R. 302; *In re Durham*, 114 Fed. Rep. 750, 8 Am. B. R. 115; *Davis v. Turner* (C. C. A. 4th Cir.), 120 Fed. Rep. 605, 56 C. C. A. 669, 9 Am. B. R. 704.

<sup>6</sup> *In re Soudan Mfg. Co.*, 113 Fed. Rep. 804, 8 Am. B. R. 45; *Davis v. Turner* (C. C. A. 4th Cir.), 120 Fed. Rep. 605, 56 C. C. A. 669, 9 Am. B. R. 704.

A mortgage creditor is not estopped to claim the lien of his mortgage by the fact that he knew the condition of the business, and

act. It is essential that the transaction should be *bona fides*. The purpose must be honest and the object not fraudulent. If the parties act in good faith, contemplating no fraud upon the act, the security is valid,<sup>8</sup> while *mala fides* will render the mortgage invalid.<sup>9</sup> In the case of bad faith, the mortgage may be invalidated by section 67e.<sup>10</sup>

Whether the mortgage is given or accepted in good faith is a question of fact to be determined by the facts and circumstances of each particular case.

*Second.* It is essential to the validity of a mortgage under 67d that the debt to be secured is created at the time that the mortgage is given. If the debt existed at that time a preference may arise under section 60. A mortgage given within four months of bankruptcy to secure a loan made at the time, is valid, provided the purpose be honest and the object not fraudulent.<sup>12</sup> The mere fact that the mortgagor

that the business was being continued by a receiver, from setting up his lien as against the expenses of the business, or by the fact that his attorney was also the attorney for the receiver and the trustee in procuring the order for continuing the business. *In re Clark Coal & Coke Co.*, 173 Fed. Rep. 658, 22 Am. B. R. 843.

<sup>8</sup> *In re Soudan Mfg. Co.*, 113 Fed. Rep. 804, 8 Am. B. R. 45; *Phillipps v. Kahn*, 96 App. Div. N. Y. Sup. Ct. 166, 89 N. Y. Supp. 250.

Possession under a mortgage was held to be in the mortgagee where he went to a store-room where the goods were stored and was shown the goods by the mortgagor who gave the mortgagee a key to the premises, where although the mortgagor kept a duplicate key he exercised no control over the goods. *In re Cole*, 171 Fed. Rep. 297, 22 Am. B. R. 611.

<sup>9</sup> *In re Pease*, 129 Fed. Rep. 446, 12 Am. B. R. 66; *Rogers v. Page*

(C. C. A. 6th Cir.), 140 Fed. Rep. 596, 72 C. C. A. 164, 15 Am. B. R. 502, and 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *Clayton v. Exchange Bank* (C. C. A. 5th Cir.), 121 Fed. Rep. 630, 57 C. C. A. 656, 10 Am. B. R. 173, reversing *In re Josephson*, 116 Fed. Rep. 404, 8 Am. B. R. 423.

<sup>10</sup> *Pollock v. Jones* (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 61 C. C. A. 555, 10 Am. B. R. 616, affirming *In re Jones*, 118 Fed. Rep. 673, 9 Am. B. R. 262; *In re McLam*, 97 Fed. Rep. 922, 3 Am. B. R. 245; *In re Steininger Mercantile Co.* (C. C. A. 5th Cir.), 107 Fed. Rep. 669, 46 C. C. A. 548, 6 Am. B. R. 68; *In re Schuller*, 108 Fed. Rep. 591, 6 Am. B. R. 278; *In re Pease*, 129 Fed. Rep. 446, 12 Am. B. R. 66; *In re Hill*, 140 Fed. Rep. 984, 15 Am. B. R. 499; *In re Moody*, 134 Fed. Rep. 628, 14 Am. B. R. 272. See Sec. 160, *ante*.

<sup>12</sup> *Crim v. Woodford* (C. C. A. 4th Cir.), 136 Fed. Rep. 34, 68 C.

intends to use the money to pay other creditors, and thereby create a preference will not invalidate the security.<sup>13</sup>

Where a mortgage is given to secure a present loan and a pre-existing debt, it may be sustained to the extent of the loan made at the time the mortgage was given and be invalid to the extent of the pre-existing debt secured thereby.<sup>14</sup>

Section 67*d* was amended in 1910 to expressly make this distinction.<sup>15</sup>

Mortgages have been sustained when given in pursuance of a valid promise made at the time of the loan, where it was shown that the promise was to give a specific security and that the promise was given as an inducement upon which the loan was made.<sup>16</sup> But a chattel mortgage, given

C. A. 584, 14 Am. B. R. 302; *In re Clifford*, 136 Fed. Rep. 475, 14 Am. B. R. 281; *In re Josephson*, 116 Fed. Rep. 404, 8 Am. B. R. 423, reversed on question fact of *bona fides* in *Clayton v. Exchange Bank* (C. C. A. 5th Cir.), 121 Fed. Rep. 630, 56 C. C. A. 656, 10 Am. B. R. 173.

<sup>13</sup> *In re Davidson*, 109 Fed. Rep. 882, 5 Am. B. R. 528; *Stedman v. Bank of Monroe*, 117 Fed. Rep. 237, 9 Fed. Rep. 4; *In re Soudan Mfg. Co.*, 113 Fed. Rep. 804, 8 Am. B. R. 45.

<sup>14</sup> B. A. 1898, Sec. 67*d*, as amended June 25, 1910, 36 Stat. at L. 838; *City National Bank v. Bruce* (C. C. A. 4th Cir.), 109 Fed. Rep. 69, 48 C. C. A. 236, 6 Am. B. R. 311; *Stedman v. Bank of Monroe*, 117 Fed. Rep. 237, 9 Am. B. R. 4; *In re Durham*, 114 Fed. Rep. 750, 8 Am. B. R. 115; *In re Dismal Swamp Construction Co.*, 135 Fed. Rep. 415, 14 Am. B. R. 175; *In re Sawyer*, 130 Fed. Rep.

384, 12 Am. B. R. 269; *In re Hull*, 115 Fed. Rep. 858, 8 Am. B. R. 302; *In re Wolf*, 98 Fed. Rep. 84, 3 Am. B. R. 555; *In re Furse & Co.* (C. C. A. 4th Cir.), 127 Fed. Rep. 690, 62 C. C. A. 446, 11 Am. B. R. 733. But a new mortgage on new property to secure an antecedent debt which an old mortgage originally secured is void. *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475.

<sup>15</sup> "Section 12 of the act of June 25, 1910, 36 Stat. at L. 838. The change here merely inserts the words 'to the extent of such present consideration only' after the word 'shall,' in the last clause of subdivision *d* of section 67 of the law."

<sup>16</sup> *In re Jackson Iron Manufacturing Co.*, No. 7153 Fed. Cas., 15 N. B. R. 438; *Brudock v. Jackson*, 15 N. B. R. 318; *Douglass v. Vogeler*, 6 Fed. Rep. 52; *Gattman v. Honea*, No. 5271 Fed. Cas., 12 N. B. R. 493; *Sabin v. Camp*, 98 Fed. Rep. 974, 3 Am. B. R. 578.

within four months in pursuance of an agreement "to give security" generally, made at the time of the loan prior to that period, can not be sustained as a mortgage made in good faith for a present consideration.<sup>20</sup>

A mortgage has been held valid when given to secure future advances to be made to the debtor.<sup>21</sup> A mortgage may be taken in exchange for a prior valid security without affecting its validity.<sup>22</sup> This is an exchange of securities, which ordinarily is not deemed a violation of the bankrupt law,<sup>24</sup> but if the security surrendered to the bankrupt is of less value than the mortgage given there may be a preference created to the extent of the difference.<sup>25</sup> A mortgage may be renewed within the four months' period without invalidating it.<sup>26</sup>

*Third.* How far the failure to record a mortgage affects its validity depends upon the local law as construed by the courts of the state.<sup>28</sup> Under the ruling of the supreme court

<sup>20</sup> *In re Ronk*, 111 Fed. Rep. 154, 7 Am. B. R. 731; *In re Dismal Swamp Construction Co.*, 135 Fed. Rep. 415, 14 Am. B. R. 175; *Pollock v. Jones* (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 61 C. C. A. 555, 10 Am. B. R. 616; *Lloyd v. Strobbridge*, No. 8435 Fed. Cases, 16 N. B. R. 107.

<sup>21</sup> *Ex parte Ames*, No. 323 Fed. Cases, 1 Low. 561; *In re Durham*, 114 Fed. Rep. 750, 8 Am. B. R. 115.

<sup>22</sup> *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766; *In re Davidson*, 109 Fed. Rep. 882, 5 Am. B. R. 528. A mortgage is valid when given partly for a new loan and partly to pay old liens on the same property. *Asbury Park Building & Loan Association v. Shepherd* (N. J. Ch. 1901), 50 A. 65.

<sup>24</sup> *Cook v. Tullis*, 18 Wall. 340, 21 L. Ed. 933; *Clark v. Iselin*, 21

Wall. 360, 22 L. Ed. 568.

<sup>25</sup> *In re Manning*, 123 Fed. Rep. 181, 10 Am. B. R. 500.

<sup>26</sup> *In re Little River Lumber Co.*, 92 Fed. Rep. 585, 1 Am. B. R. 483; *Chattanooga National Bank v. Rome Iron Co.*, 102 Fed. Rep. 755, 4 Am. B. R. 441; *Deland v. Miller and Cheney Bank*, 119 Iowa, 368, 93 N. W. Rep. 304; *In re Noel*, 137 Fed. Rep. 694, 14 Am. B. R. 715;

A mortgage for value on cotton to be raised is valid though within four months of bankruptcy, and the cotton planted and raised after the adjudication is not part of the estate in bankruptcy, and remains subject to the lien of the mortgage. *Conley v. Nelin* (Tex. Civ. App. 1910), 128 S. W. 424.

<sup>28</sup> *In re Beede*, 138 Fed. Rep. 441, 14 Am. B. R. 697; *In re Clifford*, 136 Am. B. R. 475, 14 Am. B. R. 281; *In re Ducker* (C. C. A. 6th

in the case of *York manufacturing Company v. Cassell*,<sup>30</sup> the failure to record does not invalidate a mortgage as between the mortgagee and the trustee in bankruptcy, unless creditors could successfully attack the mortgage at the time bankruptcy proceedings were instituted.<sup>31</sup>

#### § 471. What mortgages invalid.

The mortgage which the law condemns is one, *first*, which constitutes a preference,<sup>32</sup> or, *second*, which is invalid as against the claims of creditors under the state law,<sup>33</sup> or, *third*, which was given with the intent to hinder, delay or defraud creditors.<sup>34</sup>

#### § 472. Unrecorded, fraudulent or void under state law.

Any mortgage or other claim which, for want of record or other reason, is not a valid lien as against the claims of the creditors of the bankrupt, is not a lien against his estate.<sup>35</sup>

The validity of such mortgages or claims does not depend upon the time at which they are made or recorded, unless

Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 13 Am. B. R. 760; *In re Antigo Screen Door Co.* (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 59 C. C. A. 248, 10 Am. B. R. 359; *In re Shirley* (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 50 C. C. A. 252, 7 Am. B. R. 299.

In Nebraska, an unrecorded chattel mortgage is not a voidable preference if given for a present consideration except as to subsequent purchasers, attaching creditors and judgment creditors. *Mattley v. Wolfe*, 175 Fed. Rep. 619, 23 Am. B. R. 673.

<sup>30</sup> 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633. See, however, the amendment of 1910 discussed at length under Sec. 372, *ante*.

<sup>31</sup> See Sec. 472, *post*.

<sup>32</sup> B. A. 1898, Sec. 60.

<sup>33</sup> B. A. 1898, Secs. 67*a* and 67*e*.

<sup>34</sup> B. A. 1898, Sec. 67*e*. See Sec. 381, *ante*.

<sup>35</sup> B. A. 1898, Sec. 67*a*; *Bank of Leavenworth v. Hunt*, 11 Wall. 391, 20 L. Ed. 190; *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *In re Birck* (C. C. A. 7th Cir.), 142 Fed. Rep. 438, 73 C. C. A. 554, 15 Am. B. R. 694; *In re Hemstreet*, 139 Fed. Rep. 958, 14 Am. B. R. 823; *In re Miller*, 118 Fed. Rep. 360, 9 Am. B. R. 274; *In re Eagle Steam Laundry Co.*, 176 Fed. Rep. 740, 23 Am. B. R. 130 (where corporation mortgage void as required consent of stockholders is lacking, the mortgagee is a general creditor).

invalidated for this reason under provisions of the state law. There is no four months' limitation as in the case of preferences.

Whether and to what extent a mortgage or claim of this kind is valid is a local question, and the decisions of the state court will be followed by the courts of bankruptcy.<sup>36</sup> If at the date of bankruptcy a creditor has a claim or mortgage valid as against the bankrupt and other creditors under the state law and not contrary to any provision of the bankruptcy act, it is valid as against the trustee in bankruptcy.<sup>37</sup> But if a mortgage or other claim is invalid, as a lien, in whole or in part, under the local law as against the bankrupt or any of his creditors at the date of bankruptcy it may be avoided by the trustee to the extent of such invalidity.<sup>38</sup>

In such cases the trustee is vested with the title of the bankrupt together with the rights of creditors at the date his title accrues.<sup>40</sup> Where a creditor is prevented from enforcing his

<sup>36</sup> *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *In re Shirley* (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 50 C. C. A. 252, 7 Am. B. R. 299; *In re Andrae Co.*, 117 Fed. Rep. 561, 9 Am. B. R. 135; *In re Beihl*, 176 Fed. Rep. 583, 23 Am. B. R. 905.

<sup>37</sup> *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74.

<sup>38</sup> B. A. 1898, Sec. 67a; *Second Bank of Leavenworth v. Hunt*, 11 Wall. 391, 20 L. Ed. 190; *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *In re*

*Birck* (C. C. A. 7th Cir.), 142 Fed. Rep. 438, 73 C. C. A. 554, 15 Am. B. R. 694; *In re Hemstreet*, 139 Fed. Rep. 958, 14 Am. B. R. 823; *In re Miller*, 118 Fed. Rep. 360, 9 Am. B. R. 274.

Failure to record chattel mortgages within a reasonable time makes them void against all creditors of the mortgagor under New York statute. *In re Schmidt* (C. C. A. 2d Cir.), 181 Fed. Rep. 73, 100, C. C. A. 668, 24 Am. B. R. 687.

<sup>40</sup> *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re New York Economical Printing Co.* (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615; *In re Lukens*, 138 Fed. Rep. 188, 14 Am. B. R. 683; *First National Bank v. Staake*, 202 U. S. 141, 149, 50 L. Ed. 967, 15 Am. B. R. 639. See the amendment of 1910, Sec. 8, discussed fully, Sec. 372, *ante*.

rights as against a lien created or attempted to be created by the bankrupt the trustee may be subrogated to his rights and enforce them for the benefit of the estate.<sup>41</sup>

It has been held that a mortgage upon property exempt by the state statute is valid and the security is preserved notwithstanding the bankruptcy of the debtor.<sup>42</sup> Where property lying in two states is mortgaged in one deed, it may be a valid security as to the property in one state and not as to the property in the other.<sup>43</sup> Where a chattel mortgage is given with leave to the mortgagor to sell or use a part of the property covered by the mortgage the mortgage is usually good as to the property unsold or unused at the date of bankruptcy and invalid as to the property sold.<sup>44</sup> An agreement to allow the mortgagee to dispose of the property, by which the proceeds of the goods are applied to the payment of the mortgage debt, may be sustained.<sup>45</sup> Mortgages which are fraudulent and could not be enforced in a court of equity, irrespective of the bankruptcy law, may be avoided in bankruptcy.<sup>46</sup> Where a deed, which purports to transfer the title to land to a creditor to secure a debt, is void for usury it can not be enforced as to other cred-

<sup>41</sup> B. A. 1898, Sec. 67b; First Nat'l Bank v. Staake, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re* Beede, 138 Fed. Rep. 441, 14 Am. B. R. 697; *In re* New York Economical Printing Co. (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615.

<sup>42</sup> See liens on exempt property, Sec. 427, *ante*; Long v. Bullard, 117 U. S. 617, 29 L. Ed. 1004; Schlitz v. Schatz, No. 12459 Fed. Cas., 2 Biss. 248; Rix v. Capitol Bank, No. 11869 Fed. Cas., 2 Dill. 367.

<sup>43</sup> *In re* Soldiers, Business, Messenger Dispatch Co., No. 13163 Fed. Cas., 3 Ben. 204.

<sup>44</sup> *In re* Soudan Mfg. Co. (C. C.

A. 7th Cir.), 113 Fed. Rep. 804, 51 C. C. A. 476, 8 Am. B. R. 45; *In re* Ball, 123 Fed. Rep. 164, 10 Am. B. R. 564; *In re* Antigo Screen Door Co., 123 Fed. Rep. 249, 10 Am. B. R. 359; *In re* Marine Dry Dock Co., 135 Fed. Rep. 921, 14 Am. B. R. 466; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302.

<sup>45</sup> *In re* Durham, 114 Fed. Rep. 750, 8 Am. B. R. 115.

<sup>46</sup> Knapp v. Milwaukee Trust Co., 216 U. S. 545, 54 L. Ed. 610, 24 Am. B. R. 761; Robinson v. Elliott, 22 Wall. 513, 22 L. Ed. 758; Crooks v. Stuart, 7 Fed. Rep. 800; *In re* Hemstreet, 139 Fed. Rep. 958, 14 Am. B. R. 823; *In re* Hull, 115 Fed. Rep. 858, 8 Am. B. R. 302.



itors in bankruptcy.<sup>47</sup> Where a state statute provides that "any chattel mortgage securing notes, which do not state upon their face the fact of such security, shall be absolutely void," the holder of such a note and of a chattel mortgage purporting to secure the same has no lien upon the property, even though he has taken possession of the same, which can be enforced as against the trustee in bankruptcy of the mortgagor.<sup>48</sup>

Whether or not a mortgagee waives or loses his lien by attaching the mortgaged property depends upon the state law. Provisions in a mortgage permitting the mortgagor to keep possession and dispose of the property are void under the law of Wisconsin.<sup>49</sup>

**§ 473. When trustee takes only rights of bankrupt.**

In bankruptcy proceedings instituted on or before June 25, 1910,<sup>50</sup> the trustee takes the property of the bankrupt in the same plight, with reference to mortgages, in which the bankrupt held it at the time the petition in bankruptcy was filed.

He does not take as a purchaser,<sup>51</sup> or as an attachment or judgment creditor.<sup>52</sup> He simply stands in the shoes of the bankrupt with no better right or title to the bankrupt's property than belonged to the bankrupt or to his creditors at the time when the trustee's title accrued.<sup>53</sup>

<sup>47</sup> *In re* Miller, 118 Fed. Rep. 360, 9 Am. B. R. 274.

<sup>48</sup> *In re* Birck (C. C. A. 7th Cir.), 142 Fed. Rep. 438, 73 C. C. A. 554, 15 Am. B. R. 694.

<sup>49</sup> *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545, 556, 54 L. Ed. 610, 24 Am. B. R. 761.

<sup>50</sup> See statute, June 25, 1910, 36 Stat. at L. 838.

<sup>51</sup> *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709.

<sup>52</sup> *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; but see the amendment of 1910, Sec. 8.

<sup>53</sup> As to the title of the trustee, see Sec. 371, *ante*; *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re Standard Laundry Co.*, 112 Fed. Rep. 126, 7 Am. B. R. 254; *In re Lukens*, 138 Fed. Rep. 188, 14 Am. B. R. 683.

Where the bankrupt has bought property subject to chattel mortgages void as unrecorded, they can not be attacked for want of record by the trustee of the purchaser. *In re Columbia Fireproof D. &*



A mortgage, therefore, which is valid as against the bankrupt at the date of the bankruptcy under the state law and not voidable under any provision of the bankruptcy act, is valid as against the trustee in bankruptcy of the mortgagor, except in so far as creditors have vested rights at that time which are valid as against the mortgagee. In such cases the trustee may be subrogated to the rights of such creditors for the benefit of the estate.<sup>55</sup>

The amendment of 1910 provided however that the trustee should be deemed a lien creditor as to all property in the custody of the bankruptcy court and a judgment creditor as to all property not in its custody.<sup>56</sup>

#### § 474. Avoiding mortgages binding on bankrupt.

It may be observed that a trustee is expressly authorized to avoid a mortgage, as a preference, which is valid as between the bankrupt and the mortgagee,<sup>57</sup> or one given within the four months' period to hinder, delay or defraud creditors,<sup>58</sup> which could not be set aside by the bankrupt, or one which for want of record or other reason is not valid as a lien as against the claims of creditors,<sup>59</sup> although it is valid as between the mortgagor and mortgagee. In these cases the trustee is vested with the rights of creditors in addition to the title of the bankrupt.

The trustee is not a party to a mortgage given by a bankrupt "so as to come within the exception to the statute which provides that the mortgage shall not be valid without record against a person other than the parties thereto."<sup>60</sup>

T. Co., 168 Fed. Rep. 159, 21 Am. B. R. 714.

<sup>55</sup> B. A. 1898, Sec. 67b; *In re Beede*, 138 Fed. Rep. 441, 14 Am. B. R. 697; *First National Bank v. Staake*, 202 U. S. 141, 50 L. Ed. 967, 15 Am. B. R. 639; *In re New York Economical Printing Co.* (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615.

<sup>56</sup> Section 8 of the act of June

25, 1910, 36 Stat. at L. 838, and its effect, see Sec. 372, *ante*.

<sup>57</sup> B. A. 1898, Sec. 60b. See also Sec. 494, *et seq.*, *post*, and Sec. 382, *ante*.

<sup>58</sup> B. A. 1898, Sec. 67e. See also Sec. 491, *et seq.*, *post*, and Sec. 381, *ante*.

<sup>59</sup> B. A. 1898, Sec. 67a. See also Sec. 442, *ante*, and Sec. 383, *ante*.

<sup>60</sup> *Clark v. Williams*, 190 Mass. 219, 76 N. E. 723.

The local law required a chattel mortgage to be recorded in the place where the mortgagor lived and where he did business, and the mortgagor described himself as being of the city where he had his place of business, although he resided at the time in another town. The mortgagee had no knowledge of his residence and the mortgage was duly recorded in the place where he had his principal place of business. The mortgagor claimed that the trustee in bankruptcy was estopped by the representation of the bankrupt, but the court denies this claim and holds that although the trustee takes property in the same condition as the bankrupt held it that this is always subject to the qualification expressly stated;—"Except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provisions of the act."<sup>61</sup>

#### § 475. Enforcing rights of mortgagee.

A mortgagee holding a valid mortgage may, notwithstanding the bankruptcy of the mortgagor, foreclose it in the state courts<sup>62</sup> with interest,<sup>63</sup> and may prove against the estate in

<sup>61</sup> *In re McDonald*, 173 Fed. Rep. 99, 21 Am. B. R. 358.

<sup>62</sup> *In re McCane*, 152 Fed. Rep. 733, 18 Am. B. R. 594; *Carter v. People's National Bank*, 109 Ga. 573, 35 S. E. 61; *Reed v. Equitable Trust Co.*, 115 Ga. 780, 42 S. E. 102; *Johnson v. Grocery Co.*, 112 Ga. 449, 37 S. E. 766; *Parks v. Baldwin*, 123 Ga. 869, 51 S. E. 722, court refused to stay foreclosure; *Wikle v. Jones*, 133 Ga. 266, 65 S. E. 577, the trustee is interested only in the surplus above the lien; *Cobleigh v. Spitznagle*, 120 Ill. App. 110; *Spitznagle v. Cobleigh*, 120 Ill. App. 191; *Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Iowa, 432, 99 N. W. 121.

Where the mortgagee is attempting to foreclose by suit, it is competent for the trustee to question

the validity of the mortgage. *Carlsbad Water Co. v. New*, 33 Colo. 389, 81 P. 34. Interest was allowed on a mortgage debt where the mortgage was held not to be a fraudulent conveyance and the estate was ample for that purpose. *Coder v. Arts*, 213 U. S. 223, 245, 53 L. Ed. 772. A mortgagee under a valid mortgage is entitled to interest whether or not he proves his claim in bankruptcy up to the time that the property is sold and the money realized therefor with which to pay his mortgage. *In re Stevens*, 173 Fed. Rep. 842, 23 Am. B. R. 239.

<sup>63</sup> *In Sexton v. Dreyfus*, 219 U. S. 339; 54 L. Ed. —, 25 Am. B. R. 363, interest was allowed on a mortgage debt where the mortgage was held not to be a fraudulent

bankruptcy for any balance of his claim not settled in foreclosure,<sup>64</sup> or he may proceed against the trustee to recover the property or its value if taken by the trustee,<sup>67</sup> and if his mortgage is void but his debt arose in good faith he may prove his claim and share as a general creditor.<sup>68</sup>

Where the taking of possession of after-acquired property under a valid mortgage is valid under the state law it is valid as against the trustee in bankruptcy.<sup>69</sup>

### § 476. Pledges.

A security by way of pledge or pawn is a species of mortgage. The difference ordinarily recognized between a mortgage and a pledge is, that the title is transferred by the former and possession by the latter. Indeed, possession may be considered as of the very essence of a pledge.

A pledge is confined to personal property capable of delivery and is created by the mere delivery of such property to some other person as security for money advanced or to be advanced. Collateral security is the term generally used to designate a pledge of negotiable paper, corporate

conveyance and the estate was ample for that purpose. *Coder v. Arts*, 213 U. S. 223, 245 53 L. Ed. 772, 22 Am. B. R. 1. A mortgagee under a valid mortgage is entitled to interest, whether or not he proves his claim in bankruptcy up to the time that the property is sold and the money realized therefor with which to pay his mortgage. *In re Stevens*, 173 Fed. Rep. 842, 23 Am. B. R. 239.

<sup>64</sup> Where the mortgage is foreclosed within the year, the mortgagee can not prove his claim for a deficiency after the expiration of the year. *In re Sampter* (C. C. A. 2d Cir.), 170 Fed. Rep. 938, 96 C. C. A. 98, 22 Am. B. R. 357.

<sup>67</sup> *Skilton v. Coddington*, 105 N. Y. App. Div. 617, reversed, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. As to sale by the bankruptcy court of mortgaged property, see Sec. 1253, *post*.

<sup>68</sup> *Post v. Berry* (C. C. A. 8th Cir.), 175 Fed. Rep. 564, 99 C. C. A. 186, 23 Am. B. R. 699.

<sup>69</sup> *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Zartman v. First National Bank*, 189 N. Y. 267, 82 N. E. 127 (affirming 109 N. Y. App. Div. 406, 96 N. Y. Suppl. 633), possession taken within three days of bankruptcy is ineffectual.

stocks or other incorporated personalty, as distinguished from a pledge of corporeal chattels.

An equitable interest in property incapable of delivery can not be pledged, but an equitable lien may be impressed upon the property which will be enforced by a court of equity.<sup>71</sup> A pledge differs from a lien in that a pledgee may enforce his security without the aid of a court, but a lien can only be enforced through judicial proceedings.

In order to constitute a pledge an actual or symbolic delivery of the property capable of personal possession is essential and to preserve it the pledgee must retain possession.<sup>72</sup>

#### § 477. Governed by what law.

Where a pledge is valid under the state law and not in violation of any provision of the bankruptcy law it will be respected and may be enforced by a court of bankruptcy.<sup>73</sup>

<sup>71</sup> Hurley v. Atchinson, etc., Ry., 213 U. S. 126; 53 L. Ed. 729, 22 Am. B. R. 17; In Chattanooga Nat. Bank v. Rome Iron Co., 102 Fed. Rep. 755, 4 Am. B. R. 441, an equitable right which was incapable of delivery was pledged by a contract in writing. This transaction was properly held to raise an equitable lien, but it is not accurate to call it a pledge. In McDonald v. Daskam (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 53 C. C. A. 554, 8 Am. B. R. 543, the court sustained an equitable lien and said: "We can not consider this agreement as a common law pledge, and void because the policies were not given into the possession of Daskam or the bank. It was not a pledge of marketable security or of salable property." See also *In re Elm Brewing Co.*, 132 Fed. Rep. 299,

12 Am. B. R. 623. As to equitable liens, see further Sec. 460, *ante*.

<sup>72</sup> Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109; Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 74 C. C. A. 186, 16 Am. B. R. 49; Love v. Export Storage Co. (C. C. A. 6th Cir.), 143 Fed. Rep. 1, 74 C. C. A. 155, 16 Am. B. R. 171; *In re Rodgers* (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 60 C. C. A. 567, 11 Am. B. R. 79; reversed for want of jurisdiction *sub nom.*, 1st Nat'l Bank v. Title & Trust Co., 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779; Casey v. Schneider, 96 U. S. 496, 24 L. Ed. 790.

<sup>73</sup> Hiscock v. Varick Bank, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; Union Trust Co. v. Wilson, 198 U. S. 530, 59 L. Ed. 1154,

State statutes regulating pledges and warehousemen are controlling in a court of bankruptcy in determining the validity and effect of pledges.<sup>74</sup>

### § 478. Contract to pledge.

A mere contract or agreement to give a pledge is not sufficient to constitute a pledge.<sup>75</sup>

Where a creditor takes possession of goods within four months of bankruptcy in pursuance of an agreement made prior to such period, the pledge may be avoided by the trustee as a preference, because the pledge was made within the prohibited period.<sup>76</sup> But where the agreement, made at the time of the loan, is to pledge a particular thing, which is subsequently delivered to the pledgee, the date of making the pledge relates back to the time of the contract and constitutes a valid pledge which can not be disturbed by a trustee.<sup>77</sup>

<sup>74</sup> Am. B. R. 109; Wm. Firth Co. v. S. C. L. & T. Co. (C. C. A. 4th Cir.), 122 Fed. Rep. 569; 59 C. C. A. 73; *In re* Waterloo Organ Co. (C. C. A. 2d Cir.), 134 Fed. Rep. 345, 67 C. C. A. 327, 13 Am. B. R. 477; Love v. Export Storage Co. (C. C. A. 6th Cir.), 143 Fed. Rep. 1, 74 C. C. A. 155, 16 Am. B. R. 171; First Nat. Bank v. Penn. Trust Co. (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 60 C. C. A. 100, 10 Am. B. R. 782; Yeatman v. Savings Institution, 95 U. S. 764, 24 L. Ed. 589.

<sup>74</sup> Hiscock v. Varick Bank, 206 U. S. 23, 51 L. Ed. 945, 18 Am. B. R. 1; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779; Security Warehousing Co. v. Hand (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 74 C. C. A. 186, 16 Am. B. R. 49; Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109; Adams v. Merchants Nat. Bank, 2 Fed. Rep. 174; Casey v.

Schneider, 96 U. S. 496, 24 L. Ed. 790; Hardeman v. Etheridge (C. C. A. 5th Cir.), 112 Fed. Rep. 619, 50 C. C. A. 398.

<sup>75</sup> *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554; Nisbit v. Macon Bank & Trust Co., 12 Fed. Rep. 686; Copeland v. Barnes, 147 Mass. 388.

But see Wilder v. Watts, 138 Fed. Rep. 427, 15 Am. B. R. 57.

<sup>76</sup> *In re* Sheridan, 98 Fed. Rep. 406, 3 Am. B. R. 554; Nisbit v. Macon Bank & Trust Co., 12 Fed. Rep. 686; Copeland v. Barnes, 147 Mass. 388.

<sup>77</sup> Wilder v. Watts, 138 Fed. Rep. 427, 15 Am. B. R. 57; Union Trust Co. v. Bulkeley (C. C. A. 6th Cir.), 150 Fed. Rep. 510, 80 C. C. A. 328, 18 Am. B. R. 35; Hurley v. Atchinson, etc., Railway Co., 213 U. S. 126, 53 L. Ed. 729, 22 Am. B. R. 17; Sexton v. Kessler & Co. (C. C. A. 2d Cir.), 172 Fed. Rep. 535, 97 C. C. A. 961, 21 Am. B. R. 807.

A forged bill of lading on which a merchant obtains the payment of his draft operates at most as an agreement to pledge, and does not pass title where no further delivery is made.<sup>78</sup>

Where a bankrupt more than four months before bankruptcy made an agreement to pledge certain merchandise, but no delivery was made until within four months of the bankruptcy, the exercise of the right to take possession of the property within the four months did not constitute an illegal preference, because it was pursuant to a valid agreement to pledge for which a present consideration had moved to the bankrupt, and it therefore related back to such agreement.<sup>79</sup>

Where a railroad to assist a coal company in going on, advances money for coal to be mined, the court construed the arrangement as a pledge of a sufficient amount of coal after it should be mined, as security for payment of advances made. "Equity looks at the substance and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day as required, does not change the transaction into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature remained undisturbed thereby. If there had been no bankruptcy proceedings, the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement."<sup>80</sup>

<sup>78</sup> Lovell v. Hentz & Co., 181 Fed. Rep. 555.

<sup>79</sup> *In re* Automobile Livery Service Co., 176 Fed. Rep. 792, 23 Am. B. R. 799.

<sup>80</sup> Per Brewer, J., in Hurley v. Atchinson, Topeka & Santa Fe Railway Co., 213 U. S. 126, 134, 53 L. Ed. 729, 22 Am. B. R. 17.

**§ 479. Possession—Warehousing.**

The possession of the pledgee is vital to the validity of the pledge as against the trustee in bankruptcy.<sup>81</sup> A pledge in Pennsylvania is not invalid for failure to deliver where there was an honest and good reason for not delivering as where the pledgor was at work on the pledge.<sup>83</sup>

The manual delivery and possession of the thing pledged is the simplest form. Where bills of exchange, promissory notes, corporate stock, etc., are pledged there should be some evidence thereof by way of endorsement or assignment, without which the pledgee could not recover thereon. They remain the assets of the pledgor and subject to the payment of his debts unless validly transferred. A negotiable instrument payable to bearer may be pledged by delivery only. Where a part of a thing in bulk is pledged, such part must be separated and set apart, unless the pledgee has possession of the whole bulk.<sup>84</sup> If the possession of the whole is in the pledgee, then the part pledged must also be there.

The possession need not be actual. It may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor.<sup>85</sup> Where the debtor executed and delivered to a bank a bill of sale, absolute on its face, of billets of iron, which by reason of their weight

<sup>81</sup> *Fourth St. National Bank v. Millbourne Mills Co.* (C. C. A. 3d Cir.), 172 Fed. Rep. 177, 96 C. C. A. 629, 22 Am. B. R. 442; *American Can Co. v. Erie Preserving Co.*, 171 Fed. Rep. 540. Where a pledge of machinery as security for indebtedness was executed two years before the commencement of the bankruptcy proceedings, it was invalid as against the trustee in bankruptcy, where no delivery was made, and where the bill of sale was absolute in form, which did

not in any way indicate that it was a mortgage or pledge to secure a debt. *First Nat. Bank v. Guarantee & Trust Co.* (C. C. A. 3d Cir.), 178 Fed. Rep. 187, 101 C. C. A. 507, 24 Am. B. R. 330.

<sup>83</sup> *In re Pittsburgh Industrial Iron Works*, 179 Fed. 151, 22 Am. B. R. 851.

<sup>84</sup> *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 81 Fed. Rep. 439, 445.

<sup>85</sup> *Casey v. Cavaroc*, 96 U. S. 467, 477, 24 L. Ed. 779.



and bulk were permitted to remain on the premises of the vendor, the billets however being marked by a sign posted on the several piles setting out that they were the property of the bank, it was held a valid pledge.<sup>86</sup>

It has been held that a distiller's warehouse receipt for whiskey stored in its government warehouse represents the property itself, and its transfer to a purchaser or pledgee, in good faith in accordance with the usages of the business, operates as a delivery of the whiskey subject to the payment of the tax, and if made more than four months prior to the bankruptcy of the distiller, the sale or pledge is valid as against the trustee.<sup>86\*</sup>

A company can not make a warehouse of itself as to its own goods.<sup>87</sup> Where a milling company to pledge its grain for money advanced while still retaining possession and dominion over it issues "certificates" for so much grain or flour stored at the mills, and where the store is drawn upon freely no definite quantity being kept on hand the certificates

<sup>86</sup> First Nat'l Bank v. Penn. Trust Co. (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 60 C. C. A. 100, 10 Am. B. R. 782; Beiser v. Western German Bank (C. C. A. 6th Cir.), 167 Fed. Rep. 486, 93 C. C. A. 122.

<sup>86\*</sup> Taney v. Penn. National Bank (C. C. A. 3d Cir.), 187 Fed. Rep. 689, reversing on rehearing its former decision—(opinion by Judge Archibald not reported). Same case in the court below, 175 Fed. Rep. 606, 23 Am. B. R. 890.

A different view was taken by Judge Hollister in Pattison v. Dale (southern district of Ohio, Jan. 26, 1911, not reported), who said: "Warehouse receipts symbolically pass possession from the general to the qualified owner, the pledgee, because the possession of the actual property has so far passed out of the hands of the general owner that acts of dominion exercised by him

are no longer possible. When the pledgees took these receipts they knew that the owner could satisfy such control as the Government had jointly with him by paying the tax. They knew that such control as the Government had might be raised at any moment and that the owner would then be under no restraint whatever and could roll the barrels out of the warehouse without let or hindrance from anybody. This would not be possible when goods are in a warehouse in the ordinary sense."

<sup>87</sup> Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291, affirming (C. C. A. 7th Cir.) 143 Fed. Rep. 32, 77 C. C. A. 186, 16 Am. B. R. 49; Tradesman Nat. Bank v. Tagode, 186 Pa. St. 556; Drury v. Moore, 171 Mass. 252.



create no lien, as no pledge exists in the absence of delivery.<sup>88</sup>

Where an attempted warehousing of seed on the owner's premises consisted of a lease to the warehouseman, a tagging of the bags of seed without any exterior sign on the premises, the warehouseman having no key to the premises and no custodian to prevent the bankrupt from doing with it as he would, it was held that the possession was not changed from the debtor to the warehouseman.<sup>88\*</sup>

But the agreement to pledge may be upheld as a declaration of trust.

. So where a debtor set aside in its own safety deposit vaults certain securities which passed by delivery, in an envelope marked "*in escrow*" for a creditor under an arrangement with the creditor to hold these stocks as security, which arrangement was continued for some years until within four months of the bankruptcy the securities were finally delivered to the creditor by the debtor, the transaction was upheld. The court says that the parties acted in entire good faith, that no creditors were misled by apparent ownership of these securities and the court regards the transaction as a declaration of trust in favor of the creditor, and that in delivering the securities the bankrupt acted in strict accordance with the trust he had declared years before when entirely solvent.<sup>89</sup>

It is a necessary condition of possession by the pledgee that the property itself be in the possession of some person other than the pledgor.<sup>90</sup> The supreme court has said that

<sup>88</sup> Fourth St. National Bank v. Millbourne Mills Co. (C. C. A. 3d Cir.), 96 C. C. A. 629, 172 Fed. Rep. 177, 22 Am. B. R. 442.

<sup>88\*</sup> Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291, affirming (C. C. A. 7th Cir.) 143 Fed. Rep. 32, 74 C. C. A. 186, 16 Am. B. R. 49.

<sup>89</sup> Sexton v. Kessler & Co. (C.

C. A. 2d Cir.), 172 Fed. Rep. 535, 97 C. C. A. 161, 21 Am. B. R. 807. But compare the effect of statute June 25, 1910, Section 8. See Sec. 372, *ante*.

<sup>90</sup> Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291, affirming (C. C. A. 7th Cir.) 143 Fed. Rep. 32, 74 C. C. A. 186, 16 Am. B. R. 49; *In re Rodgers* (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 60 C. C.

"when there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense."<sup>91</sup>

The actual possession may be held by a third person for the pledgee. Such person will be considered the pledgee's agent. One chattel may be pledged to secure two debts to two different persons, one holding it as agent for the other to the extent of his debt.<sup>92</sup> A pledge of fire insurance policies has been sustained, where a solvent company placed the policies of insurance upon its mill, warehouse, etc., in the hands of two of its directors, which it agreed should remain in the directors' possession as pledges to secure loans which had been or which might thereafter be made to it by creditors, there being no formal assignment and consent of the insurance company.<sup>93</sup>

When the actual delivery is to a carrier or warehouseman and a bill of lading or warehouse receipt is given therefor, the transfer of the instrument and its delivery to the pledgee is a delivery of possession to the pledgee of the property represented by the instrument.<sup>94</sup> A warehousing company has been held to have possession of property pledged where it had it under lock and key in a place to which it had a legal title and right of access by lease from the debtor and

A. 567, 11 Am. B. R. 79; reversed for want of jurisdiction, 198 U. S. 280, 49 L. Ed. 1051, 14 Am. B. R. 102; *Fourth St. Nat. Bank v. Millbourne's Mills Co.* (C. C. A. 3d Cir.), 172 Fed. Rep. 177, 96 C. C. A. 629, 22 Am. B. R. 442; *American Can Co. v. Erie Preserving Co.*, 171 Fed. Rep. 540.

<sup>91</sup> Mr. Justice Holmes in *Union Trust Co. v. Wilson*, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109.

<sup>92</sup> *In re Wiley*, No. 17654 Fed. Cas., 4 Biss. 71.

<sup>93</sup> *Stout v. Yaeger Milling Co.*, 13 Fed. Rep. 802; see *McDonald v. Daskam* (C. C. A. 7th Cir.), 116 Fed. Rep. 276, 53 C. C. A. 554, 8 Am. B. R. 543, where fire insurance policies were not pledged, but enforced as an equitable lien.

<sup>94</sup> *Union Trust Co. v. Wilson*, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117. Pledge of warehouse receipts held to give no lien because no change of possession under law of Wisconsin.

no one else could get such access without breaking in, the outside of the depository being placarded with signs stating in large letters that the premises were occupied by the company as a public warehouse;<sup>95</sup> and also where it had piles of lumber on property leased by it, but not enclosed, the corners of the premises and each pile of lumber placarded and the lumber placed in the custody of an agent, who was stationed in the lumber yard to assert control and prevent others from interfering with the lumber,<sup>96</sup> and also where a warehousing company leased a part of the owner's premises, which was marked off by signboards to indicate the fact and the material for which a warehouse receipt was given being distinguished by stakes, cords and tags and in charge of a warehouse custodian.<sup>97</sup>

#### **§ 480. Stock brokers as pledgees.**

A stock broker who carries stock for a customer is the pledgee and the customer is the owner and pledgor of stocks on margin.<sup>1</sup>

The broker has the right to pledge and hypothecate securities purchased for the customer and substitute similar securities therefor with the obligation to respond at all times to the demand of the customer for the redemption of the stock.<sup>2</sup>

<sup>95</sup> *Union Trust Co. v. Wilson*, 198 U. S. 530, 49 L. Ed. 1154, 14 Am. B. R. 109.

<sup>96</sup> *Love v. Export Storage Co.* (C. C. A. 6th Cir.), 143 Fed. Rep. 1, 74 C. C. A. 155, 16 Am. B. R. 171.

<sup>97</sup> *Bush v. Export Storage Co.*, 136 Fed. Rep. 918, 14 Am. B. R. 138; *Philadelphia Warehouse Co. v. Winchester*, 156 Fed. Rep. 600; *Beiser v. Western German Bank* (C. C. A. 6th Cir.), 167 Fed. Rep. 486, 93 C. C. A. 122.

<sup>1</sup> *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717; *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; *In re McIntyre* (C. C. A. 2d Cir.), 181 Fed. Rep. 955, 104 C. C. A. 419, 24 Am. B. R. 626.

<sup>2</sup> *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717; *In re Ennis* (C. C. A. 2d Cir.), 187 Fed. Rep. 720, 109 C. C. A. —, 26 Am. B. R. —; *In re McIntyre* (C. C. A. 2d Cir.), 181 Fed. Rep. 955, 104 C. C. A. 419, 24 Am. B. R. 626.

But this right ceases if he converts to his own use or misappropriates the stocks or property of a customer.<sup>3</sup>

On the bankruptcy of the broker the customer is entitled to reclaim his collaterals and stock purchased for him or deposited with the broker or the proceeds.<sup>4</sup> The reason for this is that he owns the property and the bankrupt broker does not. If there is a balance due on the purchase, he must pay it. If he does not and the account is closed he is entitled to the credit balance only, if any there is.<sup>5</sup> In case the broker has hypothecated shares of the customer, held by him as collateral and the customer is not indebted to the broker, they belong to the customer and he is entitled to the shares, or their proceeds, when returned to the trustee, if the loan has been paid by proceeds of other securities pledged therefor.<sup>6</sup>

The delivery of collaterals and stock to a customer does not constitute a preference, although the broker may be insolvent at the time, because the customer is not a creditor of the broker.<sup>7</sup>

Where the broker has converted the stock to his own use the customer may follow the stock in specie or the proceeds into the hands of the trustee, if he can identify the same.<sup>8</sup> To do

<sup>3</sup> *In re Ennis* (C. C. A. 2d Cir.), 187 Fed. Rep. 720, 109 C. C. A. —, 26 Am. B. R. —; *Unity Banking & Saving Co. v. Bettman*, 217 U. S. 127, 54 L. Ed. 695, — Am. B. R. —; *In re McIntyre*, 181 Fed. Rep. 960, 104 C. C. A. 424, 24 Am. B. R. 626; *In re McIntyre* (C. C. A. 2d Cir.), 185 Fed. Rep. 96, 108 C. C. A. 543, 26 Am. B. R. 51.

<sup>4</sup> *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710; *In re Brown & Co.*, 189 Fed. Rep. 432, 442, — Am. B. R. —.

<sup>5</sup> *In re McIntyre, Ex parte Niven* (C. C. A. 7th Cir.), 174 Fed. Rep. 627, 98 C. C. A. 381, 24 Am. B. R. 1.

<sup>6</sup> *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R.

710; *In re McIntyre* (C. C. A. 8th Cir.), 181 Fed. Rep. 955, 104 C. C. A. 419, 24 Am. B. R. 626.

<sup>7</sup> *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717; *Thomas v. Taggart*, 209 U. S. 385, 52 L. Ed. 845, 19 Am. B. R. 710.

<sup>8</sup> See Sec. 409, *ante*; *In re Ennis* (C. C. A. 2d Cir.), 187 Fed. Rep. 720, — C. C. A. —, — Am. B. R. —; *Unity Banking & Sav. Co. v. Bettman*, 217 U. S. 127, 54 L. Ed. 695, — Am. B. R. —; *Petition of First Nat. Bank* (C. C. A. 2d Cir.), 175 Fed. Rep. 769, 99 C. C. A. 345, 23 Am. B. R. 423; *In re McIntyre* (C. C. A. 3d Cir.), 181 Fed. Rep. 960, 104 C. C. A.

this he must show that there was continuously on hand from the time of the receipt of the stock by the brokers an amount of stock or the fund containing the proceeds large enough to cover his claim.<sup>9</sup> There is no presumption of restoration arising from the presence of similar stock or a sufficient fund at insolvency.<sup>10</sup> Where a broker forges the name of the true owner of securities left with him no right passes to the pledgee.<sup>11</sup>

#### **§ 481. Trustee's rights where no pledge created.**

If the effect of the transaction is not to give a pledge, the creditor stands as a common instead of a preferred creditor of the bankrupt's estate.<sup>1</sup>

#### **§ 482. Pledgee holding two securities.**

In case one pledgee holds two separate pledges for two separate debts and it turns out that the security for one debt is too small and there is a surplus from the other pledge, the pledgee can not apply the surplus to the payment of the deficiency in the absence of a special contract that the security stand for both debts. The reason for this is that the surplus is a trust fund in possession of the pledgee and not a debt. It can not therefore be set off against the debt.

424, 24 Am. B. R. 626; *In re McIntyre* (C. C. A. 2d Cir.), 185 Fed. Rep. 96, 108 C. C. A. 543; 26 Am. B. R. 51.

<sup>9</sup> *In re Brown & Co.*, 189 Fed. Rep. 432, — Am. B. R. —; *Unity Banking & Sav. Co. v. Bettman*, 217 U. S. 127, 54 L. Ed. 695, — Am. B. R. —.

<sup>10</sup> *In re McIntyre* (C. C. A. 2d Cir.), 181 Fed. Rep. 960, 104 C. C. A. 424, 24 Am. B. R. 626; *In re Brown, Ex parte Gorman* (C. C.

A. 2d Cir.), 184 Fed. Rep. 454, 106 C. C. A. 536, — Am. B. R. —.

<sup>11</sup> *Unity Banking & Sav. Co. v. Bettman*, 217 U. S. 127, 54 L. Ed. 695, — Am. B. R. —.

<sup>1</sup> *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, 19 Am. B. R. 291; *Adams v. National Bank*, 2 Fed. Rep. 174; *French v. White*, 78 Vt. 89, 18 Am. B. R. 905.

### § 483. Pledge void as preferential.

Where the pledge is in fraud of the bankrupt law it is void, and the trustee may disregard the contract of pledge and recover the property for the benefit of the creditors.<sup>1</sup> In order to constitute a preferential pledge under section 60 it must have been, *first*, pledged by an insolvent person to a creditor, and, *second*, with the effect to enable the creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, and, *third*, such creditor must have had reasonable cause to believe that it was intended to give him a preference, and, *fourth*, the pledge must have been within four months before filing a petition in bankruptcy, or after filing the petition and before the adjudication. If any one of these elements is wanting the pledge can not be avoided as a preference and, if otherwise valid, may be enforced by the pledgee.<sup>2</sup>

### § 484. Termination of possession—Exchange.

If the possession be once given up, the pledge, as such, is extinguished.<sup>2</sup> Hence a redelivery of the thing pledged to the debtor ordinarily terminates the pledge. A redelivery for a mere temporary purpose, as for shoeing a horse which had been pledged and is owned by the farrier, or for repairing a carriage which has been pledged and is owned by the maker, does not amount to an interruption of the pledgee's

<sup>1</sup> For further consideration of these elements consult Preferences, Sec. 498, *et seq.* For examples of invalid pledges, see *Ogden v. Jackson*, 1 Johns (N. Y.), 370; *Adams v. Nat. Bank*, 2 Fed. Rep. 174; *Security Warehousing Co. v. Hand* (C. C. A. 7th Cir.), 143 Fed. Rep. 32, 74 C. C. A. 186, 16 Am. B. R. 49; *In re Sheridan*, 98 Fed. Rep. 406, 3 Am. B. R. 554; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

<sup>2</sup> *Richardson v. Shaw*, 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717; *In re Bartlett*, 172 Fed. Rep. 679, 22 Am. B. R. 891; *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. Ed. 945, 18 Am. B. R. 1; *In re Busby*, 124 Fed. Rep. 469, 10 Am. B. R. 650; *Chattanooga Nat. Bank v. Rome Iron Co.*, 102 Fed. Rep. 755, 4 Am. B. R. 441.

<sup>2</sup> *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

possession. The owner is but a mere special bailee for the creditor.<sup>3</sup>

So when the debtor is employed in the creditor's service his temporary use of the pledged article in the creditor's business does not effect a restoration of the possession of the debtor.<sup>4</sup> When a security is redelivered for the purpose of exchanging it for other security,<sup>5</sup> or where collateral security is transferred by the borrower to the lender for collection, the pledge is not terminated by such redelivery.<sup>6</sup> It has been held that the fact that placards on billets of iron, stored on owner's premises, had fallen off for a period of several months did not end the possession of the pledgee, who replaced them as soon as he knew the fact.<sup>7</sup>

#### **§ 485. Redemption.**

The trustee may redeem property pledged, under the direction of the court, by tendering performance of the contract of pledge or discharging the debt for which the property is held.<sup>8</sup> This will be done only where the property is considered of greater value than the debt. The trustee of an estate of a bankrupt, who has repledged property held by him as a pledge, may redeem the property for the estate of the bankrupt by paying the bankrupt's debt. He takes it subject to the right of the original owner to redeem, because he has only the bankrupt's interest, which is that of pledgee.

#### **§ 486. Power of attorney.**

A lien created by a judgment obtained within the four months' period on a note which gave the holder a power of

<sup>3</sup> *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779.

<sup>4</sup> *Reeves v. Capper*, 5 Bing. N. C. 136.

<sup>5</sup> *Hays v. Riddle*, 1 Sandf. (N. Y.) 248.

<sup>6</sup> *Clark v. Iselin*, 21 Wall. 360 22 L. Ed. 568.

<sup>7</sup> *First Nat. Bank v. Penn. Trust Co.* (C. C. A. 3d Cir.), 124 Fed. Rep. 968, 60 C. C. A. 100, 10 Am. B. R. 782.

<sup>8</sup> *Yeatman v. Savings Institution*, 95 U. S. 764, 768, 24 L. Ed. 589; *Van Kirk v. Slate Co.*, 140 Fed. Rep. 38, 15 Am. B. R. 239.

attorney to enter up judgment against the debtor in case of nonpayment at maturity is void, although the note was given prior to that period.<sup>9</sup> The reason is that the lien is created by the judgment and not by giving the note, while a power of attorney to collect money and pay it to the creditor executed more than four months before bankruptcy may be irrevocable and a valid lien against the trustee.<sup>10</sup>

**§ 487. Vendor's lien.**

Vendor's liens will be found treated under "Equitable Liens." Section 460, *ante*.

<sup>9</sup>*In re* Richards (C. C. A. 7th Cir.), 96 Fed. Rep. 935, 95 C. C. A. 258, 3 Am. B. R. 145; Rothermel v. Moyer, 24 Pa. Super. Ct. R. 325; Wilson v. Nelson, 183 U. S. 191, 46 L. Ed. 147, 7 Am. B. R. 142; Ferguson v. Greth, 195 Pa.

St. 272, 45 A. 735, 78 Am. St. Rep. 812.

<sup>10</sup>Wood v. Kerkeslager, 225 Pa. St. 296, 74 A. 174; Third National Bank v. Kerkeslager, 225 Pa. St. 305, 74 A. 176.



## CHAPTER XXVI.

## PREFERENCES.\*

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| <p>SEC.<br/>488. In general.<br/>489. To foreigners.<br/>490. Preference distinguished from fraud.<br/>491. Whether voluntary or under pressure.<br/>492. Bankrupt's intent to prefer.<br/>493. By judgment.<br/>494. By transfer.<br/>495. Debtor must be insolvent.<br/>496. Must be made by the bankrupt.<br/>497. Must be made to a creditor.<br/>498. Within four months.<br/>499. Whether period dates from execution and delivery or from recording.<br/>500. Whether period dates from possession or from notice.<br/>501. Exchange.<br/>502. Agreement to pledge or mortgage or settle.<br/>503. After adjudication.<br/>504. Computation of time.<br/>505. Reasonable cause to believe.<br/>506. When reasonable cause exists.<br/>507. Doubt or suspicion insufficient.<br/>508. Creditor put on inquiry.<br/>509. Knowledge of agent.<br/>510. Burden of proof.<br/>511. Question for jury.</p> | <p>SEC.<br/>512. The effect must be to enable any creditor to obtain a greater percentage of his debt than any other creditor of the same class.<br/>513. \ Classes of creditors.<br/>514. Mortgages as preferences.<br/>515. Effect of state law.<br/>516. By insolvent to creditor.<br/>517. Within four months.<br/>518. Reasonable cause to believe.<br/>519. Mortgages void when for pre-existing debt.<br/>520. Mortgages to defraud.<br/>521. Payment of money is transfer of property.<br/>522. Payment on antecedent debts.<br/>523. Payments which do not diminish estate.<br/>524. Collecting what assigned for present consideration.<br/>525. \ Endorsed or secured liability.<br/>526. Payment to attorney for services to be rendered.<br/>527. Sales.<br/>528. Fraudulent sales only affected.<br/>529. Elements of fraudulent sale.<br/>530. When sale void.<br/>531. Transfers to lien creditor.<br/>532. Conditional sales.</p> |
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## § 488. In general.

A preference is defined by the act itself in the following words: "A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition or after the filing of the petition and before the adjudication procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." <sup>1</sup>

\* Burden of proof as to a preference, Sec. 544, *post*; as to whether the amendment of 1910 is retrospective to its operation on pref-

erences, compare Sec. 433, *ante*.

<sup>1</sup> B. A. 1898, Sec. 60, as amended Feb. 5, 1903, 31 Stat. at L. 797. Compare act of June 25, 1910, Sec.

From this definition it appears that a preference may be created by a judgment or a transfer.

By judgment, in this section, is probably meant an order or decree of court upon which is founded process or other proceedings, the object of which is to take hold of the property and withdraw it from the possession and control of the debtor and from the ordinary reach of the creditors for the payment of what is due to them.

A transfer is defined to mean "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."<sup>2</sup>

#### **§ 489. To foreigners.**

Although the bankrupt law does not operate beyond the limits of the United States, a preference given to a foreigner is in violation of its provision to the same extent and under the same conditions that it would be if the preference had been given to a resident of the United States.<sup>3</sup> It makes no difference in this proposition that the contract of purchase was made abroad, and to be performed abroad when the goods had been delivered to the bankrupt, and they were his property, and in the United States.<sup>4</sup>

#### **§ 490. Preference distinguished from fraud.**

The acts mentioned in section 60 are not such as were forbidden by the common law or generally by the statutes of

11, 36 Stat. at L. 838; *Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —; *Tumlin v. Bryan* (C. C. A. 5th Cir.), 165 Fed. Rep. 166, 91 C. C. A. 200, — Am. B. R. —; *In re Neill-Pinckney, Maxwell Co.*, 170 Fed. Rep. 481, 22 Am. B. R. 401.

<sup>2</sup> B. A. 1898, Sec. 1, clause 25.

<sup>3</sup> *Olcott v. McLean*, 50 How. Pr. (N. Y.) 455. See *Sexton v. Kessler* (C. C. A. 2d Cir.), 172 Fed. Rep. 535, 97 C. C. A. 961, 21 Am. B. R. 807, where the doctrine of the text seems to have been assumed.

<sup>4</sup> *Olcott v. McLean*, 50 How. Prac. 455.

the states, nor are they acts which in their essential nature are immoral or dishonest. In order to carry out the spirit of the bankrupt system, namely, an equal division of the bankrupt's property among his creditors, Congress has adopted a conventional rule to determine the validity of these preferences. It has prescribed a limit of four months. Any transfer made within that time is fraudulent and voidable. It is so not because such preferences are morally objectionable, but simply because the bankrupt act says they are.<sup>5</sup>

No intent to defraud on the part of the bankrupt need be proved.<sup>6</sup>

"A consideration of the provisions of the bankruptcy law as to preferences and conveyances, shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in section 60, enabling one creditor to obtain a greater portion of the estate than others of the same class, is not neces-

<sup>5</sup> Bean v. Brookmire, No. 1168 Fed. Cas., 1 Dill. 25. A conveyance giving a preference is not *ipso facto* a fraud on creditors under Sec. 67. Congleton v. Schreihofner (N. J. Ch. 1903), 54 A. 144. A preferential payment may be constructively fraudulent, but it is not in itself a fraudulent conveyance. It can only become the latter where actual fraud, in addition to the preference is established. Van Iderstine v. National Discount Co. (C. C. A. 2d Cir.), 174 Fed. Rep. 518, 98 C. C. A. 300, 23 Am. B. R. 345.

<sup>6</sup> Gabriel v. Tonner, 138 Cal. 63; Benedict v. Deshel, 177 N. Y. 1, 68 N. E. 999, 11 Am. B. R. 20. See discussion in Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 454; 45 L. Ed. 1171, 5 Am. B. R. 814.

A mortgage given within four months of bankruptcy, when the bankrupt was insolvent to his own

knowledge, but while the mortgagee did not know and had no reason to know of the insolvency, is held not to be a fraudulent conveyance under Sec. 67e of the bankruptcy law. It was contended that as the necessary consequence of the giving of the mortgage was to hinder, delay, or defraud creditors of the bankrupt in the collection of their debts the bankrupt must be presumed to have intended such consequences and the mortgage was therefore voidable. But the court holds that there is a wide difference between preferences voidable under Sec. 60 and fraudulent conveyances under Sec. 67e as the former are not necessarily fraudulent, while the latter must be. The expression intent to hinder, delay, or defraud creditors is familiar to the common law and was used in the statute of Eliza-

sarily fraudulent. Preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference.

In construing the bankruptcy act this distinction must be kept constantly in mind.<sup>7</sup> As was said in *Githens v. Shiffer*:<sup>8</sup> "An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transaction with a fraudulent one." In *In re Maher*,<sup>9</sup> it was well said by the district court of Massachusetts: "In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors, which it is the policy of the law to enforce when all can not be fully paid. In a fraudulent transfer the fraud is actual, the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him."

A fraudulent misapplication of funds was held not to be a mere preference, but avoidable as a fraud on the bankrupt law though taking place more than four months before bankruptcy.<sup>11</sup>

both, and has always been held to require that there shall be actual fraud. The question of fraud depends on the motive. The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment was not sufficient to avoid a conveyance; but it was uniformly recognized that acting in good faith a debtor might thus prefer one or more creditors. The court holds that the terms "to hinder, delay, or defraud creditors" are used in their well known meaning as being aimed at conveyances intended to defraud. To make a conveyance

void under Sec. 67e, actual fraud must be shown. (Citing Loveland on Bankruptcy, 3rd edition, 476). So where the lower court finds that the bankrupt had no intention to hinder or delay his creditors the transaction can not be set aside as fraudulent. *Coder v. Arts*, 213 U. S. 223, 241, 53 L. Ed. 772, 22 Am. B. R. 1.

<sup>7</sup> *Coder v. Arts*, 213 U. S. 223, 241, 53 L. Ed. 772, 22 Am. B. R. 1.

<sup>8</sup> 112 Fed. Rep. 505, 7 Am. B. R. 453.

<sup>9</sup> 144 Fed. Rep. 503, 509, 16 Am. B. R. 340.

<sup>11</sup> *Commercial State Bank v. Bates* (Miss. 1910), 51 So. 599.

### § 491. Whether voluntary or under pressure.

It is immaterial under the bankrupt act whether the preference is given voluntarily or at the urgent solicitation or threat of a creditor,<sup>12</sup> but no preference is created by a conversion of the bankrupt's property by a creditor.<sup>13</sup>

### § 492. Bankrupt's intent to prefer.

Prior to the amendment of 1910 the intent of the bankrupt to prefer was essential to a preference.<sup>14</sup>

The act as originally passed, and as amended in 1903, included as an element of voidable preference that the creditor "had reasonable cause to believe that it was intended thereby to give a preference."<sup>15</sup> This language was held to imply that the debtor must intend the transfer to be a preference at the time

<sup>12</sup> *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. Ed. 542; *Wilson v. Brinkman*, No. 17794 Fed. Cas., 2 N. B. R. 468; *Rison v. Knapp*, No. 11861 Fed. Cas., 1 Dill. 187; *Graham v. Stark*, No. 5676 Fed. Cas., 3 N. B. R. 357; *Foster v. Hackley*, No. 4971 Fed. Cas., 2 N. B. R. 406.

<sup>13</sup> An action to recover a preference is not proven by evidence that the creditor obtained some jewelry on the pretense he wanted to buy it, and that he then kept it without paying for it as security for his debt against the protest of the bankrupt. The trustee should have brought an action for conversion under B. A. Section 70. *Stern v. Mayer*, 113 N. Y. App. Div. 181, 98 N. Y. Suppl. 1028.

<sup>14</sup> *In re First Nat. Bank* (C. C. A. 6th Cir.), 155 Fed. Rep. 100, 84 C. C. A. 16, 18 Am. B. R. 766; *Tumlin v. Bryan* (C. C. A. 5th

Cir.), 165 Fed. Rep. 166, 91 C. C. A. 200, 21 Am. B. R. 319; *In re Andrews* (C. C. A. 1st Cir.), 144 Fed. Rep. 922, 75 C. C. A. 562, 14 Am. B. R. 387; *Rutland Co. Nat. Bank v. Graves*, 156 Fed. Rep. 168, 19 Am. B. R. 446; *Sparks v. Marsh*, 177 Fed. Rep. 739, 24 Am. B. R. 280; *Rogers v. Fidelity Sav. Bank & L. Co.*, 172 Fed. Rep. 735, 23 Am. B. R. 1; *Stevens v. Oscar Holway*, 156 Fed. Rep. 90, 19 Am. B. R. 399; *In re Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —.

But see *Alexander v. Redmond* (C. C. A. 2d Cir.), 180 Fed. Rep. 92, 103 C. C. A. 446, 24 Am. B. R. 620.

<sup>15</sup> B. A. 1898, Sec. 60, 30 Stat. at L. 544, as amended by the act of Feb. 5, 1903, 32 Stat. at L. 797.

it was made.<sup>16</sup> The intent of the bankrupt might be presumed from the necessary result of the transaction.<sup>17</sup>

This language of section 60 of the act was changed by the amendment of 1910 to "had reasonable cause to believe the enforcement of such judgment or transfer would effect a preference."<sup>17\*</sup> This makes the intent of the debtor immaterial. The test is clearly the effect of the transaction without regard to the intent of the debtor.

### § 493. By judgment.

A preference may occur where an insolvent within the four months' period or before the adjudication has "procured or suffered a judgment to be entered against himself" which will result if enforced in enabling any one of his creditors to obtain a greater percentage of his debt than others of the same class,<sup>18</sup> or where a lien "obtained and permitted" will work a preference.<sup>19</sup>

<sup>16</sup> *In re Andrews* (C. C. A. 1st Cir.), 144 Fed. Rep. 922, 75 C. C. A. 562, 14 Am. B. R. 387; *In re First Nat. Bank* (C. C. A. 6th Cir.), 155 Fed. Rep. 100, 84 C. C. A. 16, 18 Am. B. R. 766; *In re Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —.

<sup>17</sup> *In Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —, Judge Sanford speaking for the court, said: "The intention to give a preference may be shown not merely by proof of actual intent, but by its equivalent in law, that is by proof that the necessary result of the transaction was to create a preference, in which case the intention to give a preference will be presumed. Where the inevitable

result of a transaction between a debtor and creditor is to create a preference, the law will conclusively impute to the debtor the intention to bring about the result necessarily arising from the nature of the act which he does."

See also *Western Tie Co. v. Brown*, 196 U. S. 502, 508; *Hardy v. Gray* (C. C. A. 1st Cir.), 144 Fed. Rep. 922, 75 C. C. A. 562.

<sup>17\*</sup> Section 11 of the act of June 25, 1910, 36 Stat. at L. 838.

<sup>18</sup> B. A. 1898, Sec. 60a.

<sup>19</sup> B. A. 1898, Sec. 67c (1).

"Permits" in 67c (1) is synonymous with "suffered," and includes a case where a creditor enters judgment under power of attorney executed more than four months before bankruptcy. *Ferguson v. Greth*, 195 Pa. St. 272, 45 A. 735.

The words "procured or suffered" imply at least covert aid given by the bankrupt to the judgment creditor.<sup>20</sup>

#### **§ 494. By transfer.**

Under the bankrupt act a preference may be created by transferring property to or for the benefit of a creditor as well as by a judicial lien.<sup>25</sup>

The word "transfer," as used in the bankrupt act, includes the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally as a payment, pledge,

<sup>20</sup> A decree removing a trustee and ordering him to pay over trust funds is not one "procured or suffered" so as to avoid it as a preference. *Fry v. Pennsylvania Trust Co.*, 195 Pa. St. 343. Where the bankrupt opposed an execution sale of its property the transaction was not a preference, within Sec. 60b of the bankrupt act, as the bankrupt had no intention to transfer his property or to aid the execution creditor and he had no reason to suspect any such intention on the part of the bankrupt. *Nelson v. Svea Pub. Co.*, 178 Fed. Rep. 136.

In order to constitute a preference the debtor must do some act to facilitate the proceedings; submissive inactivity is not enough. It is not enough that the creditor institutes attachment, obtains judgment by default and sells the property where the debtor has in no way participated in the act of the creditor. *Johnson v. Anderson*, 70 Neb. 233, 97 N. W. 339. *Cf.* *Wilson v. Nelson*, 183 U. S. 191, 198. Under the act of 1867 "suffer" did not contemplate mere passive non-resistance, but required some affirmative act. *Wilson v. City*

*Bank*, 100 U. S. 473, 484; *Mason v. Warthens*, 7 W. Va. 532.

<sup>25</sup> B. A. 1898, Sec. 60, as amended Feb. 5, 1903 (32 Stat. at L. 797), and June 25, 1910, 36 Stat. at L. 838.

<sup>26</sup> B. A. 1898, Sec. 1, clause 25.

In *Stern, Falk & Co. v. Louisville Trust Co.* (C. C. A. 6th Cir.), 112 Fed. Rep. 501, 50 C. C. A. 367, 7 Am. B. R. 305, the circuit court of appeals for the sixth circuit, said:

"The controlling question of law in the cases is whether these facts constitute a preference within the meaning of that term in the bankrupt act. The word is not in set terms defined by the act, but we have no doubt that so far as the nature of the property transferred is concerned it includes everything which has capacity for being taken and appropriated to the satisfaction of debts provable under the act. It may be of a legal or of an equitable nature.

"In respect to the means by which the transfer is effected there is no limitation. However devious the method, if the result is that, but for the act, the creditor acquires

mortgage, gift, or security,<sup>26</sup> and can only be upheld where a delivery valid under state law has taken place.<sup>27</sup>

Transfer of property includes payment of money<sup>29</sup> but does not include a set-off.<sup>30</sup>

A preference may be created by the return of goods which have been purchased on credit,<sup>31</sup> by a release of a claim against a convertor,<sup>32</sup> by giving the note of a third person,<sup>33</sup> or by giving the creditor an order payable to the bankrupt.<sup>34</sup>

property from the debtor which is subject at law or in equity to be appropriated to the satisfaction of the debtor's obligations, that is a transfer within the meaning of the law."

See also *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773.

A transfer does not embrace a fictitious transaction where no value was intended to pass and where none was actually transferred. *In re Steam Vehicle Co.*, 121 Fed. Rep. 939, 10 Am. B. R. 385.

<sup>27</sup> Under Missouri statute branding lumber as cut with the name of the buyer, under an agreement for passing title is sufficient as against the trustee in bankruptcy. *In re Ozark Cooperage & Lumber Co.* (C. C. A. 8th Cir.), 180 Fed. Rep. 105, 103 C. C. A. 603, 24 Am. B. R. 835.

Where an assignment is made of the equity in pledged securities, a notice to the pledgee who held the securities is a sufficient delivery under the statute requiring either recording or delivery. Here no creditor ever became such relying on the possession by the bankrupt of these securities. "The important thing is, not that the property be in the possession of the cred-

itor, but that it be out of the possession of the debtor." *In re Bird*, 180 Fed. Rep. 229, 25 Am. B. R. 24.

<sup>29</sup> *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 445, 45 L. Ed. 1171, 5 Am. B. R. 814.

<sup>30</sup> The application by a bank of a deposit within four months of the filing of a petition to a debt owing to the bank is not a transfer of property within Sec. 60a. *Booth v. Prete*, 81 Conn. 636, 71 A. 938, 20 L. R. A. (N. S.) 863; *West v. Bank of Lahoma*, 16 Okl. 328, 85 P. 469.

<sup>31</sup> *Silberstein v. Stahl*, 4 Am. B. R. 626; *In re Klingaman*, 101 Fed. Rep. 691, 4 Am. B. R. 254; *In re Andrews*, 135 Fed. Rep. 599, 14 Am. B. R. 247.

<sup>32</sup> A release executed within four months of bankruptcy by an insolvent with knowledge that the person released has taken property belonging to the insolvent may be a preference. *Coolidge v. Ayers*, 76 Vt. 405, 57 A. 970.

<sup>33</sup> *In re Crooks v. Nat. Bank* (N. Y. Sup. Ct. App. Div.), 3 Am. B. R. 238; *Dickinson v. Security Bank* (C. C. A. 4th Cir.), 110 Fed. Rep. 353, 49 C. C. A. 84, 6 Am. B. R. 551.

<sup>34</sup> *Marden v. Sugden*, 71 N. H. 274.



Before considering these different methods of transferring property separately, it may be profitable to notice the incidents relating to transfers generally.

It should be observed that section 60a defines what constitutes a preference, and paragraph *b* of the same section prescribes the conditions under which such preference may be set aside. By the amendment of 1903 the four months' limitation was taken from clause *b* and inserted in clause *a*. Under the bankruptcy act as it exists the only interest a practitioner has in a preference is to determine whether it is a voidable preference or not. This is necessary in deciding whether the preferred property transferred can be recovered in a suit by the trustee or whether the creditor must surrender his preference under section 57g before the allowance of his claim. In either of these cases it must be a voidable preference since the amendment of 1903. What constitutes a preference so as to be an act of bankruptcy is considered in Chapter 10.

In order that a transfer shall constitute a preference, which may be avoided, whatever the manner of transferring it may be, four elements are necessary.<sup>35</sup>

*First*, the transfer must be made from an insolvent person to a creditor. *Second*, the effect of such transfer must be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Third*, the person receiving it or to be benefited thereby, or his agent acting therein, must have had reasonable cause to believe that it would effect a preference.\* *Fourth*,

<sup>35</sup> B. A. 1898, Sec. 60, as amended June 25, 1910, 36 Stat. at L. 838; *Sebring v. Wellington* (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; *In re Dundas*, 111 Fed. Rep. 500, 7 Am. B. R. 129; *In re Leech* (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599, Judge Severens said: "In order to establish that there was an unlawful preference, it must be alleged and proven that at the

time of the transfer the party making it was insolvent, that the property transferred was such as his creditors had a right to have subjected to their claims, that he intended a preference, and that the transferee had reasonable cause to believe that the transferer had such an intention. Section 60a and *b* of the act."

\* In cases pending June 25, 1910, the former rule still obtains that the

the transfer must have been made within four months before filing a petition in bankruptcy, or after filing the petition and before adjudication.

If any one of these elements is wanting, the preference can not be set aside, if otherwise valid under the state law.<sup>36</sup> Thus if it were made more than four months prior to the filing of the petition, or by a solvent person, or did not in fact prefer a creditor by giving him a larger percentage than other creditors, or if the person receiving it had no cause whatever to believe that he was obtaining a preference over other creditors, it can not be recovered by the trustee.

Repayment of stolen money is not a preference.<sup>36\*</sup>

#### § 495. Debtor must be insolvent.†

A transfer or conveyance of property by a solvent debtor to his creditor is not a preference voidable under section 60. A person may dispose of his property by gift or sale so long as he has enough to pay his just debts,<sup>37</sup> though within four months of bankruptcy.<sup>38</sup>

creditor must have had reasonable cause to believe that it was intended thereby to give a preference. Cf. B. A. Sec. 60b as amended by the act of 1903 with St. June 25, 1910, Secs. 11, 14, 36 Stat. at L. 838.

<sup>36</sup> *In re Leech* (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; *Tiffany v. Lucas*, 15 Wall. 410, 21 L. Ed. 198; *Anibal v. Heacock*, 2 Fed. Rep. 169; *Rice v. Grafton Mills*, 117 Mass. 228; *Paddock v. Fish*, 10 Fed. Rep. 125; *Alexander v. Galt*, 9 Fed. Rep. 149; *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1128.

*In re Henry C. King Co.*, 113 Fed. Rep. 110, 7 Am. B. R. 619, Judge Lowell said: "I must hold, therefore, that knowledge of insolvency did not make a preference

of acts which otherwise did not amount to a preference."

<sup>36\*</sup> *McNaboe v. Columbian Mfg. Co.* (C. C. A. 2d Cir.), 153 Fed. Rep. 967, 83 C. C. A. 81, 18 Am. B. R. 684; *Crooks v. Peoples Nat. Bank* (C. C. A. 2d Cir.), 18 Am. B. R. 684.

† Whether "insolvency" must exist at the date of the execution or of the record, in view of the amendment of 1910, see Sec. 495, *post*.

<sup>37</sup> *Warren v. Moody*, 122 U. S. 132, 30 L. Ed. 1128; *Adams v. Collier*, 122 U. S. 382, 30 L. Ed. 1207; *Savage v. Savage* (C. C. A. 4th Cir.), 141 Fed. Rep. 346, 72 C. C. A. 494, 15 Am. B. R. 599.

<sup>38</sup> *In re Leech* (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; *In re Wittenberg Veneer & Panel Co.*,

In order to set aside a conveyance or transfer of property it must be alleged and proved to have been made by a person insolvent at the time.<sup>40</sup>

To recover a preference of partnership property the insolvency of the individual partners must be shown.<sup>41</sup>

The act of 1867 did not define what constituted insolvency. It was defined by the courts to mean that a debtor could not pay his debts in the ordinary course of business as men in trade usually do, and such was the conclusion, even though his inability was not so great as to compel him to stop business.<sup>42</sup>

But in the present act "insolvency" is not used in the same sense as it was used in the prior acts. It is defined by the statute itself: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to hinder or

108 Fed. Rep. 593, 8 Am. B. R. 271; Kimball v. Dresser, 98 Me. 519, 59 A. 787.

Preference is tested by condition at time mortgage given and not at time of record. When mortgages given when mortgagor solvent to secure a loan the fact that they are not recorded till within four months does not matter. Seager v. Lamm, 95 Minn. 325, 104 N. W. 1.

<sup>40</sup> Tumlin v. Bryan (C. C. A. 5th Cir.), 165 Fed. Rep. 166, 21 Am. B. R. 319; *In re* Alexander, 102 Fed. Rep. 464, 4 Am. B. R. 376; *In re* Wittenberg Veneer & Panel Co., 108 Fed. Rep. 593, 6 Am. B. R. 271; Martin v. Bigelow (Supr. Ct. N. Y.), 36 Misc. Rep. 298, 7 Am. B. R. 218; Kimball v. Dresser, 98 Me. 519; *In re* Mandel, 127 Fed. Rep. 863, 10 Am. B. R. 774; Empire

Trust Co. v. Fisher, 67 N. J. Eq. 88, 57 Atl. Rep. 502; Schilling v. Curran, 30 Mont. 370, 76 Pac. Rep. 998; Swartz v. Frank, 183 Mo. 438; Townes v. Alexander, 69 S. C. 23; *In re* Leech (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599; *In re* Perlhefter, 177 Fed. Rep. 299, 25 Am. B. R. 576; Sparks v. Marsh, 177 Fed. Rep. 737, 24 Am. B. R. 280; Blyth & Fargo Co. v. Kastor, 17 Wyo. 180, 97 P. 921.

<sup>41</sup> Worrell v. Whitney, 179 Fed. 1014, 24 Am. B. R. 749.

<sup>42</sup> Toof v. Martin, 13 Wall. 40, 20 L. Ed. 481; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723; Tiffany v. Lucas, 15 Wall. 410, 21 L. Ed. 198.

In Scammon v. Cole, No. 12433 Fed. Cas., 1 Hask. 214, Judge Fox says: "This definition has been

delay his creditors shall not at a fair valuation be sufficient in amount to pay his debts"<sup>43</sup>

It thus appears that a person might not be able to pay his debts as they become due in the ordinary course of business, and yet be perfectly solvent. The test under the present act is whether or not the debtor's property, at a fair valuation, equals his liabilities.

The question of insolvency is one of fact.<sup>44</sup> It should be submitted to a jury under proper instructions when the case is tried to a jury. The burden of establishing insolvency at the time the preference was given is on the person alleging it.<sup>45</sup>

The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition.<sup>47</sup> But where the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding the fact of insolvency at the date the act was committed may be taken as established by the adjudication.<sup>48</sup> The books of a bankrupt, the schedule and inventory and appraisement are evidence on the question of insolvency within four months of the date of the filing of the petition, but are not conclusive.<sup>49</sup>

substantially adopted by every district judge in the country before whom the question has arisen."

<sup>43</sup> B. A. 1898, Sec. 1, clause 15; *In re Eggert* (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 43 C. C. A. 1, 4 Am. B. R. 449; *Butler Paper Co. v. Goembel* (C. C. A. 7th Cir.), 143 Fed. Rep. 295, 74 C. C. A. 433, 16 Am. B. R. 26.

For a discussion of when a debtor is insolvent, see Sec. 140, *ante*.

<sup>44</sup> *Kaufman v. Treadway*, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 862.

<sup>45</sup> *In re Chappel*, 113 Fed. Rep. 545, 7 Am. B. R. 608; *Edwards v. Milling Co.*, 108 Mo. App. 275; *Hal-*

*bert v. Pranke*, 91 Minn. 104; *In re Gilbert*, 112 Fed. Rep. 951, 8 Am. B. R. 101. The bankrupt's assets and liabilities should be shown. *Kimball v. Dresser*, 98 Me. 519, 57 A. 787.

<sup>47</sup> *In re Chappell*, 113 Fed. Rep. 545, 7 Am. B. R. 608; *Kimball v. Dresser*, 98 Me. 519; *Edwards v. Milling Co.*, 108 Mo. App. 275.

<sup>48</sup> *DeGraff v. Lang*, 87 N. Y. Supp. 78, 92 App. Div. N. Y. Supr. Ct. 564.

<sup>49</sup> *In re Docker-Fisher Co.*, 123 Fed. Rep. 190, 10 Am. B. R. 584; *In re Mandel*, 127 Fed. Rep. 863, 10 Am. B. R. 774; *Bank of N. Y. v. Southern Nat. Bank*, 170 N. Y.

Where the quantity and value of the bankrupt's assets were not materially diminished from the time of the transfer until the commencement of the proceedings in bankruptcy, the court or jury may find that the debtor was insolvent when he made the transfer.<sup>50</sup>

**§ 496. Must be made by the bankrupt.**

An essential element of a preferential transfer voidable under section 60 is that the transfer be made by an insolvent person to or for the benefit of his creditor.

A transfer by a person other than the bankrupt to the creditor does not constitute a preference,<sup>51</sup> as where the wife of a bankrupt pays his debts from her separate estate,<sup>52</sup> or where money is advanced to the bankrupt, by a third person for a specific purpose and is not used for that purpose but returned to him.<sup>53</sup>

Where the payment is made out of the bankrupt's property although by another person, it may be a preference.<sup>53\*</sup> Where the transfer is made by the agent of the bankrupt to a creditor, it constitutes a preference, as where a clearing house in making settlements with its members pays money due the bankrupt bank to its creditors.<sup>54</sup>

Payment by a partnership of notes made by a bankrupt partner and indorsed by the firm is not a preference to the payee as he has not received any of the bankrupt's property.<sup>55</sup>

1; *Hackney v. Hargreaves Bros.*, 68 Neb. 624, 13 Am. B. R. 164, overruling 10 Am. B. R. 213. As to evidence of insolvency, see Sec. 546, *post*, and Sec. 141, *ante*.

<sup>50</sup> *Clarion Bank v. Jones*, 21 Wall. 325, 22 L. Ed. 542.

<sup>51</sup> *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541; *Goode v. Elwood Lodge*, 160 Ind. 251; *Keegan v. Hamilton Nat. Bank*, 163 Ind. 216; *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447.

<sup>52</sup> *Goode v. Elwood Lodge*, 160 Ind. 251.

<sup>53</sup> *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541.

<sup>53\*</sup> *Benjamin v. Chandler*, 142 Fed. Rep. 217, 15 Am. B. R. 439.

<sup>54</sup> *Rector v. City Deposit Bank*, 200 U. S. 405, 50 L. Ed. 527, 15 Am. B. R. 336; *Rector v. Commercial Nat. Bank*, 200 U. S. 420, 50 L. Ed. 533, 15 Am. B. R. 347.

<sup>55</sup> *Catchings v. Chatham Nat'l Bank* (C. C. A. 2d Cir.), 180 Fed. Rep. 103, 103 C. C. A. 601, citing,

**§ 497. Must be made to a creditor.**

A transfer to a person other than a creditor, unless for his benefit <sup>56</sup> is not a preference within this section.<sup>58</sup> The second indorser of the bankrupt's notes is not a "person benefited" by the transfer by the bankrupt to the first indorser of collateral to secure him where the first indorser was all the while entirely solvent.<sup>61</sup> A customer is not a creditor of a stockbroker.<sup>62</sup>

Transactions have been upheld where the debtor has made a transfer on an agreement of the grantee to pay a certain creditor,<sup>63</sup> or where the grantee loans the debtor money for

Mason v. National Herkimer Bank, 172 Fed. Rep. 529, 97 C. C. A. 155, 22 Am. B. R. 733.

<sup>56</sup> *In re* Wright Lumber Co., 114 Fed. Rep. 1011, 8 Am. B. R. 345. "To constitute a preferential transfer it is immaterial to whom the transfer is made, if it be made for the purpose of paying the claims of one creditor in preference to those of others." Hackney v. Hargreaves Bros., 68 Neb. 624, 99 N. W. 675, 677.

<sup>58</sup> Richardson v. Shaw, 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717, affirming (C. C. A. 2d Cir.) 147 Fed. Rep. 659, 77 C. C. A. 643, 16 Am. B. R. 842; *In re* Hersey, 171 Fed. Rep. 1004, 22 Am. B. R. 856; *In re* McLoon, 162 Fed. Rep. 575, 20 Am. B. R. 719; Mason v. Nat. Bank (C. C. A. 2d Cir.), 172 Fed. Rep. 529, 97 C. C. A. 155, 22 Am. B. R. 733; Lyon v. Clark, 129 Mich. 381; North v. Taylor, 70 N. Y. Supp. 339, 6 Am. B. R. 233.

A preference is not created by a payment to creditors of the wife of the bankrupt although he was insolvent at the time, the money was his, and the effect of paying would be to reduce the percentage that would otherwise be paid to peti-

tioning creditors. *In re* Kayser (C. C. A. 3d Cir.), 177 Fed. Rep. 383, 100 C. C. A. 615, 24 Am. B. R. 174.

Where directors of an insolvent corporation borrow money and later pay it by furnishing collateral for a new loan, this is in no sense a payment of a debt of the corporation, although the money was borrowed for it and used by it. Keegan v. Hamilton Nat. Bank, 163 Ind. 216, 71 N. E. 647.

<sup>61</sup> Page v. Moore, 179 Fed. 988, 24 Am. B. R. 745.

<sup>62</sup> Richardson v. Shaw, 209 U. S. 365, 52 L. Ed. 835, 19 Am. B. R. 717, affirming (C. C. A. 2d Cir.) 147 Fed. Rep. 659, 77 C. C. A. 643, 16 Am. B. R. 842.

<sup>63</sup> Where an insolvent sells to indorsers on his note property on the agreement of the indorsers to pay the note to the holding bank which they do, there is no preference as to the bank, as it did not participate in the contract and no property of the estate was applied in payment of the note. Horstman v. Little (Texas, 1906), 90 S. W. 1095, 92 S. W. 407, 88 S. W. 286, modified.

that purpose,<sup>64</sup> or where a creditor transfers the bankrupt's note to the bankrupt's debtor who uses it in set-off.<sup>65</sup> A payment to a secured creditor.<sup>66</sup>

*Contra.* A transaction claimed to be a preference must be determined by its effect and not by its form, so where a bank which had loaned money to the bankrupt refused him further credit, and thereupon the bankrupt while insolvent to the knowledge of the bank, sold his entire business to a third party on condition that the third party would pay the bank's loan, this was held to be a preference. *Rogers v. Fidelity Bank & Loan Co.*, 172 Fed. Rep. 735, 32 Am. B. R. 1. A preference is created where a purchaser of the goods of an insolvent agrees as part of the purchase price to pay the claims of a certain creditor. The court regards this as a subterfuge to defeat the act. *Hackney v. Hargreaves Bros.*, 68 Neb. 624, 99 N. W. 675 (affirming 92 N. W. 626), reversing opinion in 94 N. W. 822. A preference is created where a purchaser of the goods of an insolvent agrees as part of the purchase price to pay the claims of a certain creditor. The court regards this as a subterfuge to defeat the act. *Hackney v. Hargreaves Bros.*, 68 Neb. 624, 99 N. W. 675, 3 Neb. 676, 92 N. W. 626.

<sup>64</sup> Where A. loans a bankrupt money in consideration of a mortgage with which the bankrupt may pay a debt he owes to B., this is not a preference, and creates a valid lien, although if a mortgage had been made directly to B. it would have been a preference under the circumstances. *In re Hersey*, 171 Fed. Rep. 1001, 22 Am. B. R. 856.

"A creditor will not be permitted to obtain a preference indirectly by transfer of his account procuring a third party to loan money to the debtor for payment of such creditor, or other colorable device or transaction intended to evade the provisions of the bankruptcy act. As was said in the case of *In re Beerman* (D. C.), 112 Fed. 663, 7 Am. B. R. 431, 434. "If transactions of this sort are to be permitted, then instead of a creditor taking a mortgage himself, when a debtor is in failing circumstances, he will get some one else to advance the money, agreeing that the person advancing the money shall suffer no loss and thereby obtain by indirection a preference which he would be unable to get if he had acted directly with the debtor." But an absolute transfer of another account against the insolvent debtor, in good faith, to one who, afterwards buys the latter's stock of goods and obtains credit for such account on the purchase price, without any agreement or understanding that such use was to be made thereof, or that the purchaser of the account was to be protected by the creditor in any way, does not constitute a preference of the creditor to the extent of the money he received on sale of his claim. To construe the bankruptcy act as preventing creditors from disposing of their claims absolutely in good faith, as they undoubtedly may do where the debtor is solvent, would, as the court well expressed it in *In re Eggert*, 102



But the courts will not permit the creditor to obtain a preference by indirect loan or transfer or other colorable device or transaction intended to evade the provisions of the bankrupt act.<sup>67</sup> A loan to pay a pre-existing creditor secured by a mortgage given at the time is a valid mortgage, although the payment to the creditor may be a preference.<sup>68</sup> A transfer by the debtor to himself as guardian may be avoided by his trustee.<sup>69</sup>

An endorser or surety is a creditor, who may receive a preference from his principal,<sup>71</sup> but not where he has no rea-

Fed. Rep. 734, 43 C. C. A. 1, "put at hazard many business transactions, and make the act oppressive." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822.

<sup>65</sup> It is absolutely essential to a preference that some of the bankrupt's property be transferred to the creditor. So where a creditor of a bankrupt takes the bankrupt's notes to a bank which discounts them on collateral deposited by the creditor, and where the creditor later becomes indebted to the bankrupt and pays the bank for the notes and sets off the notes against its own debts this is not a preference on the part of the bank, and equity will not require that it be set aside as an evasion of the bankruptcy act. It may well be that when a debtor with the approval of his creditor takes up the latter's note at a bank and offsets the amount paid upon his debt, the payment to the bank will be treated as having been made to the creditor, but in this case the creditor in taking up the note and collateral acted in its own behalf and in no sense as agent of the bankrupt. The note was not discharged and on no theory can it be said that the note was paid by the bankrupt.

*Mason v. National Herkimer County Bank* (C. C. A. 2d Cir.), 172 Fed. Rep. 529, 97 C. C. A. 155, 22 Am. B. R. 732.

<sup>66</sup> *In re Lynn Camp Cod Co.*, 168 Fed. Rep. 998, 22 Am. B. R. 60.

<sup>67</sup> *In re Beerman*, 112 Fed. Rep. 663, 7 Am. B. R. 431; *In re Wright Lumber Co.*, 114 Fed. Rep. 1011, 8 Am. B. R. 345; *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822.

<sup>68</sup> *In re Hersey*, 171 Fed. Rep. 1004, 22 Am. B. R. 856.

<sup>69</sup> *Manning v. Patterson*, 156 Fed. Rep. 111, 19 Am. B. R. 224.

<sup>71</sup> *Crandall v. Coats*, 133 Fed. Rep. 965, 13 Am. B. R. 712; *Swarts v. Siegal* (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 54 C. C. A. 399, 8 Am. B. R. 689; *In re Lyon*, 121 Fed. Rep. 723, 725; *Brown v. Streicher*, 177 Fed. Rep. 473, 24 Am. B. R. 267; *Chicago Title & Trust Co. v. Moody*, 233 Ill. 634, 84 N. E. 656 (affirming 138 Ill. App. 233); *In re Sanderson*, 149 Fed. Rep. 273, 17 Am. B. R. 871.

Where an insolvent sells his goods to a surety, and with the proceeds pays the note which the surety indorsed, this is a preference to the surety. *Goldberg v. Harlan*, 33 Ind. App. 465, 67 N. E. 707.



sonable cause to believe a preference is intended.<sup>72</sup> Such transfers may be recovered in a proper case under section 67*e* and section 70*e*.

A transfer of all his property by a debtor to a corporation, owned by a committee of creditors selected at a general meeting of his creditors for this purpose, can not be set aside at the suit of a nonparticipating creditor, in the absence of a fraudulent design.<sup>73</sup>

A payment to a bank to pay a note which the bank has discounted is a preference in favor of the person who had the note discounted.<sup>74</sup> Giving an order on another which is afterwards accepted and paid is a preference.<sup>75</sup>

#### **§ 498. Within four months.**

In order that a preference be created under the bankruptcy act the transfer must have been within four months before

Payment of a note may be a preference which can be recovered by the trustee, although there are solvent indorsers on the note. It was argued that as the holder was amply secured the indorsers were really the parties benefited and that the holder was bound to receive payment when tendered as otherwise the sureties would be discharged. *Harris v. Second Nat. Bank*, 110 Tenn. 239, 75 S. W. 1053, citing *Bartholow v. Bean*, 18 Wall. 635, 21 L. E. 866.

Where a note has a solvent indorser, a payment by an insolvent maker to relieve the indorser is a preference as to the indorser, as it is made for his benefit. *Landry v. Andrews*, 22 R. I. 597, 48 A. 1036.

Where a president of a corporation takes a conveyance of its assets in return for money he loans it to pay indebtedness on which he is guarantor, it is in violation of Sec. 60*b* as a preference to the

president, he having reasonable cause to believe a preference was intended. *Moody v. Chicago Title & Trust Co.*, 126 Ill. 68.

<sup>72</sup> Where indorsers on the bankrupt's notes had no knowledge of any intent to prefer they are not liable for a preference where the bankrupt transferred goods preferentially on the transferee's promise to pay the notes. *North v. Taylor*, 6 N. Y. App. Div. 253, 70 N. Y. Suppl. 339.

<sup>73</sup> *In re Robertshaw Mfg. Co.*, 133 Fed. Rep. 556, 13 Am. B. R. 409.

A transfer of all property to a corporation under agreement to pay all unsecured creditors is not void as a preference. *Gill v. Bell's Knitting Mills*, 128 N. Y. App. Div. 691, 113 N. Y. Suppl. 90.

<sup>74</sup> *In re Waterbury Furniture Co.*, 114 Fed. Rep. 255, 8 Am. B. R. 79.

<sup>75</sup> *In re Dundas*, 111 Fed. Rep. 500, 7 Am. B. R. 129.

filing a petition in bankruptcy, or after filing the petition and before the adjudication.<sup>81</sup>

This clause was transferred from section 60*b* to section 60*a* by the amendment of February 5, 1903. By this change the four months' limitation becomes an element of a preference and not merely an element of a voidable preference. Prior to the amendment there was a conflict in the decisions as to whether a transfer prior to the four months' period was a preference. This became material in determining whether the preference must be surrendered under section 57*g* before a claim could be allowed. It is not material, since the amendment, because only voidable preferences are required to be surrendered.

If the transfer is made within four months or before the adjudication it may be avoided and set aside.<sup>82</sup> If it has been made prior to that time it is a valid preference, and the creditor secured thereby will be protected under the bankrupt act aside from fraud.<sup>83</sup>

<sup>81</sup> B. A. 1898, Sec. 60, as amended Feb. 5, 1903, 32 Stat. at L. 797, and June 25, 1910, 36 Stat. at L. 838. *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74, reversing 184 Mass. 361; *Little v. Holley Brooks Hardware Co.* (C. C. A. 5th Cir.), 133 Fed. Rep. 874, 67 C. C. N. 46, 13 Am. B. R. 422; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Alexander v. Galt*, 9 Fed. Rep. 149.

<sup>82</sup> B. A. 1898, Sec. 60. *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *Blennerhasset v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Auffm'ordt v. Rasin*, 102 U. S. 620, 26 L. Ed. 262; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797; *Dutcher v. Wright*, 94 U. S.

553, 24 L. Ed. 130; *In re Klingaman*, 101 Fed. Rep. 691, 4 Am. B. R. 254; *In re Woodward*, 95 Fed. Rep. 260, 2 Am. B. R. 239; *Sebring v. Wellington* (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; *In re McLam*, 97 Fed. Rep. 922, 3 Am. B. R. 245. In *Page v. Rogers*, *supra*, it was held that a deed unrecorded and placed in escrow more than four months before bankruptcy and delivered within that time was a preference.

<sup>83</sup> *Bank v. Sherman*, 101 U. S. 404, 25 L. Ed. 866; *In re Randall*, No. 11552 Fed. Cas., 1 Saw. 56; *Taylor v. Robertson*, 21 Fed. Rep. 209; *In re Kindt*, 101 Fed. Rep. 107, 4 Am. B. R. 148; *In re Wright*, 96 Fed. Rep. 187, 2 Am. B. R. 364; *Manning v. Evans*, 156 Fed. Rep. 106, 19 Am. B. R. 217.

The date from which an unauthorized act of an agent which has been ratified is computed is the date of the act and not of the ratification. This rule is subject to the exception that intervening rights of third persons can not be defeated by the ratification.<sup>84</sup>

Where four months have elapsed after the giving of a firm note by a person to pay a separate debt before the bankruptcy of the firm, but less than four months before the bankruptcy of the partner, the transfer is valid.<sup>85</sup> But where the arrangement was made by which property was changed from joint to several after insolvency and within four months of bankruptcy, it was held voidable.<sup>86</sup>

When an assignment of accounts is made more than four months prior to the bankruptcy the fact that the accounts are not collected by the creditor until within four months does not make the transaction a preference.<sup>87</sup> Where property is delivered in good faith within four months of bankruptcy on a previous contract of sale it is valid.<sup>88</sup>

**§ 499. Whether period dates from execution and delivery or from recording.**

Prior to the amendment of February 5, 1903,<sup>89</sup> it was generally held that the four months' period began to run from the date the transfer was made; that is to say, from the date of the delivery of the deed or mortgage and not

<sup>84</sup> *Cook v. Tullis*, 18 Wall. 338, 21 L. Ed. 933; *In re Farmers Supply Co.*, 170 Fed. Rep. 502, 22 Am. B. R. 460; *In re Kansas Manufacturing Co.*, No. 7610 Fed. Cas., 9 N. B. R. 76; *Strain v. Gourdin*, No. 13521 Fed. Cas., 2 Woods, 380.

<sup>85</sup> *In re Lane*, No. 8044 Fed. Cas., 2 Low. 333. See also *Forsaith v. Merritt*, No. 4946 Fed. Cas., 1 Low. 336; *In re Shepard*, No. 12754 Fed. Cas., 3 Ben. 347.

<sup>86</sup> *In re Waite*, No. 17044 Fed. Cas., 1 Low. 207; *In re Federhen*, No. 4713a Fed. Cas., 1 Low. 207; *In re Johnson*, No. 7369 Fed. Cas., 2 Low. 129.

<sup>87</sup> *In re Bird*, 180 Fed. Rep. 229, 25 Am. B. R. 24.

<sup>88</sup> *Belding-Hall Mfg. Co. v. Lumber Co.* (C. C. A. 6th Cir.), 175 Fed. Rep. 335, 99 C. C. A. 123, 23 Am. B. R. 595.

<sup>89</sup> 32 Stat. at L. 797.

the date of recording it,<sup>90</sup> unless recording was necessary to create the lien.<sup>91</sup> This was the rule under the act of 1867.<sup>92</sup>

But if the mortgagee withholds the mortgage from record for the purpose of allowing the four months to run so as to defeat the provisions of the bankruptcy act relating to preferences, and intending so to do when he took it, it was held that such acts constitute a fraud upon the bankruptcy act and render the mortgage invalid.<sup>93</sup> Under this construction it was possible for a transferee to obtain a deed or mortgage more than four months before bankruptcy, which would be valid against the trustee, although the instrument was recorded within the four months. The date of recording the instrument marks the beginning of the four months' period in case of an act of bankruptcy created by a preference.<sup>94</sup>

One four months' period of time therefore determined whether a transfer was a preference and an act of bankruptcy, but a different four months' period was the test as to whether the same transfer was a preference and an asset

<sup>90</sup> *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 12 Am. B. R. 74; *Rogers v. Page* (C. C. A. 6th Cir.), 140 Fed. Rep. 596, 72 C. C. A. 164, 15 Am. B. R. 502; *Little v. Holley-Brooks Hardw. Co.* (C. C. A. 5th Cir.), 133 Fed. Rep. 874, 67 C. C. A. 46, 13 Am. B. R. 422; *In re Kindt*, 101 Fed. Rep. 107, 4 Am. B. R. 148; *Sabin v. Camp*, 98 Fed. Rep. 974, 3 Am. B. R. 578; *Dean v. Plane*, 195 Ill. 495, 63 N. E. 274 (affirming 96 Ill. App.); *Miller v. Schriver*, 197 Pa. St. 191, 46 A. 926; *Dutton v. Cloar*, 26 Tex. Civ. App. 847, 65 S. W. 70; *Texas Brewing Co. v. Mallette*, 28 Tex. Civ. App. 461, 67 S. W. 441, under Section 67e, the four months' period starts from the date of record.

<sup>91</sup> *First Nat. Bank v. Connett* (C. C. A. 8th Cir.), 142 Fed. Rep. 33,

73 C. C. A. 219, 15 Am. B. R. 662; *Landis v. McDonald*, 88 Mo. App. 335; *Babbitt v. Kelly*, 9 Am. B. R. 335, 70 S. W. Rep. 384, 96 Mo. 529.

<sup>92</sup> *Gibson v. Warden*, 14 Wall. 244, 20 L. Ed. 797; *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235.

<sup>93</sup> *Page v. Rogers*, 211 U. S. 575, 53 L. Ed. 332, 21 Am. B. R. 496; *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080; *Clayton v. Exchange Bank* (C. C. A. 5th Cir.), 121 Fed. Rep. 630, 10 Am. B. R. 173; *Rogers v. Page*, 140 Fed. Rep. 596, 15 Am. B. R. 502; *In re Noel*, 137 Fed. Rep. 694, 14 Am. B. R. 715; *In re Ewald & Brainard*, 135 Fed. Rep. 168, 14 Am. B. R. 267.

<sup>94</sup> B. A. 1898, Sec. 3b. Sec. 145, *ante*.

to be recovered by the trustee. To correct the evil of secret liens and to make the same period the test in both instances section 60a was amended by the act of 1903.<sup>95</sup> The amendment provides that "where a preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required."<sup>96</sup>

In applying this provision the courts differ as to the meaning of the word "required." As the amendment was introduced in the House it read "required or permitted." In this regard it followed the phraseology of section 3b of the act. The Senate struck out the words "or permitted."<sup>97</sup> It has been held that an instrument may be said to be "required" to be recorded, when recording is necessary to make the transfer or lien valid as against the claims of the creditors represented by the trustee, but if under the laws of the state the transfer or lien is valid as against the claims of such creditors without recording such recording is not required.<sup>98</sup> It is a serious objection to this construction that it does not materially change the rule, which existed prior to the amendment. Some effect should be given to the amendment if the language of the provision will permit.

The better rule is that the word "required" refers to the character of the instrument giving the preference and not as to the persons as between whom it may be valid without

<sup>95</sup> 32 Stat. at L. 797; *In re Hunt*, 139 Fed. Rep. 283, 14 Am. B. R. 416; *Loeser v. Savings Deposit Bank & Trust Co.* (C. C. A. 6th Cir.), 148 Fed. Rep. 975, 78 C. C. (N. S.) 597, 17 Am. B. R. 628.

<sup>96</sup> B. A. 1898, Sec. 60a, as amended Feb. 5, 1903, 32 Stat. at L. 797. See statute of 1910, Section 11, 36 Stat. at L. 838.

<sup>97</sup> For a history of this amendment, see *In re Hunt*, 139 Fed. Rep. 283, 14 Am. B. R. 416; *Loeser*

*v. Savings Deposit Bank & Trust Co.* (C. C. A. 6th Cir.), 148 Fed. Rep. 975, 78 C. C. A. 597, 17 Am. B. R. 628.

<sup>98</sup> *Meyer Drug Co. v. Pipkin Drug Co.* (C. C. A. 5th Cir.), 136 Fed. Rep. 396, 69 C. C. A. 240, 14 Am. B. R. 477; *In re Hunt*, 139 Fed. Rep. 283, 14 Am. B. R. 416; *In re Doran* (C. C. A. 6th Cir.), 154 Fed. Rep. 467, 83 C. C. A. 265, 18 Am. B. R. 760; *In re Sturdevant* (C. C. A. 7th Cir.), 188 Fed. Rep. 196.

recording or the persons as to whom it may be void for failure to record; that is to say, if the instrument falls within the class of instruments subject to record under the laws of the state, it is "required" to be recorded within the meaning of this provision.<sup>99</sup>

Where the state statute does not declare unrecorded chattel mortgages void, except as against innocent purchasers, mortgagees and judgment or execution creditors, and where none such were concerned in the present case, and although the trustee stands only as a representative of the bankrupt and his general creditors, the court says that these considerations are immaterial under section 60a of the act. The only question for the court is whether record is "required" under the local law, and as the local law in this case required recording, it is immaterial as between what parties an unrecorded mortgage has been held to be valid, even though in this case, the mortgage was executed more than four months before the bankruptcy.<sup>1</sup>

This construction gives effect to the amendment and makes the same period of time the test as to whether a preferential transfer subject to record is an act of bankruptcy or may be avoided and the property recovered by the trustee. It is true that a mortgagee may have a valid lien under the state law for more than four months by reason of the age of his mortgage and that it may be avoided as a preference because not recorded, or because recorded, or because recorded within four months of bankruptcy. It should be borne in

<sup>99</sup> *Loeser v. Savings Deposit Bank & Trust Co.* (C. C. A. 6th Cir.), 148 Fed. Rep. 975, 78 C. C. A. 597, 17 Am. B. R. 628; *First Nat. Bank v. Connett* (C. C. A. 8th Cir.), 142 Fed. Rep. 33, 73 C. C. A. 219, 15 Am. B. R. 662; *English v. Ross*, 140 Fed. Rep. 630, 15 Am. B. R. 370.

"Required" includes a case where a mortgage not recorded is valid

as to some classes of creditors, subsequent purchasers and incumbrances and void as to others. *Bowler v. First Nat. Bank*, 21 S. D. 449, 113 N. W. 618.

<sup>1</sup> *In re Beckhaus* (C. C. A. 7th Cir.), 177 Fed. Rep. 141, 100 C. C. A. 561, 24 Am. B. R. 380. See *McElvain v. Hardesty* (C. C. A. 8th Cir.), 169 Fed. Rep. 31, 94 C. C. A. 399, 22 Am. B. R. 320.

mind that all preferences are valid under state laws, as has been pointed out above, and are invalid only because they fall within a class of transfers made within the period of time fixed by the bankrupt act.

Where no recording or registering is required under the state law, this provision does not apply and the general rule prevails; namely, that the four months' period begins to run, in the absence of fraud, from the time the transfer is made.<sup>3</sup>

The amendment of 1910, section 11, represents an attempt to do away with the evils of secret liens and preferences under the amendment of 1903, as construed in many cases by providing that a transaction shall be void as a preference if the essentials of a preference exist either at the time of the transfer or of the recording thereof. This does away with the difficulty under which creditors have labored of endeavoring to prove the insolvency of the bankrupt and other elements of a preference as existing at the date of the original transfer which might have been many months and even years before bankruptcy.<sup>6</sup>

Secret preferences are also made more difficult by section 8 of the amendment of 1910 which gives the trustee all the rights of a lien creditor over property in the custody of the bankruptcy court and the rights of a judgment creditor over property not in its custody.

<sup>3</sup> Meyer Drug Co. v. Pipkin Drug Co. (C. C. A. 5th Cir.), 136 Fed. Rep. 396, 69 C. C. A. 240, 14 Am. B. R. 477; *In re* Hunt, 139 Fed. Rep. 283, 14 Am. B. R. 416.

Where a debtor, by delivery, transferred goods to his creditor in payment of his debts, more than four months before bankruptcy and where such transfer is valid and not a preference, a subsequent filing of a claim of exemption, and executing a bill of sale within the four months' period does not make the transaction a preference. *In re* Ratliffe, 177 Fed. Rep. 587.

The time as of which the preference is reckoned depends on state law—whether taking possession or execution under unrecorded mortgage. *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 25 S. Ct. 567 (reversing *Tatman v. Humphrey* (1903), 184 Mass. 361, 68 N. E. 844, 63 L. R. A. 738, 100 Am. St. Rep. 562).

<sup>6</sup> *Seager v. Lamm*, 95 Minn. 325, 104 N. W. 1. For a glaring case see *Claridge v. Evans*, 137 Wis. 218, 118 N. W. 198.

**§ 500. Whether period dates from possession or from notice.**

It may be observed that section 60a as amended does not contain the provision of section 3b with reference to the four months' period beginning to run, when recording is not required, from the date when possession is taken or notice is otherwise brought home to the creditors of the bankrupt. It has been held that this clause is to be read into section 60a.<sup>7</sup> If possession or notice in some form is necessary to a valid transfer the time would regularly begin to run from the date such possession is taken or notice given.<sup>8</sup> If Congress had intended this clause to be read into section 60a it is fair to presume that it would have been incorporated in it by the amendment.

**§ 501. Exchange.**

A transfer made within four months merely in exchange for a valid pre-existing transfer is not a preference within the act.<sup>9</sup>

<sup>7</sup> In *Long v. Farmers' State Bank* (C. C. A. 8th Cir.), 147 Fed. Rep. 360, 365, 77 C. C. A. 538, 17 Am. B. R. 103, the court said. "Said provisions of Sections 3 and 60 are to be read together. When so read there can be no permissible question but that the date of the preference referred to in Section 60 is the same as that referred to in Section 3b, which, as applied to the facts of this case, is the date when the transferee takes possession of the property, unless the instrument under which the claim is made antedated the four months' period and was recorded prior thereto, if authorized to be recorded under the local statute, or if not so entitled then from the date the beneficiary takes notorious, exclusive possession, unless the creditors of the bankrupt had actual notice of the alleged contract.

There is no pretense made in this case of any such disclosure. There was, therefore, no effective transfer of this property under the bankrupt act until June 28, 1904, when the money was turned over by the insolvent to the bank; and this for the palpable reason that that was the first time the bank took any possession of the property or gave any recognizable notice to any creditor of the bankrupt of its asserted title or lien. This we hold is so both upon reason and the weight of authority."

See also *English v. Ross*, 140 Fed. Rep. 630, 15 Am. B. R. 370.

<sup>8</sup> *Landis v. McDonald*, 88 Mo. App. 335.

<sup>9</sup> *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235, mortgage taken in exchange for a valid bill of sale; *Stewart v. Hoffman*, 31 Mont. 184, 81 P. 3, 77 P. 689, valid power ex-



### § 502. Agreement to pledge or mortgage or settle.

Where a creditor in pursuance of a valid contract, executed prior to the four months, exercises his right in possessing himself of the bankrupt's property under such contract within four months no preference is created.<sup>10</sup>

It has been held that where an agreement to pledge is made more than four months prior to bankruptcy, but the goods actually pledged within four months, a preference is created.<sup>11</sup> If, however, the agreement is to pledge a particular thing, which is subsequently delivered, the date of the delivery relates back to the time of making the agreement and the four months' period should be computed from the date of the agreement.<sup>12</sup> The same rule applies to agreements to give mortgages,<sup>13</sup> or other security.<sup>15</sup>

Where machinery is delivered on an express understanding that a lease or conditional sale contract should later be ex-

changed for mortgage; *State Bank of Williamson v. Fish*, 120 N. Y. Suppl. 365; *Cf. Engel v. Union Square Bank*, 182 N. Y. 544, 75 N. E. 1129, affirming 94 N. Y. App. Div. 244.

<sup>10</sup> *Sabin v. Camp*, 98 Fed. Rep. 974, 3 Am. B. R. 578; *In re Wolf*, 98 Fed. Rep. 74, 3 Am. B. R. 555; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Fisher v. Zollinger*, 148 Fed. Rep. 907; *Wood v. United States Fidelity & Guaranty Co.*, 143 Fed. Rep. 424, 16 Am. B. R. 21; *Union Trust Co. v. Bulkeley* (C. C. A. 6th Cir.), 150 Fed. Rep. 510, 80 C. C. A. 328, 18 Am. B. R. 35.

<sup>11</sup> *In re Sheridan*, 98 Fed. Rep. 406, 3 Am. B. R. 554; *Nisbit v. Macon Bank & T. Co.*, 12 Fed. Rep. 686; *Copeland v. Barnes*, 147 Mass. 388.

<sup>12</sup> *Hurley v. Atchison, etc., Ry.*, 213 U. S. 126, 53 L. Ed. 729, 22 Am. B. R. 17; *Wilder v. Watts*, 138 Fed. Rep. 427, 15 Am. B. R. 57; *Union Trust Co. v. Bulkeley* (C. C. A. 6th Cir.), 150 Fed. Rep. 510, 80 C. C. A. 328, 18 Am. B. R. 35.

<sup>13</sup> *Douglas v. Voegler*, 6 Fed. Rep. 52; *Sabin v. Camp*, 98 Fed. Rep. 974, 3 Am. B. R. 578; *Pollock v. Jones* (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 61 C. C. A. 555, 10 Am. B. R. 616; *In re Dismal Swamp Const. Co.*, 135 Fed. Rep. 415, 14 Am. B. R. 175.

A mortgage given within four months of the bankruptcy, may be a preference although made in compliance with a prior oral agreement. *In re Smith*, 176 Fed. Rep. 426, 26 Am. B. R. 864.

<sup>15</sup> *Murray v. Beal* (Utah 1901), 65 P. 726.

cuted there is no preference although the contract was not actually signed until about six months after the delivery of the machinery.<sup>16</sup>

Where a creditor previously agreed to receive grain in payment of his debt, the transfer dates from the time when the warehouse receipt is mailed to him, but if the creditor had not previously agreed to receive grain in payment of his debt, the transfer dates from the time when the receipt sent by mail is received and accepted by him.<sup>17</sup> In other words, it dated from the time the contract is actually made. An order on a third person for money is not effective as a transfer until it is presented for payment and the four months' period does not begin to run until that time.<sup>18</sup>

### **§ 503. After adjudication.**

Where a transfer is made by the debtor after an adjudication, and before a trustee is appointed, it is not a preference,<sup>19</sup> but simply an unlawful intermeddling. Such a transfer is at least voidable.

### **§ 504. Computation of time.**

The four months' period as to preference dates from the filing of the original petition,<sup>20</sup> and in computing the four months the first day is excluded and the last included, unless the last day falls on a Sunday or holiday, in which event the

<sup>16</sup> *In re* C. K. Hutchins Co., 179 Fed. 864, 24 Am. B. R. 647.

<sup>17</sup> *Brooks v. Scroggins*, 11 N. B. R. 258.

<sup>18</sup> *Johnston v. Huff, Andrews & Moyler Co.*, 133 Fed. Rep. 704, 13 Am. B. R. 287.

<sup>19</sup> *Ryttenberg v. Schefer*, 131 Fed. Rep. 313, 11 Am. B. R. 652.

<sup>20</sup> The four months' period as to preferences dates from the filing of the original petition, although this

petition was filed by only one creditor on an allegation which later appeared untrue, that there were less than twelve creditors of the bankrupt and later the petition was amended by the addition of enough other creditors to give jurisdiction. *First State Bank v. Haswell* (C. C. A. 8th Cir.), 174 Fed. Rep. 209, 98 C. C. A. 217, 23 Am. B. R. 330.

last day included shall be the next day thereafter which is not a Sunday or a legal holiday.<sup>21</sup> Fractions of a day are not considered in the reckoning.<sup>24</sup>

Holidays are defined by the act to include Christmas, the Fourth of July, the twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving.<sup>26</sup>

### § 505. Reasonable cause to believe.

Under the act of 1867 the person receiving the transfer must at the time have had reasonable cause to believe the person making the transfer was insolvent.<sup>27</sup> Under the act of 1898 the creditor to be benefited must have reasonable

<sup>21</sup> B. A. 1898, Sec. 31; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *In re Hill*, 140 Fed. Rep. 984, 15 Am. B. R. 499; *In re Lang*, No. 8056 Fed. Cas., 2 N. B. R. 480; *Jones v. Stevens*, 94 Me. 582, 5 Am. B. R. 571; *Richards v. Clark*, 124 Mass. 491. See *Cooley v. Cook*, 125 Mass. 406, Sunday excluded.

Where a petition was filed September 12 an agreement on May 11 is not within four months before the filing. "We must start to count from the date on which the petition was filed and count backward toward the date of the preference excluding the day on which the petition was filed." *Kelly v. Skaggs*, 90 Ill. App. 543.

Where the transfer was made November 2, 1898, and the petition was filed March 2, 1899, the transfer was within the four months as to preferences. The court should include the day when the petition is filed but it is not material error to instruct the jury to exclude the filing day of the transfer and in-

clude the date of the filing of the petition as the result is the same. The same rule should be adopted in computing time as to the acts of bankruptcy as in case of preferences. *Whitley Grocery Co. v. Roach*, 115 Ga. 918, 42 S. E. 282.

<sup>24</sup> Attachment made February 8th, 1905, in the forenoon is dissolved by filing a petition June 8th, 1905, at 5 p. m. *In re Warner*, 144 Fed. Rep. 987, 16 Am. B. R. 519.

Attachment September 9, in the morning is dissolved by a petition filed January 9 following in the afternoon. *Jones v. Stevens*, 94 Me. 582, 48 A. 170, overruling *Manufacturing Co. v. Grant*, 60 Me. 88, in reliance on *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130.

<sup>26</sup> B. A. 1898, Sec. 1, clause 14.

<sup>27</sup> R. S. Sec. 5128; *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 281; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504.

cause to believe that a preference was intended to be given.<sup>28</sup> This phrase includes reasonable cause to believe that the debtor is insolvent, for this is one of the elements of a preference.<sup>33</sup>

<sup>28</sup> *Coder v. Arts*, 213 U. S. 223, 240, 53 L. Ed. 772, 22 Am. B. R. 1; B. A. 1898, Sec. 60b; *Jacobs v. Van Sickle*, 123 Fed. Rep. 340, 10 Am. B. R. 519; *Tait v. National Bank*, 8 Ohio N. P. Rep. 59, 2 N. B. N. 1145; *Hicks v. Langhorst* (Hamilton County, O., Common Pleas), 3 N. B. N. 528, 6 Am. B. R. 178; *In re Jacobs*, 1 Am. B. R. 518; *Sebring v. Wellington* (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; *Levor v. Seiter* (N. Y. Sup. Ct. App. Div.), 8 Am. B. R. 459; *In re Dundas*, 7 Am. B. R. 129, 111 Fed. Rep. 500; *Sparks v. Marsh*, 177 Fed. Rep. 739, 24 Am. B. R. 280; *Hawes v. Bank of Elberton*, 124 Ga. 567, 52 S. E. 922; *Beatty v. Dudley*, 80 Ky. 381, 4 Ky. Law Rep. 212; *Harmon v. Feldheim*, 131 Mich. 470, 91 N. W. 744, 9 Detroit Leg. N. 421; *Cummings v. Kansas City Wholesale Grocery Co.*, 123 Mo. App. 9, 99 S. W. 470; *Blyth & Fargo Co. v. Kastor*, 17 Wyo. 180, 97 P. 921.

The trustee need not prove knowledge or belief—only reasonable cause to believe. *Lampkin v. People's Nat. Bank*, 98 Mo. App. 239, 71 S. W. 715.

An instruction that the transaction was void if the creditor intended to take a preference is erroneous. The question should be whether the creditor had reasonable cause to believe that a preference was intended. *Whitson v. Farber Bank*, 105 Mo. App. 605, 80 S. W. 327.

A finding that certain property was transferred not with a fraudulent intent but with the intent and for the purpose of preferring the transferee to his other creditors is insufficient as a foundation for a judgment that the transaction was a voidable preference as it was not alleged that the bankrupt was insolvent at the time of the transfer nor that the transferee had any reason to believe that the payment was intended as a preference. *In re Leech* (C. C. A. 6th Cir.), 171 Fed. Rep. 622, 96 C. C. A. 424, 22 Am. B. R. 599.

To render a transfer voidable under Section 60b, the creditor must have reasonable cause to believe though the transfer was within four months. *Hawes v. Bank of Elberton*, 124 Ga. 567, 52 S. E. 922.

<sup>33</sup> *Thomas v. Adelman*, 136 Fed. Rep. 973, 14 Am. B. R. 510; *Blankenaker v. Charleston State Bank*, 111 Ill. App. 393; *Des Moines Savings Bank v. Morgan Jewelry Co.*, 123 Ia. 432; *Wright v. Cotten*, 140 N. C. 1, 52 S. E. 141; *Gamble v. Elkin*, 205 Pa. St. 226, 54 A. 782.

As to reasonable cause to believe the debtor insolvent, see further cases cited under Section 506, *post*.

Knowledge that a debtor is insolvent furnishes a foundation for reasonable cause to believe that a preference is intended—payment under such circumstances shows reasonable cause to believe a preference is intended unless the creditor can show a proportionate amount was given other creditors.

It also includes a reasonable cause to believe that he is to obtain a greater percentage of his debts than any other creditor in his class, for this is another element of a preference.<sup>36</sup>

The amendment of 1910 made the test a reasonable cause to believe that a "preference would be effected."<sup>37</sup> This would seem to be the logical rule.

### § 506. When reasonable cause exists.

The reasonable cause covered by the statute should exist at the time the preference is created.<sup>38</sup>

Reasonable cause may be predicated whenever the circumstances would produce in the mind of an ordinary man the belief that a preference was intended,<sup>39</sup> and otherwise the proof is insufficient.<sup>40</sup>

*Pepperdine v. National Exch. Bank*, 84 Mo. App. 234. Notice of facts sufficient to lead the creditor to think that the debtor could not meet his obligations as they matured in the ordinary course of business is insufficient—that definition was good under the old law but not under the act of 1898. *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822.

<sup>36</sup> The mere fact that a preference gage does not make the mortgage void under Section 67*e* of the bankruptcy act. Having been given for a present consideration, the mortgage is valid under Sec. 67*d* if it was made in good faith although the mortgagee knew that the proceeds were to be used to pay existing creditors, unless the mortgagee had reasonable cause to believe at the time the mortgage was made, that the mortgagor was insolvent. *In re Kullberg*, 176 Fed. Rep. 585, 23 Am. B. R. 758; see *In re Henry C. King Co.*, 113 Fed. Rep. 110, 7 Am. B. R. 619.

<sup>37</sup> Act June 25, 1910, Section 11, 36 Stat. at L. 838, see Sec. 492, *ante*.

<sup>38</sup> *Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —; *In re Kullberg*, 176 Fed. Rep. 585, 23 Am. B. R. 758; *Babbitt v. Kelly*, 96 Mo. App. 529, 70 S. W. 384, at the time a mortgage is recorded.

<sup>39</sup> *Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —; *In re Eggert*, 102 Fed. Rep. 735, 4 Am. B. R. 449; *Grant v. National Bank*, 97 U. S. 80; 24 L. Ed. 971; *Sirriner v. Stover-Marshall Co.*, 64 S. C. 457, 42 S. E. 432; *Blyth & Fargo Co. v. Kastor*, 17 Wyo. 180, 97 P. 92.

*In Wright v. Sampter*, 152 Fed. Rep. 196, 18 Am. B. R. 355, it was held that an unrequested repayment of loan does not furnish reasonable cause to believe preference intended, nor is such payment a fraudulent transfer.

Whether a creditor has reasonable cause to believe, etc., may be determined from the conduct of the parties and the nature of the transaction.<sup>43</sup> This is often the only means of proof. A person is always presumed to intend what is the necessary and unavoidable consequences of his act.<sup>44</sup>

It has been held that the mere knowledge that a debtor was behind in his payments is not sufficient of itself to put his creditors upon inquiry and charge them with notice of facts which inquiry might disclose,<sup>45</sup> nor the mere fact of taking security for a loan.<sup>47</sup>

Under the amendment of 1910 the question is whether the creditor had reasonable cause to believe that the transaction "would effect a preference." See statute June 25, 1910, Sec. 11, 36 Stat. at L. 838.

<sup>40</sup> *In re* Evans Lumber Co., 176 Fed. Rep. 643, 23 Am. B. R. 899; *Bacon v. Merchants' Bank of Florence*, 146 Ala. 521, 40 S. 413, where the debtor's credit had always been good. *Brown v. Guichard*, 37 Misc. (N. Y.) 78, 74 N. Y. Suppl. 735, where bankrupt concealed another indebtedness from the creditor. *Stackhouse v. Holden*, 66 N. Y. App. Div. 423, 73 N. Y. Suppl. 203, where both creditor and debtor thought the debtor was prosperous.

No reasonable cause to believe where creditor a woman of small business experience and poor memory. *Congleton v. Schreibhofer* (N. J. Ch. 1903), 54 A. 144. Where a creditor knew that partners had personal liabilities but not that they had as a firm liabilities in excess of assets no preferential knowledge. *Lyon v. Clark*, 129 Mich. 381, 88 N. W. 1046, 8 Detroit Leg. N. 994.

<sup>43</sup> *Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —;

*Sebring v. Wellington* (N. Y. Sup. Ct. App. Div.), 6 Am. B. R. 671; *Hackney v. Raymond Bros., Clarke Co.*, 68 Neb. 624, 13 Am. B. R. 164, overruling 10 Am. B. R. 213; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147; *In re McDonald & Sons*, 178 Fed. Rep. 487, 24 Am. B. R. 446.

<sup>44</sup> *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 13 Am. B. R. 447; *English v. Ross*, 140 Fed. Rep. 630, 15 Am. B. R. 370; *Wilson v. Nelson*, 183 U. S. 191, 46 L. Ed. 147.

"A man may ordinarily be presumed to intend that which is the natural and probable consequence of his acts. The intent to prefer might be properly inferred from the fact of preference." *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475.

<sup>45</sup> *In re Eggert* (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 43 C. C. A. 1, 4 Am. B. R. 449; *Arkansas Nat. Bank v. Sparks*, 83 Ark. 626, 103 S. W. 626; *Gnichtel v. First Nat. Bank*, 66 N. J. Ch. 88, 57 A. 508.

<sup>47</sup> *Stedman v. Bank*, 117 Fed. Rep. 237, 9 Am. B. R. 4; *Grant v. National Bank*, 97 U. S. 81, 24 L. Ed. 971; *Sharpe v. Allender* (C. C. A. 3d Cir.), 170 Fed. Rep. 589, 96

It may be collated from the decisions that a person has reasonable cause for inquiry, where a banker allows his drafts to go to protest, suspends payment and closes his doors against depositors and the creditor has knowledge of these facts,<sup>48</sup> or where a merchant stops payment of his commercial paper and the holder is compelled to bring a suit to which no defense is put in,<sup>49</sup> or where a merchant fails to meet his debts as they mature in the ordinary course of business.<sup>50</sup>

The existence of a general financial crisis should put a prudent man upon inquiry with reference to doubtful debtors,<sup>51</sup> or rumors which a creditor has heard about his debtor's embarrassment,<sup>52</sup> or any transfer or payment made to a creditor out of the ordinary course of business,<sup>53</sup> unless the circumstances are explained.<sup>54</sup>

C. C. A. 104, 22 Am. B. R. 431; *Perry v. Booth*, 80 N. Y. App. Div. 373, 80 N. Y. Suppl. 706.

<sup>48</sup> *Markson v. Hobson*, No. 9099 Fed. Cas., 2 Dill. 327. But if the bank is not the general banker of a bankrupt, the rule does not apply. *Rankin v. National Bank*, No. 15568 Fed. Cas., 14 N. B. R. 4.

<sup>49</sup> *Dunning v. Perkins*, No. 4180 Fed. Cas., 2 Bliss, 421; *Bardes v. First Nat. Bank*, 122 Iowa, 433, 98 N. W. 284, 178 U. S. 524, 44 L. Ed. 1175, 4 Am. B. R. 163. See *Hawes v. Bank of Elberton*, 124 Ga. 567, 52 S. E. 922, declining to honor drafts held insufficient.

<sup>50</sup> *In re Forsyth*, No. 4048 Fed. Cas., 7 N. B. R. 174; *Swan v. Robinson*, 5 Fed. Rep. 287; *Mayer v. Herman*, No. 9344 Fed. Cas., 10 Blatch. 256; *Dunning v. Perkins*, No. 4180 Fed. Cas., 2 Bliss. 421; *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866; *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723.

But the mere knowledge that a small claim remains unsettled does not constitute a reasonable cause

to believe, etc. *Castle v. Lee*, No. 2506 Fed. Cas., 11 N. B. R. 80. *In re Eggert* (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 43 C. C. A. 1, 4 Am. B. R. 449; *Lyon v. Clark*, 129 Mich. 381, Fed. Cas., 2 Bliss. 434; *Post v. Corbin*, No. 11299 Fed. Cas., 5 N. B. R. 11; *Christopherson v. Oleson*, 19 S. D. 176, 102 N. W. 685. But see *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624, 94 N. W. 822, to the effect that this is not a proper test under the definition of insolvency given in the act of 1898.

<sup>51</sup> *In re Clark & Dougherty*, 10 N. B. R. 21. See *In re Neill-Pinckney-Maxwell Co.*, 170 Fed. Rep. 481, 22 Am. B. R. 401.

<sup>52</sup> *Golson v. Niehoff*, No. 5524 Fed. Cas., 2 Bliss. 434; *Post v. Corbin*, No. 11299 Fed. Cas., 5 N. B. R. 11; *Hyde v. Corrigan*, No. 6968 Fed. Cas., 9 N. B. R. 466.

<sup>53</sup> See R. S. Sec. 5130, which expressly provided that such transfers are *prima facie* void. *Pratt v. Columbia Bank*, 157 Fed. Rep. 137, 18 Am. B. R. 406; *Getts v.*



Where the debtor sells or mortgages substantially all his property to pay his debt,<sup>60</sup> or where execution must necessa-

Zanesville Grocery Co., 163 Fed. Rep. 417, 21 Am. B. R. 5.

In *Wright v. Skinner Mfg. Co.* (C. C. A. 2d Cir.), 162 Fed. 315, 89 C. C. A. 23, 20 Am. B. R. 527. A payment of four thousand dollars was received by creditor on account the day before the filing of an involuntary petition. Was held to give reasonable cause to believe that a preference was intended.

In *re McDonald & Sons*, 178 Fed. Rep. 487, 24 Am. B. R. 446. Knowledge of insolvency where creditor took back goods he had sold giving a release in full although the goods returned only amounted to sixty per cent. of the claim. *Silberstein v. Stahl*, 32 Misc. (N. Y.) 353, 66 N. Y. Suppl. 646, 63 N. Y. App. Div. 614, 71 N. Y. Suppl. 1148, affirmed, 171 N. Y. 649, 63 N. E. 1122. Preference where usual credit was forty-five days and where creditors got checks and had them certified at once. *Cannon v. James M. Bill Co.*, 34 Misc. (N. Y.) 734, 70 N. Y. Suppl. 1024.

An assignment by an insolvent of all his outstanding collections to a bank, his creditor, on its demand which in return does not promise anything was held with other circumstances sufficient to show "reasonable cause" in the bank. *Evans v. Nat. Broadway Bank*, 48 Misc. (N. Y.) 248, 96 N. Y. Suppl. 789.

<sup>64</sup> The fact that payments to creditors were made before maturity of the notes they held, is no evidence whatever of their knowledge, where by doing so, the bankrupt saved ac-

cumulated interest. *Sparks v. Marsh*, 177 Fed. Rep. 739, 24 Am. B. R. 280.

Where a manufacturer requests \$1,000 as a temporary loan to meet the payroll and repays the amount in nine days instead of ten, the court holds that the creditor had no reasonable cause to believe that it was intended thereby to give a preference. *Hamilton Nat. Bank v. Balcomb*, (C. C. A. 7th Cir.), 177 Fed. Rep. 155, 100 C. C. A. 575, 24 Am. B. R. 338.

There was a failure to prove insolvency at the date of the assignment in question and reasonable cause to believe the company was insolvent on the part of the assignee where an assignment of insurance policies was made to cover indebtedness during the panic of 1907, but where a careful examination of the company at the time showed that the company's assets exceeded liabilities by about \$18,000 and where within two weeks of the assignment a fire occurred which altered the situation of the company. In *re Neill-Pinckney-Maxwell Co.*, 170 Fed. Rep. 481, 22 Am. B. R. 401.

<sup>60</sup> *Thomas v. Adelman*, 136 Fed. Rep. 973, 14 Am. B. R. 510; *Allen v. McMannes*, 156 Fed. Rep. 615, 19 Am. B. R. 276; *English v. Ross*, 140 Fed. Rep. 631, 15 Am. B. R. 370; *In re Hines*, 144 Fed. Rep. 543, 16 Am. B. R. 495; *In re Pease*, 129 Fed. Rep. 446, 12 Am. B. R. 66; *Roberts v. Johnson* (C. C. A. 4th Cir.), 151 Fed. Rep. 567, 81 C. C. A. 47, 18 Am. B. R. 132; *In re Knopf*, 146 Fed. Rep. 109, 17 Am. B. R. 48.



rily stop the debtor's business, it is sufficient to put the creditor upon inquiry,<sup>63</sup> or knowledge of the commission of an act of bankruptcy on the part of the debtor may be enough.<sup>64</sup>

Reasonable cause to believe does not arise from the mere fact that the debtor knew that he was insolvent or that the creditor believed him to be insolvent,<sup>65</sup> and does not exist

The creditor was said to have reasonable cause to believe that the debtor was insolvent and was constructively chargeable with that knowledge where he took a transfer on all his debtor's property, a going concern, in satisfaction of a debt, where he knew of his own dishonored notes, and where he knew that his debtors could not have carried on business and make enough to pay the obligations incurred under the transfer and where he might have inquired of his debtors or examined their account books. *McElvain v. Hardesty* (C. C. A. 8th Cir.), 169 Fed. Rep. 31, 94 C. C. A. 399, 22 Am. B. R. 320.

"Where the bankrupt conveys his entire estate, and one creditor alone is benefited thereby, there is a strong presumption of an unlawful preference, and when, as in this case, insolvency is admitted by the filing of the voluntary petition of the debtor within less than fifty days from the date of the transfer, and the proof is that for some months prior thereto they had been pressed by creditors and had secured extensions, that the creditor was a bank, which in a town like Marion had unusual opportunities of finding out the true condition of the debtor, that it had claims against it of long standing, there arises such a strong presumption that the creditor had such reasonable cause to believe that the debtor

was in such financial condition as was actually proved in less than two months, the court must conclude that the circumstances were such as to put upon the creditor the duty of inquiry, and where the creditor, as here, fails entirely to offer any testimony to rebut the strong presumptions against it which necessarily arise, when it is in his power to say, if it was the truth, that it had no knowledge of the debtor's actual financial condition, that it had no reasonable cause to believe that its debtor was insolvent if such were the truth, it strengthens the presumption, and leads to the conclusion that this was an unlawful preference and must be set aside; and it is so ordered." *In re McDonald & Sons*, 178 Fed. Rep. 487, 24 Am. B. R. 446.

<sup>63</sup> *Zahm v. Fry*, No. 18198 Fed. Cas., 9 N. B. R. 546; *Hood v. Karper*, No. 6664 Fed. Cas., 5 N. B. R. 358; *Smith v. McLean*, No. 13074 Fed. Cas., 10 N. B. R. 260; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280.

<sup>64</sup> *Warren v. National Bank*, No. 17202 Fed. Cas., 10 Blatch. 493, 96 U. S. 539, 24 L. Ed. 640.

<sup>65</sup> *Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —; *Tumlin v. Bryan* (C. C. A. 5th Cir.), 165 Fed. Rep. 166, 91 C. C. A. 200, 21 Am. B. R. 319; *In re*

where the creditor examines the debtor's books which do not reveal insolvency.<sup>66</sup> An adjudication soon after the transfer is in itself insufficient to show reasonable cause to believe.<sup>68</sup>

A "purchase" of a farm by a creditor was found to be preferential where the creditor never visited the farm or notified its tenants of the purchase and it appears from other circumstances that the creditor had "reasonable cause to believe."<sup>69</sup>

### § 507. Doubt or suspicion insufficient.

A transfer can not be avoided simply on proof that the creditor had doubt<sup>70</sup> or suspicion<sup>71</sup> that a preference was intended.

First Nat. Bank (C. C. A. 6th Cir.), 155 Fed. Rep. 100, 84 C. C. A. 16, 18 Am. B. R. 766; Hess v. Theodore Hamm Brewing Co., 108 Minn. 22, 121 N. W. 232.

<sup>66</sup> *In re* Neill-Pinckney-Maxwell Co., 170 Fed. Rep. 481, 22 Am. B. R. 401; Stratton v. Lawson, 27 Wash. 310, 67 P. 562, where books show large monthly profits.

Where a bank advances money to a bankrupt to enable the bankrupt to compromise with his creditors and takes a bill of sale of the bankrupt's property as collateral security this is not voidable as a preference where the bank had the bankrupt's business carefully examined and the examination showed that he was solvent. The bank, therefore, has a lien on the proceeds of the sale to the amount of its note but not for debts which were assigned to it in the course of the compromise. *In re* Bartlett, 172 Fed. Rep. 679, 22 Am. B. R. 891.

<sup>67</sup> *In re* Bartlett, 172 Fed. Rep. 679, 22 Am. B. R. 891.

<sup>68</sup> *Laundy v. First National Bank*, 66 Kan. 759, 71 P. 259.

<sup>69</sup> *Whitwell v. Wright*, 120 N. Y. Suppl. 1065, 136 N. Y. App. Div. 246.

<sup>70</sup> *Farmers & Mechanics Bank v. Wilson*, 4 Neb. 606, 95 N. W. 609; *Suffel v. McCartney National Bank*, 127 Wis. 208, 106 N. W. 837, 115 Am. St. Rep. 1004.

<sup>71</sup> *Tumlin v. Bryan* (C. C. A. 5th Cir.), 165 Fed. Rep. 166, 91 C. C. A. 200, 21 Am. B. R. 319; *Sparks v. Marsh*, 177 Fed. Rep. 739, 24 Am. B. R. 280, must be substantial evidence for belief. *Stevenson v. Milliken-Tomlinson Co.*, 99 Me. 320, 59 A. 472; *Harmon v. Walker*, 131 Mich. 540, 91 N. W. 1025, 9 Detroit Leg. N. 439; *Mackel v. Bartlett*, 33 Mont. 123, 91 P. 1064; *Gnichtel v. First National Bank*, 66 N. J. Eq. 88, 57 A. 508; *Taft v. Fourth National Bank*, 10 Ohio Dec. 405, 8 Ohio N. P. 59; *Sirriner v. Stoner-Marshall Co.*, 64 S. C. 457, 42 S. E. 432; *Stuart v. Farmers' Bank*, 137 Wis. 66, 117 N. W. 820.

Mr. Justice Bradley, speaking for the supreme court in a leading case on this subject, laid down the rule with reference to what constituted a reasonable cause to believe a debtor to be insolvent under the former statutes in the following words:<sup>72</sup> "Some confusion exists in the cases as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' *Dicitur* are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such knowledge of facts as to induce reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure."<sup>73</sup>

"It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure,

<sup>72</sup> Grant v. National Bank, 97 U. S. 81, 24 L. Ed. 971. This is referred to in Stuckey v. Savings Bank, 108 U. S. 74, 27 L. Ed. 640, as "a case which was fully considered, and which has since been followed by us as a leading case on the subject."

<sup>73</sup> Powell v. Gate City Bank (C. C. A. 8th Cir.), 178 Fed. Rep. 609,

102 C. C. A. 55; *In re* Eggert (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 43 C. C. A. 1, 4 Am. B. R. 449; Lyon v. Clark, 129 Mich. 381; Brown v. Guichard (Sup. Ct. N. Y.), 7 Am. B. R. 515; *In re* Soudan Mfg. Co. (C. C. A. 7th Cir.), 113 Fed. Rep. 804, 51 C. C. A. 476, 8 Am. B. R. 45.

which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through his difficulties long after his case is in fact desperate; and his creditors, if they know nothing of his embarrassments, either participate in the same feeling or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

"Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of the ordinary intelligent man." The definition given by the supreme court to the phrase used in the act of 1867 has been applied in construing language used in the present bankrupt act.<sup>74</sup>

#### § 508. Creditor put on inquiry.

It is not necessary that the creditor knows or even actually believes that a preference is being given, provided he has rea-

<sup>74</sup> As was done *In re Eggert* (C. C. A. 7th Cir.), 102 Fed. Rep. 735, 43 C. C. A. 1, 4 Am. B. R. 449; *Lyon v. Clark*, 129 Mich. 381; *Bardes v. First Nat. Bank*, 122 Ia. 443, 12 Am. B. R. 771; *In re Virginia Hardwood Mfg. Co.*, 139 Fed. Rep. 209, 15 Am. B. R. 135; *Stevenson v. Milliken Milling Co.*,

99 Me. 320, 13 Am. B. R. 201; *In re Goodhile*, 130 Fed. Rep. 471, 12 Am. B. R. 374; *Off v. Hakes* (C. C. A. 7th Cir.), 142 Fed. Rep. 364, 73 C. C. A. 464, 15 Am. B. R. 696; *Butler Paper Co. v. Goembel* (C. C. A. 7th Cir.), 143 Fed. Rep. 295, 74 C. C. A. 433, 16 Am. B. R. 26.

sonable cause to be put upon inquiry as to whether a preference is actually given or not.

Constructive notice is sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence and an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained.<sup>75</sup>

<sup>75</sup> Crittenden v. Barton (N. Y. Sup. Ct. App. Div.), 5 Am. B. R. 775; Wager v. Hall, 16 Wall. 584, 21 L. Ed. 504; Hackney v. Hargreaves, 68 Neb. 624, 13 Am. B. R. 164, overruling 10 Am. B. R. 213; Andrews v. Kellogg, 41 Colo. 35, 92 P. 222; Walker v. Tenison Bros. Saddlery Co., 42 Tex. Civ. App. 582, 94 S. W. 166; Whitwell v. Wright, 115 N. Y. Suppl. 48.

In Stevens v. Oscar Holway Co., 156 Fed. 90, 19 Am. B. R. 399, it was held knowledge of facts which would disclose the preferential character of transfer, acquired during the time of payments, make those acquired after such knowledge voidable.

"The knowledge of the one taking the preference must be of such a nature as to start an inquiry which, if pursued to its legitimate end would lead to a belief of insolvency and not to a doubt concerning it." Farmers & Mechanics' Bank v. Wilson, 4 Neb. 606, 95 N. W. 609.

"With judgments against the bankrupt unpaid, various notes and drafts unpaid, all of which were

well known to respondent, he was charged, as a matter of law, with such notice as to put him upon inquiry to ascertain the condition of the bankrupt, and to ascertain why it was that these judgments, notes, and drafts were not paid; and they furnish a foundation for a reasonable cause to believe that an unlawful preference was intended, in fraud of the bankrupt act."

"It being established, therefore, by the record in this case that the bankrupt was in fact insolvent, and that such a state of facts existed as to his indebtedness as to put the respondent upon inquiry as to the solvency or insolvency of the bankrupt, and that as a result of such inquiry the respondent would have ascertained, if he did not then know as a fact, that the bankrupt was actually insolvent, he was, therefore, chargeable with notice that the bankrupt intended to give him a preference which, as we have seen, under the law of Congress, makes it voidable by his trustee in bankruptcy." Christopherson v. Oleson, 19 S. D. 176, 102 N. W. 685.

On the other hand it is often said that the creditor is bound only by the information in his possession and that he is not bound to investigate and trace mere suspicious circumstances which come to his attention.<sup>79</sup>

"Actual knowledge is not made the criterion of proof in such cases, nor is it necessary that it should appear that the bank actually believed that the mortgagor was insolvent, but the true inquiry is whether Mr. Mullins, as president of the bank, a lawyer, and business man of ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances, and, as it appears that the debtor was in fact insolvent, it seems to me clear that the circumstances were such as would put a person of ordinary prudence and discretion upon inquiry, and that it was his duty to make all such reasonable inquiry, and that there were such means of knowledge as would have enabled him to ascertain the true state of the case. A creditor, under these circumstances, is required to exercise ordinary prudence, and, if they failed to investigate, they are chargeable with all the knowledge, which it is reasonable to suppose they would have acquired if they had performed their duty in that regard. Positive proof of collusion between debtor and creditor, by which one may be preferred, is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances inconclusive if separately considered may by their joint operation, especially

when corroborated by moral coincidences, be sufficient. Signs of insolvency were too many and too marked not to warn the president of the bank that he was getting a prohibited advantage over other creditors. The facts are so persuasive that they would have given reasonable ground for suspicion to persons far less astute and less accustomed to the ways of business in general than was the president of this bank. The unusual nature of the transaction, in connection with all the circumstances, raises such a presumption that it can only be overcome by proof on the part of the preferred creditor that he took the proper steps to find out the pecuniary condition of the debtor." *In re McDonald & Sons*, 178 Fed. Rep. 487, 24 Am. B. R. 446.

<sup>79</sup> *Blankenbaker v. Charlestown State Bank*, 111 Ill. App. 393.

*In re Wolf Co.*, 164 Fed. 448, 21 Am. B. R. 73, it was held that in absence of express notice of debtor's insolvency, creditor is only bound by information opened to observation.

State of mind which would lead to inquiry is mere suspicion and is not reasonable cause to believe. *Stuart v. Farmers' Bank*, 137 Wis. 66, 117 N. W. 820.

"The creditor is bound only by the information he has at the time he receives payment and is not obliged to trace to the ultimate any suspicious circumstances that may exist within his knowledge to ascertain whether such payment

The plea of ignorance on the part of the creditor will not relieve him of liability when a small amount of inquiry would have given all the necessary information.<sup>83</sup> Nor is an inquiry of a person suspected of fraud, who has every motive for concealing the truth, sufficient, when better and more reliable sources of information are open.<sup>84</sup>

### § 509. Knowledge of agent.

It should be observed that a person receiving a preference is chargeable with the knowledge of his agent, who shall have reasonable cause to believe that it was intended to be a preference. The words of the statute are "agent acting therein."<sup>85</sup>

would be void within the law. Neither is it enough that a creditor has some cause to suspect that payment to him was intended as a preference." *Blankenbaker v. Charles-town State Bank*, 111 Ill. App. 393.

A payment under a compromise to one creditor was said not to be a preference under Sec. 60b. Creditors are under no such onerous duty as to investigate when an offer of compromise is made to ascertain if the debtor can pay the amount offered, and intends to pay it to all creditors alike. When an offer of compromise is made, the creditors are justified in believing that it is made in good faith to all creditors, unless something occurs to put them on inquiry. The court refused to set it aside on the ground that the creditor had cause to believe he was getting more than his proportion. *Smith v. Hewlett Robin Co.* (C. C. A. 2d Cir.), 178 Fed. Rep. 271, 101 C. C. A. 576, 24 Am. B. R. 153.

<sup>83</sup> *In re Wright*, No. 18071 Fed. Cas., 2 N. B. R. 490.

<sup>84</sup> *Singer v. Jacobs*, 11 Fed. Rep. 559.

<sup>85</sup> B. A. 1898, Sec. 60b; *Babbitt v. Kelley* (St. Louis Court of App.), 9 Am. B. R. 335, 70 S. W. R. 384; *In re Dunavant*, 96 Fed. Rep. 542, 3 Am. B. R. 41; *In re Gillette*, 104 Fed. Rep. 769, 5 Am. B. R. 119; *In re Nassau*, 140 Fed. Rep. 912, 14 Am. B. R. 828; *Plummer v. Myers*, 137 Fed. Rep. 660, 14 Am. B. R. 805; *Beattie v. Gardner*, No. 1195 Fed. Cas., 4 Ben. 479; *Graham v. Stark*, No. 5676 Fed. Cas., 3 Ben. 520; *Mayer v. Herman*, No. 9344 Fed. Cas., 10 Blatch, 256; *Rogers v. Palmer*, 102 U. S. 263; 22 L. Ed. 164; *Nisbit v. Macon Co.*, 12 Fed. Rep. 686; *Ungewitter v. Von Sachs*, No. 14343 Fed. Cas., 4 Ben. 167; *Alexander v. Redmond* (C. C. A. 2d Cir.), 180 Fed. Rep. 92, 103 C. C. A. 146, 24 Am. B. R. 620, interviews with the agent as basis of "reasonable cause." *Babbitt v. Kelley*, 96 Mo. App. 429, 70 S. W. 384; *Wright v. Cotton*, 140 N. C. 1, 525 S. E. 141.



It is therefore necessary in order to charge the creditor with notice, that the agent should have some part in negotiating the transfer which constitutes the preference,<sup>88</sup> and knowledge acquired while working for the debtor may be imputed to the creditor employing the same person as agent.<sup>89</sup>

Where money is collected through a collection agency by an attorney of that agency, who was not employed directly by the creditors, his knowledge was held not chargeable to the creditors in such a sense as to render them liable to the trustee in bankruptcy for the money collected.<sup>92</sup>

In determining the relation of debtor and creditor the court has applied "the principle that one who credits an agent, who, by the consent and with the knowledge of his principal, is transacting the principal's business in his own name—that is,

The knowledge of a bank to which a note is sent for collection that the maker is insolvent is the knowledge of the holder and will make the transaction a preference. *Hooker v. Blount*, 44 Tex. Civ. App. 162, 97 S. W. 1083.

The husband is not the wife's agent so that his knowledge is imputed to her although he ordered certain real estate conveyed to her from a third party in satisfaction of a debt he owed her. *Pearsall v. Nassau National Bank*, 74 N. Y. App. Div. 89, 77 N. Y. Suppl. 11.

<sup>88</sup> *Whitson v. Farber Bank*, 105 Mo. App. 605, 80 S. W. 327.

A clerk or salesman in a store is not charged with knowledge of his employer's financial condition. No knowledge found although he knew payment was result of sale after hours of whole stock. *Dunlop v. Thomas*, 28 Wash. 521, 68 P. 909.

<sup>89</sup> Where the president of the creditor bank is also the senior member

of the debtor firm his knowledge is imputed to the bank although the cashier was the official who acted for the bank in these negotiations. *Crooks v. People's National Bank*, 34 Misc. (N. Y.) 450, 70 N. Y. Suppl. 271, *Id.* 72 N. Y. App. Div. 331, 76 N. Y. Suppl. 92, 495, affirmed, 177 N. Y. 68, 69 N. E. 228. The knowledge of its clerk can not affect a creditor bank where the clerk, who had formerly worked for the bankrupt, was simply placed in charge of goods after the bank had taken possession of them and he had no connection with the bank when it happened. *Whitson v. Farber Bank*, 105 Mo. App. 605, 80 S. W. 327.

<sup>92</sup> *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392. The attorney's knowledge in this case was that of his principal—the collection agency—and not the creditors, who did not employ him.



the name of the agent—may ordinarily pursue for payment the agent or the equitable owner who lies behind the agent.”<sup>92\*</sup>

### § 510. Burden of proof.

The burden of proving reasonable cause lies on the trustee.<sup>93</sup>

### § 511. Question for jury.

Whether or not the facts and circumstances in the possession of the creditor at the time the alleged preference was made were sufficient to cause an ordinary prudent business man to conclude that a preference was intended is a question for the jury and not for the court in a jury trial.<sup>96</sup>

<sup>92\*</sup> *Calnan Co. v. Doherty* (C. C. A. 1st Cir.), 174 Fed. Rep. 222, 98 C. C. A. 130, 23 Am. B. R. 297.

<sup>93</sup> *Kimmerle v. Farr* (C. C. A. 6th Cir.), 189 Fed. Rep. 295, 109 C. C. A. —, 27 Am. B. R. —; *Arkansas National Bank v. Sparks*, 83 Ark. 626, 103 S. W. 626.

Burden of proof as to a preference, see *post*, Sec. 544.

Although as a general rule the burden is upon the creditors who object to the allowance of a claim under a transfer to show that the bankrupts were insolvent and that the claimant had reasonable cause to believe that a preference was intended, a clear distinction is to be drawn between strangers asserting such claims and the assertion thereof by near relatives. The taking by a near relative of a trust deed within thirty days of bankruptcy, long after a loan of money for which no note or obligation was given, constituted *prima facie* evidence of knowledge of insolvency and the intention of the bankrupt to give a preference and places the burden upon the relative to show

that the transaction was in good faith. *In re Sanger*, 169 Fed. Rep. 722, 22 Am. B. R. 145. Where a purchaser is shown to have paid a present fair consideration for property bought, the burden shifts to him who would show that he purchased in bad faith, to show that he knew of the intention of the bankrupt who made the sale to make it for the purpose of paying a debt to a relative to the exclusion of other creditors. *Shelton v. Price*, 174 Fed. Rep. 891, 23 Am. B. R. 431.

<sup>96</sup> *Kaufman v. Treadway*, 195 U. S. 271, 49 L. Ed. 190, 12 Am. B. R. 682; *Wetstein v. Franciscus* (C. C. A. 2d Cir.), 133 Fed. Rep. 900, 67 C. C. A. 62, 13 Am. B. R. 326; *Sundheim v. Ridge Ave. Bank*, 138 Fed. Rep. 951, 15 Am. B. R. 132; *Evans v. Nat. Broadway Bank*, 88 N. Y. Sup. Ct. App. Div. 549, 85 N. Y. Supp. 101. The test of insufficiency for submission to the jury of the question whether the creditor had reasonable cause to believe that the bankrupt was insolvent, does not rest on assertions by either party of his intent

Where it appears on the undisputed facts that the creditor had "reasonable cause," the court may direct a verdict for the plaintiff.<sup>98</sup>

**§ 512. The effect must be to enable any creditor to obtain a greater percentage of his debt than any other creditor of the same class.\***

The main object of the bankrupt law is to provide for the equal distribution of the property of a debtor among his creditors. Section 60a makes every transfer of any of the insolvent's property, by means of which a greater percentage would be paid out of his estate to any creditor, or on any claim, than every other creditor and every other claim of the same class would receive a preference to be avoided or surrendered under other provisions of the statute.<sup>98\*</sup> "The test of a preference, under the act, is the payment, out of the bankrupt's property, of a greater percentage of the creditor's claim than other creditors of the same class receive."<sup>99</sup> It does not now depend upon the purpose or intent of the debtor or the creditor.<sup>1</sup> It is merely the effect or result of the transaction.<sup>2</sup>

or belief in the transaction, but on inferences thereof which may fairly arise from the facts in evidence. *Hamilton Nat. Bank v. Balcomb* (C. C. A. 7th Cir.), 177 Fed. Rep. 155, 100 C. C. A. 575, 24 Am. B. R. 338.

<sup>98</sup> *Brooks v Bank of Beaver City*, 82 Kan. 597, 109 P. 409.

\* Effect of transfer judged by day of its record, see statute June 25, 1910, discussed under Sec. 499, *ante*.

<sup>98\*</sup> *Eau Claire Nat. Bank v. Jochman*, 204 U. S. 522, 17 Am. B. R. 675.

<sup>99</sup> *Swarts v. Fourth National*

*Bank* (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673. No preference, as the jury found that payment did not enable creditor to receive greater percentage of his debt than other creditors. *John S. Brittain Dry Goods Co. v. Bertenshaw*, 68 Kan. 734, 75 P. 1027.

<sup>1</sup> Intent of the debtor, see further Sec. 492, *ante*.

<sup>2</sup> Whether a conveyance is a preference depends on its effect. B. A. 1898, Sec. 60, as amended June 25, 1910, 36 Stat at L. 838; see also Sec. 492, *ante*.

Absolute transfers,<sup>3</sup> or transfers by way of security for a present consideration<sup>4</sup> or of exempt property, or payments and sales in the usual course of business where the new sales succeed payments and the net result is to increase the bankrupt's estate do not constitute preferential transfers.<sup>10</sup>

A part payment to a creditor is not a preference, when by the receipt of the amount he did not get a larger percentage of his debt than the debtor is able to pay his other creditors at that time.<sup>13</sup>

<sup>3</sup> A transfer of goods to a purchaser for value with a view to using the purchase money for a voluntary preference, the purchaser knowing its intention is not a fraudulent conveyance within the meaning of the 6th section of the English bankruptcy act. *Ex parte Stubbins*, L. R. 17 Ch. Div. 58, 68. Where a bankrupt conveyed property while insolvent to a purchaser who advanced money to enable him to pay other indebtedness and the purchaser made the loan for a present fair consideration, and where there was no evidence that he sold for the purpose of assisting the bankrupt in an attempt to defraud his creditors, the transaction was not fraudulent as far as the creditor was concerned. *Van Iderstine v. National Discount Co.* (C. C. A. 2d Cir.), 174 Fed. Rep. 518, 98 C. C. A. 300, 23 Am. B. R. 345. Where a creditor bought cattle and paid part of the purchase price in advance, and the balance on receiving the cattle, the bankrupt being insolvent at the time, the delivery of the cattle is not a preference or a fraudulent transfer, and the court orders judgment for the creditor, notwithstanding a verdict to the contrary by the jury.

*Templeton v. Kehler*, 173 Fed. Rep. 575, 23 Am. B. R. 39.

<sup>4</sup> *Presbyterian Board v. Bilbee*, 212 Pa. St. 310, 61 A. 925.

A mortgage given by one known to be insolvent in good faith to secure future advances, by mistake was not recorded till a few days before bankruptcy, though two years after its date was held valid as not a preference at all as the money was put right into the business. *Claridge v. Evans*, 137 Wis. 218, 118 N. W. 198.

<sup>10</sup> *Wild v. Provident Trust Co.*, 214 U. S. 292, 53 L. Ed. 1003; *Yaple v. Dahl-Millikan Grocery Co.*, 193 U. S. 526, 28 L. Ed. 274, 11 Am. B. R. 569; *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773; *In re Sagor* (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 57 C. C. A. 412, 9 Am. B. R. 361; *Dickson v. Wyman* (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 49 C. C. A. 574, 7 Am. B. R. 186; *Gans v. Ellison* (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 52 C. C. A. 356, 8 Am. B. R. 153; *Kimball v. Rosenhan Co.* (C. C. A. 8th Cir.), 52 C. C. A. 33, 114 Fed. Rep. 85, 7 Am. B. R. 718.

<sup>13</sup> *Brittain Dry Goods Co. v. Bertenshaw*, 68 Kan. 734, 75 P. 1027.

No preference is created by the exchange of securities on renewal of a loan.<sup>14</sup> Where a bankrupt misappropriates money of his principal and it is dissipated, and when hopelessly insolvent he sends the principal a conveyance of property its acceptance makes the creditor a general creditor and the conveyance may well be a preference. The principal can not claim that the conveyance is simply given in exchange for property to which he is entitled.<sup>15</sup>

A preference does not arise by settlement of litigation for a fair consideration,<sup>17</sup> or by taking property to which by contract the creditor was already entitled,<sup>18</sup> nor by offsetting credits.<sup>19</sup>

<sup>14</sup> *Deland v. Miller & Chaney Bank*, 119 Iowa, 368, 93 N. W. 304. Where the new securities are more valuable than the old the transaction may be a preference to the extent of the difference. *In re Manning*, 123 Fed. Rep. 181, 10 Am. B. R. 500.

<sup>15</sup> *Atherton v. Green* (C. C. A. 7th Cir.), 179 Fed. 806, 103 C. C. A. 298, 24 Am. B. R. 650; or by taking property to which by contract the creditor was already entitled.

<sup>17</sup> "In Alabama, when an insolvent contests his father's last will, he may abandon or settle the contest at any stage of the litigation upon any terms he pleases, and his subsequent adjudication in bankruptcy will not give the trustee any cause of action growing out of such settlement or abandonment, unless it be to recover any sum or sums the bankrupt may have received and afterwards transferred in derogation of the bankruptcy law." *Edington v. Masson* (C. C. A. 5th Cir.), 177 Fed. Rep. 209, 101 C. C. A. 379, 24 Am. B. R. 183.

<sup>18</sup> Where a buyer under an installment contract of ties pays drafts

for them, and on learning of the seller's insolvency, takes possession of ties which he had paid for, but which had not been shipped under the contract, this is not a preference. *Weeks v. Spooner*, 142 N. C. 479, 55 S. E. 432. An assignment of a liquor license to a brewing company is not a preference where the brewing company advanced the money to pay for the license originally under an agreement to protect it. *Sharp v. Simonitsch*, 107 Minn. 133, 119 N. W. 790.

<sup>19</sup> Where an insolvent borrows money of a bank on his note and deposits the money in the bank the bank commits no preference by applying his deposit in payment of its note just before bankruptcy. The bank had a right to offset its debt against the deposit under Sec. 68 and hence the general creditors have lost nothing. *West v. Bank of Lahoma*, 16 Okl. 328, 85 P. 469. The surrender to a creditor of a note signed by him can not be a preference to him as the creditor had an offset, either legal or equitable to the claim on the note. *Taylor v. Nichols*, 119 N. Y.

It is a preference for a clearing-house, having notice of the failure of a bank, to apply in its settlement of accounts the credit item to the payment of claims of other banks against the insolvent bank.<sup>22</sup> Such funds pass to the trustee in bankruptcy. It has been held to be a preference to pay any creditor in full while insolvent and leave others unpaid,<sup>23</sup> but it is no preference to transfer property at a fair valuation to a creditor in payment of his debt which is already secured.<sup>25</sup>

Where firm creditors coequally share with individual creditors in the individual estates, firm creditors are prejudiced by preferences made by a partner to his individual creditors, the trustee of the firm may set aside the transfer in the state court, but the distribution when paid in depends upon section 5 of the bankrupt act.<sup>25\*</sup>

### § 513. Classes of creditors.

Where creditors are entitled to the same percentage on their debts they are in the same class, as unsecured creditors having provable claims. This is true even though some of them are secured by endorsement or guaranty by persons other than the bankrupt and the others are not.<sup>26</sup> Labor

Suppl. 919, 134 N. Y. App. Div. 783. See *Booth v. Prete*, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.), 863.

<sup>22</sup> *Rector v. City Deposit Bank*, 200 U. S. 405, 50 L. Ed. 527, 15 Am. B. R. 336.

<sup>23</sup> *Fox v. Gardner*, 21 Wall. 475, 22 L. Ed. 685; *In re Foley*, 140 Fed. Rep. 300, 14 Am. B. R. 829; *In re Oregon Bulletin Printing and Publishing Co.*, No. 10559 Fed. Cas., 13 N. B. R. 503; *Silverman's Case*, No. 12855 Fed. Cas., 1 Saw. 410; *In re Dibblee*, No. 3884 Fed. Cas., 3 Ben. 283, *sub nom.*, *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568; *Keller v. Faickney*, 42 Tex. Civ. App. 483,

94 S. W. 103. An antecedent debt is not one "for value" under B. A. Sec. 70c. *Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co.*, 67 N. J. Eq. 602, 60 A. 940, reversing 67 N. J. Eq. 88, 57 A. 502.

<sup>25</sup> *Posey v. McManis*, 28 Tex. Civ. App. 452, 67 S. W. 792; *Sellers v. Hayes*, 163 Ind. 422, 72 N. E. 119.

<sup>25\*</sup> *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416.

<sup>26</sup> *Swarts v. Fourth Nat. Bank*, 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673; *Swarts v. Siegel*, 114 Fed. Rep. 1001 (on app. to

claimants, entitled to priority, constitute a separate class from the unsecured creditors.<sup>27</sup>

Other classes may be composed of creditors having a valid mortgage, lien or other securities or entitled to priorities in the distribution of the estate. These secured classes become material in actual practice when there are not sufficient funds to pay the whole of any one class, as where the assets are insufficient to pay all the labor claims. In such case they must be paid *pro rata* or a preference is created.

The giving of a leasehold in order that the grantee may get an advantage over other creditors is a preference.<sup>28</sup> In order to entitle a trustee to recover a preference he must allege and prove, among other things, that there is a consequent inequality between creditors of the same class.<sup>29</sup>

#### § 514. Mortgages as preferences.

A mortgage, otherwise valid, may be avoided as a lien because it constitutes a preference in bankruptcy.<sup>30</sup>

This is so, not because such mortgages are fraudulent at common law, or by the statutes of the states, or are immoral or dishonest, but simply because the statute says they are voidable. Such mortgages are valid as between a mortgagee and the bankrupt. A trustee, taking only the title of the bankrupt, could not attack their validity, except as power is expressly given him by the bankrupt act. Such power is conferred on him by section 60b.

C. C. A.), 117 Fed. Rep. 13, 54 C. C. A. 399, 8 Am. B. R. 689.

But see *In re Harpke*, 116 Fed. Rep. 295, 8 Am. B. R. 535.

<sup>27</sup> *In re Read & Knight*, 7 Am. B. R. 111.

<sup>28</sup> *Carter v. Hobbs*, 94 Fed. Rep. 108, 2 Am. B. R. 224.

<sup>29</sup> *Kimball v. Dresser*, 98 Me. 519. The trustee to recover a preference must show that he has not sufficient assets of the bankrupt to pay the

claims filed and allowed against him. *Cree v. Bradley's Bank of Mystic*, 141 Iowa, 232, 119 N. W. 614. Trustee to recover must show that assets in his hands insufficient to satisfy all creditors. *Deland v. Miller & Chaney Bank*, 119 Iowa, 368, 93 N. W. 304.

<sup>30</sup> *In re Great Western Mfg. Co.* (C. C. A. 8th Cir.), 152 Fed. Rep. 123, 18 Am. B. R. 259.

In order that a mortgage security for a debt may be set aside as a voidable preference, four things must concur;<sup>32</sup> namely, *First*, the mortgage must have been given by an insolvent person to a creditor; *second*, the effect of such mortgage must be to enable such creditor to obtain a greater percentage of his debts than any other of such creditors of the same class; *third*, the creditors receiving the mortgage must have had reasonable cause to believe that it was intended thereby to give a preference; and, *fourth*, the mortgage must have been made within four months before filing the petition in bankruptcy or after filing the petition and before the adjudication.

If any element of the combination is wanting, the mortgage being valid under the state law, there is no infringement of the bankrupt law.<sup>33</sup>

#### § 515. Effect of state law.

A mortgage may be invalid under state law, though unaffected by the bankruptcy act.<sup>34</sup>

#### § 516. By insolvent to creditor.

It will not constitute a preference for a person other than a bankrupt to mortgage his own property to secure the debt

<sup>32</sup> B. A. 1898, Sec. 60; *In re Hunt*, 139 Fed. Rep. 283, 14 Am. B. R. 416. Assignment of accounts as collateral invalid—when requisites of preference appear. *State Bank of Williamson v. Fish*, 120 N. Y. Suppl. 365.

For further consideration of these elements as to preferences generally, see Sec. 494, *et seq.*

<sup>33</sup> *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *McNair v. McIntyre* (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 51 C. C. A. 89, 7 Am. B. R. 638; *In re Clifford*, 136 Fed. Rep. 475,

14 Am. B. R. 281; *Empire State Trust Co. v. Fisher Co.*, 67 N. J. Eq. 88; *In re Virginia Hardwood Mfg. Co.*, 139 Fed. Rep. 200, 15 Am. B. R. 135.

<sup>34</sup> *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416. A state statute providing that a preferential mortgage shall operate as an assignment of property for creditors is not superseded by the bankruptcy act and may be invoked where mortgage was more than four months before bankruptcy. *Louisville Dry Goods Co. v. Lanman*, 135 Ky. 163, 121 S. W. 1042.

of a bankrupt, or where a solvent debtor gives a mortgage, even within the four months' period, to secure his own debt.<sup>36</sup> The mortgage must be given to a creditor, but if it is given to a third person in trust for him, it does not prevent its being a preference.<sup>37</sup>

### § 517. Within four months.

It is an essential element of a mortgage preference, which may be avoided by a trustee, that the mortgage be given within four months before filing the petition in bankruptcy or after filing the petition and before the adjudication.<sup>38</sup>

A mortgage valid under the state law, made before the four months' period, is valid as against the trustee of the mortgagor.<sup>39</sup> Where such a mortgage covers after-acquired property, it is not a preferential transfer for a mortgagee to take possession of such after-acquired property within the four months' period, although the mortgagee may have known that the mortgagor was insolvent and considering going into bankruptcy and a petition be filed within four months thereafter.<sup>40</sup>

<sup>36</sup> *Empire State Trust Co. v. Fisher Co.*, 67 N. J. Eq. 88. See Secs. 496 and 497, *ante*.

<sup>37</sup> *In re Wright Lumber Co.*, 114 Fed. Rep. 1011, 8 Am. B. R. 345.

<sup>38</sup> B. A. 1898, Sec. 60, as amended June 25, 1910. For a discussion of this element generally, see Sec. 498, *et seq.*, *ante*.

<sup>39</sup> *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Curry v. McCauley*, 20 Fed. Rep. 583; *Judson v. Courier Co.*, 25 Fed. Rep. 705; *Meyer Bros. Drug Co. v. Pipkin Drug Co.* (C. C. A. 5th Cir.), 136 Fed. Rep. 396, 69 C. C. A. 240, 14 Am. B. R. 477; *Carton v. Booze*, 68 N. J. Chan. 771, 57 Atl. Rep. 1029; *In re Hunt*, 139 Fed. Rep. 283, 14 Am. B. R.

416; *In re New York Economical Printing Co.* (C. C. A. 2d Cir.), 110 Fed. Rep. 514, 49 C. C. A. 133, 6 Am. B. R. 615.

It should be borne in mind that the time limit under the original act of 1867, Secs. 35 and 39 (R. S. Sec. 5128), was four months. But this was changed to two months by the act of June 22, 1874, Secs. 10 and 11, 18 Stat. at L. 180; *Auffm'ordt v. Rasin*, 102 U. S. 620, 26 L. Ed. 262.

<sup>40</sup> *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 14 Am. B. R. 74; *Fisher v. Zollinger* (C. C. A. 6th Cir.), 149 Fed. Rep. 54, 79 C. C. A. 76, 17 Am. B. R. 618; *In re National Valve Co.*, 140 Fed. Rep. 679, 15 Am. B. R. 524; *In re*



Prior to the amendment of February 5, 1903,<sup>41</sup> it was generally held that the four months' period began to run from the date the mortgage was made and not from the date of recording.<sup>42</sup> The amendment provides that "where a preference consists in a transfer such period of four months shall not expire until after the date of recording or registering of the transfer, if by law such recording or registering is required."<sup>43</sup> In applying this provision the courts differ as to the meaning of the word "required." The better rule is that if a mortgage is subject to record under the laws of the state it is required to be recorded within the meaning of this provision.<sup>44</sup> The reason for this amendment and the construction to be given it and the effect of the amendment of 1910 have already been considered.<sup>45</sup>

Where a chattel mortgage by statute is not a lien until filed, when the filing takes place more than ten days after its date, it is then avoided by the bankruptcy law as a preference as a mortgage given to avoid a pre-existing indebtedness.<sup>47</sup>

In computing the four months, the first day is excluded and the last is included unless the last day falls on a Sunday or a holiday, in which event the last day included shall be

Rogers & Woodward, 132 Fed. Rep. 560, 13 Am. B. R. 75. See also *In re Sentenne and Green Co.*, 120 Fed. Rep. 436, 9 Am. B. R. 648.

But see *In re Marine, etc.*, Dock Co. (C. C. A. 2d Cir.), 144 Fed. 649, 75 C. C. A. 451, 16 Am. B. R. 325.

<sup>41</sup> 32 Stat. at L. 797.

<sup>42</sup> *Humphrey v. Tatman*, 198 U. S. 91, 49 L. Ed. 956, 12 Am. B. R. 74.

<sup>43</sup> B. A. 1898, Sec. 60a, as amended Feb. 5, 1903, 32 Stat. at L. 797.

<sup>44</sup> *Loeser v. Savings Deposit Bank & Trust Co.* (C. C. A. 6th Cir.), 148 Fed. Rep. 975, 78 C. C. A. 597, 17 Am. B. R. 628; *First Nat. Bank v. Connett* (C. C. A. 8th Cir.), 142

Fed. Rep. 33, 73 C. C. A. 219, 15 Am. B. R. 662; *English v. Ross*, 140 Fed. Rep. 630, 15 Am. B. R. 370.

But see *Meyer Drug Co. v. Pipkin Drug Co.* (C. C. A. 5th Cir.), 136 Fed. Rep. 396, 69 C. C. A. 240, 14 Am. B. R. 477; *In re Hunt*, 139 Fed. Rep. 283, 14 Am. B. R. 416. Where a mortgage is not valid until recorded, the four months' period runs from the date of record. *In re Mission Fixture & Mantel Co.*, 180 Fed. Rep. 263, 24 Am. B. R. 873.

<sup>45</sup> See Sec. 372, *ante*.

<sup>47</sup> *In re Mission Fixture & Mantel Co.*, 180 Fed. Rep. 263, 24 Am. B. R. 873.

the next day thereafter which is not Sunday or a legal holiday.<sup>48</sup>

**§ 518. Reasonable cause to believe.**

It is an essential element of a preference that the mortgagee have reasonable cause to believe that it was intended to give him a preference.<sup>49</sup> The rules relating to what constitutes "a reasonable cause to believe a preference was intended to be given" have been considered in another place, and what is there said is applicable to mortgages.<sup>50</sup>

**§ 519. Mortgages void when for pre-existing debt.**

The effect of such a mortgage must be to enable the creditor to obtain a greater percentage of his debt than any other of such creditors of the same class. This can occur only in the case of security given for a pre-existing debt.<sup>51</sup> If a chattel mortgage executed at the time the loan is made, creates at that time a lien on specific chattels, no preference is created; but if the mortgage is to an unidentified part of a mass, a lien is not created until there is a separation, and at that time is for an antecedent debt and so a preference.<sup>52</sup>

A mortgage given to secure a pre-existing debt, although a promise to give "security when required" was made at the time when the debt was created, is invalid.<sup>53</sup> But it is other-

<sup>48</sup> B. A. 1898, Sec. 31; *In re Hill*, 140 Fed. Rep. 984, 15 Am. B. R. 499; *Jones v. Stephens*, 94 Me. 582, 5 Am. B. R. 571; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130. See further, *ante*, Sec. 504.

<sup>49</sup> *In re Virginia Hardwood Mfg. Co.*, 139 Fed. Rep. 209, 15 Am. B. R. 135; *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stuckey v. Savings Bank*, 108 U. S. 74, 27 Am. B. R. 4; *In re Durham*, 111 Fed. Rep. 750, 8 Am. B. R. 115; *In re Dismal Swamp Construction Co.*, 135 Fed. Rep. 415, 14 Am. B. R. 175; *In re Sawyer*, 130 Fed. Rep.

384 12 Am. B. R. 269; *Summerville v. Stockton Milling Co.*, 142 Cal. 529.

<sup>50</sup> Sec. 505, *et seq.*

<sup>51</sup> *In re Clifford*, 136 Fed. Rep. 475, 14 Am. B. R. 281; *Sebring v. Wellington*, 63 N. Y. App. Div. 498, 71 N. Y. Suppl. 788.

<sup>52</sup> *First Nat. Bank of Holdredge v. Johnson*, 68 Neb. 641, 10 Am. B. R. 208.

<sup>53</sup> *Pollock v. Jones* (C. C. A. 4th Cir.), 124 Fed. Rep. 163, 61 C. C. A. 555, 10 Am. B. R. 616; *In re Dismal Swamp Construction Co.*, 135 Fed. Rep. 415, 14 Am. B. R.

wise where the promise was to give specific security as an inducement for an advance.<sup>54</sup> Where a mortgage is given to secure a present loan and a pre-existing debt, it is invalid as a preference to the extent of the pre-existing debt secured thereby.<sup>55</sup>

It has been held that a note of a partner given to pay a firm debt, which was secured by mortgage upon the individual property of the partner, was a fraudulent preference.<sup>56</sup> The reason is that it was in effect an appropriation of so much of the separate estate of the partner to the payment of one creditor's debt to the prejudice and wrong of other creditors of the firm to whom any surplus of such estate, after the payment of his individual debts, justly belonged. But a mortgage by a partnership of property does not create a preference in favor of the mortgagee as against the trustee in bankruptcy of one of the partners.<sup>57</sup>

### § 520. Mortgages to defraud.

If it appears that the taking of possession of mortgaged property is done to hinder, delay or defraud creditors such transfer would be invalid under section 67*e* of the bankruptcy law.<sup>58</sup>

175; *In re Ronk*, 111 Fed. Rep. 154, 7 Am. B. R. 731.

<sup>54</sup> *Douglass v. Vogeler*, 6 Fed. Rep. 52; *In re Jackson Iron Manufacturing Co.*, No. 7153 Fed. Cas., 15 N. B. R. 438; *Burdock v. Jackson*, 15 N. B. R. 318; *Gattman v. Honea*, No. 5271 Fed. Cas., 12 N. B. R. 493; *Sabin v. Camp*, 98 Fed. Rep. 974, 3 Am. B. R. 578.

<sup>55</sup> B. A. 1898, Sec. 67*d*, as amended June 25, 1910, 36 Stat. at L. 838. *City National Bank v. Bruce* (C. C. A. 4th Cir.), 109 Fed. Rep. 69, 48 C. C. A. 236, 6 Am. B. R. 311; *Stedman v. Bank of Monroe*, 117 Fed. Rep. 237, 115 Fed. Rep. 858, 8 Am. B. R. 302;

*In re Wolf*, 98 Fed. Rep. 84, 3 Am. B. R. 555; *In re Furse & Co.* (C. C. A. 4th Cir.), 127 Fed. Rep. 690, 62 C. C. A. 446, 11 Am. B. R. 733.

<sup>56</sup> *Miller v. New Orleans Fertilizer Co.*, 211 U. S. 496, 53 L. Ed. 300, 21 Am. B. R. 416; *in re Parker*, 11 Fed. Rep. 397.

<sup>57</sup> *In re Sanderlin*, 109 Fed. Rep. 857, 6 Am. B. R. 384, affirmed in *McNair v. McIntyre* (C. C. A. 4th Cir.), 113 Fed. Rep. 113, 51 C. C. A. 89, 7 Am. B. R. 638.

<sup>58</sup> *In re Pease*, 129 Fed. Rep. 446, 12 Am. B. R. 66; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. Ed. 577, 13 Am. B. R. 437; *In re*

**§ 521. Payment of money is transfer of property.**

A payment of money is a transfer of property within the bankruptcy act.<sup>59</sup>

**§ 522. Payment on antecedent debts.**

A payment of money within four months of bankruptcy by an insolvent to apply on a debt past due is a preferential transfer of property, irrespective of the intent of the parties, where it has the effect of enabling a creditor to obtain a greater percentage of his debt than other creditors of the same class.<sup>60</sup>

Such a preferential payment may be recovered or required to be surrendered before claim is allowed in cases where the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference,<sup>61</sup> but not otherwise.<sup>62</sup>

It should be observed that it is the payment on a check or note and not the giving of it that constitutes a preference.<sup>63</sup>

Payments on account of loans constitute a preference, although the loans were made during the insolvency and within the four months' period.<sup>64</sup> Where a bank borrows one of its

Antigo Screen Door Co. (C. C. A. 7th Cir.), 123 Fed. Rep. 249, 59 C. C. A. 248, 10 Am. B. R. 359. See Sec. 160, *ante*; *In re* Hugill Mercantile Co., 100 Fed. Rep. 616, 3 Am. B. R. 686.

<sup>59</sup> *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 620; *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814; *Andrews v. Kellogg*, 41 Colo. 35, 92 P. 222; *Chism v. Citizens' Bank*, 77 Miss. 599, 27 S. 637; *Wright v. Cotten*, 140 N. C. 1, 52 S. E. 141; *West v. Bank of Lahoma*, 160 Okl. 328, 85 P. 469; *Landry v. Andrews*, 22 R. I. 597, 48 A. 1036; *Claridge v. Evans*, 137 Wis. 218, 118 N. W. 198, 303, pref-

erence by payment of money above security.

<sup>60</sup> B. A. 1898, Sec. 60a, as amended Fed. 5, 1903. *Pirie v. Trust Co.*, 182 U. S. 438, 45 L. Ed. 1171, 5 Am. B. R. 814.

<sup>61</sup> *In re Goodhile*, 130 Fed. Rep. 471, 12 Am. B. R. 374. For a discussion of the elements of a voidable preference, see Sec. 494, *ante*, *et seq.*

<sup>62</sup> *Sherman v. Luckhart*, 96 Mo. App. 320, 9 Am. B. R. 307.

<sup>63</sup> *In re Wolf & Levy*, 122 Fed. Rep. 127, 10 Am. B. R. 153.

<sup>64</sup> *In re Colton Export & Import Co.* (C. C. A. 2d Cir.), 121 Fed. Rep. 663, 57 C. C. A. 417, 10 Am. B. R. 14.

depositor's deposit and gives security therefor, the giving security creates a preference.<sup>65</sup> To pay for goods ten days after delivery is not a cash transaction but a preferential payment,<sup>66</sup> or to pay an overdraft on a bank.<sup>67</sup>

### § 523. Payments which do not diminish estate.

A payment to a creditor which does not have the effect to diminish the estate is not a preference.

It has been held not to be a preference to pay rent for the purpose of preserving a valuable lease,<sup>68</sup> or to make payments and sales under a running account, where new sales succeed payments and the net result is to increase the indebtedness of the bankrupt, because the creditor does not obtain a greater percentage of his debt than other creditors,<sup>69</sup> or to pay wages because if there are sufficient assets to pay all

<sup>65</sup> *In re Cobb*, 96 Fed. Rep. 821, 3 Am. B. R. 129.

<sup>66</sup> *In re Morrow & Co.*, 134 Fed. Rep. 686, 13 Am. B. R. 392.

<sup>67</sup> *Payne v. Solman*, No. 10856 Fed. Cas., 14 N. B. R. 162; *In re Kellar*, 110 Fed. Rep. 348, 6 Am. B. R. 621.

<sup>68</sup> *In re Pearson*, 95 Fed. Rep. 425, 2 Am. B. R. 482; *In re Merchants' Insurance Co.*, No. 9441 Fed. Cas., 3 Biss. 162; *contra*, *Smith v. Teutonia Ins. Co.*, No. 13113 Fed. Cas., 6 Am. Law Rev. 584.

In *In re Lange*, 97 Fed. Rep. 197, 3 Am. B. R. 231, Judge Brown said: "Payment of rent by an insolvent is not necessarily a preference. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors, it should be so regarded."

<sup>69</sup> *Bryant v. Swofford*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111; *Jaquith v. Alden*, 189 U. S. 78, 47 L. Ed. 717, 9 Am. B. R. 773; *Yaple v. Dahl-Millikan Grocery Co.*,

193 U. S. 526, 48 L. Ed. 776, 11 Am. B. R. 569; *Peterson v. Nash* (C. C. A. 8th Cir.), 112 Fed. Rep. 311, 50 C. C. A. 260, 7 Am. B. R. 181; *In re H. C. King Co.*, 113 Fed. Rep. 110, 7 Am. B. R. 619; *Dickson v. Wyman* (C. C. A. 1st Cir.), 111 Fed. Rep. 726, 49 C. C. A. 574, 7 Am. B. R. 186; *In re Sagor & Bro.* (C. C. A. 2d Cir.), 121 Fed. Rep. 658, 57 C. C. A. 412, 9 Am. B. R. 361; *Gans v. Ellison* (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 52 C. C. A. 356, 8 Am. B. R. 153; *Kimball v. Rosenham Co.* (C. C. A. 8th Cir.), 114 Fed. Rep. 85, 52 C. C. A. 33, 7 Am. B. R. 718.

Where the additional credits do not equal the payments, the difference only need be surrendered. *Gans v. Ellison* (C. C. A. 3d Cir.), 114 Fed. Rep. 734, 52 C. C. A. 356, 8 Am. B. R. 153; *In re Geo. M. Hill Co.* (C. C. A. 7th Cir.), 130 Fed. Rep. 315, 59 C. C. A. 354, 12 Am. B. R. 221.

labor claims of the same class in full, payments on account prior to the bankruptcy are immaterial as each creditor of that class is fully paid, and therefore there can be no preference of one over another,<sup>70</sup> or to repay a bank money advanced for a certain purpose on a check when not used for such purpose,<sup>71</sup> or to pay money on account of interest on statutory dower,<sup>72</sup> or to pay interest in advance for the renewal of a loan,<sup>73</sup> or to pay an old debt separate and distinct from an indebtedness arising upon an open account,<sup>74</sup> or to pay a percentage on claims of a part of the creditors when the others will receive the same percentage,<sup>75</sup> or to pay

<sup>70</sup> *In re* Feuerlicht, 8 Am. B. R. 550; *In re* Read & Knight, 7 Am. B. R. 111. But see *In re* Kohn, 7 Am. B. R. 111 (note); *In re* Jones, 110 Fed. Rep. 736, 4 Am. B. R. 563; *In re* Proctor, 6 Am. B. R. 660.

<sup>71</sup> *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541.

<sup>72</sup> *In re* Riddle's Sons, 122 Fed. Rep. 559, 10 Am. B. R. 204.

<sup>73</sup> *In re* Kellar, 110 Fed. Rep. 348, 6 Am. B. R. 621.

<sup>74</sup> *In re* Abraham Steers Lumber Co., 7 Am. B. R. 332, 112 Fed. Rep. 406; *In re* Seay, 113 Fed. Rep. 969, 7 Am. B. R. 700; *In re* Champion, 7 Am. B. R. 560; *Dickson v. Wyman* (C. C. A. 1st Cir.), 111 Fed. 726, 49 C. C. A. 574, 7 Am. B. R. 186.

In the case of *Abraham Steers Lumber Co.*, 112 Fed. Rep. 406, 7 Am. B. R. 332, the court says:

"The bankrupt was indebted to the creditor upon an open account, and at a date more than four months previous to the filing of the petition made a payment upon that account of money, and gave his note for the balance, which pay-

ment and note were treated by the creditor as full payment, and the account was balanced upon his books. The debtor was insolvent at the time, but the creditors had no reasonable cause to believe that preference was intended. Subsequently the bankrupt contracted another debt with the creditor. The question is, whether proof of that debt can not be allowed without a surrender by the creditor of the payment received upon the previous debt. We are of the opinion that the payment, notwithstanding it was a preference, being upon a distinct and independent debt than that which is sought to be proved, need not be surrendered by the creditor. . . . We do not deem it necessary to enlarge upon the reasons for our conclusions in respect to these questions. These are fully discussed in the opinion of Judge Thomas, who decided the case in the court below, and we fully concur in his views."

<sup>75</sup> *Brittain Dry Goods Co. v. Bertenshaw*, 68 Kan. 634; *In re* Hapgood, No. 6044 Fed. Cas., 2 Low. 200; *Jones v. Sleeper*, No. 7496 Fed. Cas., 2 N. Y. Leg. Obs. 131.

unearned premiums on policies of insurance,<sup>76</sup> or a payment made in full to a creditor by a third person as a friendly act.<sup>77</sup>

The reason for this is that the fund to which the creditors look for payment is in nowise diminished. It has been held not to constitute a preferential payment where mutual debts and credits have been adjusted in good faith by payments by the debtor.<sup>78</sup> A deposit of money in a bank subject to check within the four months' period is not a preferential payment.<sup>79</sup>

#### § 524. Collecting what assigned for present consideration.

It is not a preference to collect book accounts assigned at the time the credit was given,<sup>80</sup> or to subsequently take possession of property or give security for a debt in accordance with an agreement made at the time the debt was created.<sup>81</sup> Where a railroad contractor to obtain money for the work assigns to a bank all moneys due and to become due from the railroad on his contract this is not a preference either as to the money due or to become due, but was a sale of credit for a present valid consideration, and hence the later payments, though within the four months' period, are not preferential.<sup>82</sup>

<sup>76</sup> *Knickerbocker Ins. Co. v. Comstock*, No. 7879 Fed. Cas., 9 N. B. R. 484.

<sup>77</sup> *Dressel v. North State Lumber Co.*, 119 Fed. Rep. 531, 9 Am. B. R. 541; *Goode v. Elwood Lodge*, 160 Ind. 241; *Keegan v. Hamilton Nat. Bank*, 163 Ind. 216; *Winsor v. Kendell*, No. 17886 Fed. Cas., 3 Story, 507; *Replier v. Bloodgood*, 1 Sweeney (N. Y. Supt. Ct.), 34. See further Sec. 496, *ante*.

<sup>78</sup> *Robinson v. Ins. Co. Bank*, No. 11969 Fed. Cas., 9 Biss. 117; *Hough v. National Bank*, No. 6721 Fed. Cas., 4 Biss. 349; *Winslow v. Bliss*, 3 Lansing (N. Y.), 220.

<sup>79</sup> *New York County Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380, 11 Am. B. R. 42; *In re Geo. M. Hill Co.* (C. C. A. 7th Cir.), 130 Fed. Rep. 315, 59 C. C. A. 354, 12 Am. B. R. 221; *In re Scherzer*, 130 Fed. Rep. 631, 12 Am. B. R. 451.

<sup>80</sup> *In re Little*, 110 Fed. Rep. 621, 6 Am. B. R. 681; *Young v. Upson*, 115 Fed. Rep. 192, 8 Am. B. R. 377.

<sup>81</sup> *Sabin v. Camp*, 98 Fed. Rep. 974, 3 Am. B. R. 578. But see *In re Sheridan*, 98 Fed. Rep. 406, 3 Am. B. R. 554.

<sup>82</sup> *Cox v. First Nat. Bank* (La. 1910), 52 So. 227.

### § 525. Endorsed or secured liability.\*

It has been held to be a preference to pay a note or check, even where there is an endorsement by a solvent party.<sup>84</sup> If the surety pays the debt of his principal he takes it subject to the disqualifications and limitations of the principal debtor, and if the principal creditor had received preferential payments it is as if the endorser had received such preferential payments.<sup>86</sup> A payment which relieves a surety is a preference in favor of the surety,<sup>87</sup> and it does not take it out of the general rule that the payment was made to a holder of a note overdue, on which there was a solvent endorser, whose liability was already fixed.<sup>88</sup> Payments to an endorsee who holds the note as collateral security for a debt of the payee are payments to the payee and a preference.<sup>89</sup>

### § 526. Payment to attorney for services to be rendered.

It may be a preference for a debtor, either directly or indirectly in contemplation of the filing of a petition by or against him to pay money or transfer property to an attorney

\* See further Sec. 497, *ante*.

<sup>84</sup> *Swarts v. Fourth Nat. Bank* (C. C. A. 8th Cir.), 117 Fed. Rep. 1, 54 C. C. A. 387, 8 Am. B. R. 673; *In re Lyon* (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 58 C. C. A. 143, 10 Am. B. R. 25, affirming 114 Fed. Rep. 326, 7 Am. B. R. 412; *Landry v. Andrews*, 21 R. I. 597, 6 Am. B. R. 281; *In re Geo. M. Hill Co.* (C. C. A. 7th Cir.), 130 Fed. Rep. 315, 59 C. C. A. 354, 12 Am. B. R. 221; *Harris v. Second Nat. Bank*, 110 Tenn. 239. A preferential payment of a note by a bankrupt does not extinguish it either as to indorser or sureties. *Hooker v. Blount*, 44 Tex. Civ. App. 162, 97 S. W. 1083.

<sup>86</sup> *Swarts v. Siegel* (C. C. A. 8th Cir.), 117 Fed. Rep. 13, 54 C. C.

A. 387, 8 Am. B. R. 689; *Livingston v. Heineman* (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39; *In re Lyon* (C. C. A. 2d Cir.), 121 Fed. Rep. 723, 58 C. C. A. 143, 10 Am. B. R. 25. But see *In re Levi*, 121 Fed. Rep. 198, 9 Am. B. R. 176; *In re Wyly*, 116 Fed. Rep. 38, 8 Am. B. R. 604; *In re New*, 116 Fed. Rep. 116, 8 Am. B. R. 566.

<sup>87</sup> *Livingston v. Heineman* (C. C. A. 6th Cir.), 120 Fed. Rep. 786, 57 C. C. A. 154, 10 Am. B. R. 39; *Crandall v. Coats*, 133 Fed. Rep. 965, 13 Am. B. R. 712.

<sup>88</sup> *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866.

<sup>89</sup> *In re Meyer*, 115 Fed. Rep. 997, 8 Am. B. R. 598.



and counselor at law, solicitor in equity or proctor in admiralty for services to be rendered. Such transaction may be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.<sup>90</sup>

### § 527. Sales.

The law does not recognize that every sale of property by an embarrassed person within the period limited is necessarily in fraud of the bankrupt act.<sup>92</sup>

If it were so, no one would know with whom he could safely deal; and, besides, a person in this condition would have no encouragement to make proper efforts to extricate himself from the difficulty.

### § 528. Fraudulent sales only affected.

The interdiction in the act with reference to preferences applies to sales having a fraudulent object, and not to those with an honest purpose. Thus the transfer of property by an insolvent to a creditor, with the consent of all his other creditors, is not a preferential sale which can be set aside by the trustee.<sup>93</sup> So also a sale by a merchant of his entire

<sup>90</sup> B. A. 1898, Sec. 60*d*; see also Sec. 107, *ante*.

*In re* Wood & Henderson, 210 U. S. 246, 52 L. Ed. 1046, 20 Am. B. R. 1; *Furth v. Stahl* (Sup. Ct. Pa.), 205 Pa. 439, 55 A. 29, 10 Am. B. R. 442; *In re* Lewin, 4 Am. B. R. 632, 103 Fed. Rep. 850; *In re* Corbett, 5 Am. B. R. 224, 104 Fed. Rep. 872; *In re* Habegger (C. C. A. 8th Cir.), 139 Fed. Rep. 623, 71 C. C. A. 607, 15 Am. B. R. 198; *Pratt v. Bothe* (C. C. A. 6th Cir.), 130 Fed. Rep. 670, 65 C. C. A. 48, 12 Am. B. R. 529; *Swartz v. Frank*, 183 Mo. 438, 82 S. W. 60.

Fees are "in contemplation of bankruptcy" although directed principally to preventing the filing of a petition. *Furth v. Stahl*, 205 Pa. St. 439, 55 A. 29.

<sup>92</sup> *Tiffany v. Lucas*, 15 Wall. 421, 21 L. Ed. 198; *Rice v. Grafton Mills*, 117 Mass. 228; *Rice v. Melendy*, 41 Iowa, 395; *Sparhawk v. Richards*, No. 13205 Fed. Cas., 12 N. B. R. 74; *Sonstiby v. Keeley*, 11 Fed. Rep. 578; *Lancaster v. Collins*, 7 Fed. Rep. 338; *In re Strenz*, 8 Fed. Rep. 311.

<sup>93</sup> *Judson v. The Courier Co.*, 8 Fed. Rep. 422.

stock of goods for full value, in the absence of fraud, can not be impeached.<sup>94</sup> It has also been held that a *bona fide* purchaser will be protected to the extent of the actual money paid as consideration.<sup>95</sup> A transfer may of course be fraudulent in the sense that it is in violation of the act, though involving no moral obliquity.\*

### § 529. Elements of fraudulent sale.

In order to set aside a sale on the ground that it is a preference, four things must concur: *First*, the sale must be made by an insolvent person to a creditor; *second*, the effect of such sale must be to enable that creditor to obtain a greater percentage of his debt than any other of such creditors of the same class; *third*, the creditor must have had reasonable cause to believe that it was intended thereby to give a preference; and, *fourth*, the sale must have been made within four months before filing the petition in bankruptcy, or after the filing of the petition and before the adjudication.<sup>96</sup> If any one of these elements is wanting, the sale can not be set aside as a preference. It should be borne in mind that a sale which is fraudulent under the common or statutory law may be avoided on another ground, although made more than four months before the filing of the petition.<sup>97</sup>

### § 530. When sale void.

Whether a sale is a fraudulent preference or not depends upon the facts in the particular case. It has been held to be a preferential sale which could be avoided, where an insolvent sold to a creditor, knowing that he was receiving a preference, all his real and personal property, leaving other cred-

<sup>94</sup> *In re Strenz*, 8 Fed. Rep. 311. But see *In re Moody*, 134 Fed. Rep. 628, 14 Am. B. R. 272.

<sup>95</sup> *Lancaster v. Collins*, 7 Fed. Rep. 338; *Sostiby v. Keeley*, 11 Fed. Rep. 578.

\* See Sec. 1070, *ante*.

<sup>96</sup> B. A. 1898, Sec. 60. For a further consideration of these elements, see preferences by transfers, Sec. 494, *et seq*.

<sup>97</sup> See setting aside fraudulent conveyances. See Sec. 381, *ante*, and Sec. 548, *post*.

itors unprovided for;<sup>98</sup> or, under similar circumstances, where a merchant transferred to one creditor his entire stock of goods;<sup>99</sup> or where a debtor transferred a large portion of his property to one creditor without making provision for an equal distribution among his other creditors;<sup>2</sup> or where property was transferred on the ground of exercising a factor's lien;<sup>3</sup> or a sale to a creditor through the intervention of an agent who pays the purchase price with notes of the bankrupt;<sup>4</sup> or a sale in consideration of an illegal agreement, as that creditor would not prosecute the debtor for a misdemeanor;<sup>5</sup> or a sale to a bank to make good an overdraft;<sup>6</sup> or generally any sale the consideration of which is a pre-existing debt;<sup>7</sup> or where firm property is conveyed to a continuing partner,<sup>8</sup> or under an unrecorded bill of sale.<sup>9</sup>

<sup>98</sup> *Foster v. Hackley*, No. 4971 Fed. Cas., 2 N. B. R. 406.

<sup>99</sup> *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489; *Rison v. Knapp*, No. 11861 Fed. Cas., 1 Dill. 187; *Smith v. McLean*, No. 13074 Fed. Cas., 10 N. B. R. 260; *Norton v. Billings*, 4 Fed. Rep. 623; *Singer v. Jacobs*, 11 Fed. Rep. 559. No preference where creditor bought all the lumber an insolvent had, paying him the balance due and releasing pledges on other property. *Perry v. Booth*, 67 N. Y. App. Div. 235, 73 N. Y. Suppl. 216.

Bill of sale of goods to creditor in exchange for agreement to realize best prices obtainable where goods were sacrificed and creditor was paid was void. *W. B. Belknap & Co. v. Lyell*, 89 Miss. 373, 42 S. 799.

<sup>2</sup> *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Merchants' Nat. Bank v. Cook*, 95 U. S. 342, 24 L. Ed. 412; *In re Drum-*

*mond*, No. 4094 Fed. Cas., 4 Biss. 149; *In re House*, No. 6735 Fed. Cas., 1 N. Y. Leg. Obs. 348; *In re Foster*, No. 4964 Fed. Cas., 18 N. B. R. 64; *Nisbet v. Quinn*, 7 Fed. Rep. 760.

<sup>3</sup> *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286.

<sup>4</sup> *Fleming v. Andrews*, 3 Fed. Rep. 632.

<sup>5</sup> *Sharp v. Philadelphia Warehouse Co.*, 10 Fed. Rep. 379.

<sup>6</sup> *Alderdice v. State Bank*, No. 154 Fed. Cas., 1 Hughes, 47.

<sup>7</sup> *Post v. Corbin*, No. 11299 Fed. Cas., 5 N. B. R. 11; *Ex parte Shouse*, No. 12815 Fed. Cas., Crabbe, 482. See also *Casey v. La Societie, etc.*, No. 2496 Fed. Cas., 2 Woods, 77; *Armstrong v. Chemical National Bank*, 41 Fed. Rep. 234.

<sup>8</sup> *In re Kindt*, 101 Fed. Rep. 107, 4 Am. B. R. 148; *Collins v. Hood*, 3015 Fed. Cas., 4 McLean, 186; *In re Johnson*, No. 7369 Fed. Cas., 2 Low. 129, 129; *In re Waite*, No.

**§ 531. Transfers to lien creditor.**

But the conveyance of property to a creditor who has a valid lien on such property to a greater amount than the value of it is not a preferential sale.<sup>14</sup> It is otherwise where the lien is invalid.<sup>15</sup>

**§ 532. Conditional sales.**

Whether a sale to a person, who subsequently becomes a bankrupt, on condition that the title shall remain in the seller constitutes a valid lien as against the trustee of the vendee depends upon whether the arrangement between the seller and the purchaser is valid under the local law.<sup>16</sup> If valid the

17044 Fed. Cas., 1 Low. 207; *In re* Federhen, No. 4713a Fed. Cas., referred to *In re* Lane, No. 8044 Fed. Cas., 2 Low. 333. But see *Forsaith v. Merritt*, No. 4946 Fed. Cas., 1 Saw. 336; *In re* Shepard, No. 12754 Fed. Cas., 3 Ben. 347; *Smith v. McLean*, No. 13074 Fed. Cas., 10 N. B. R. 260. See also *Johnston v. Strauss*, 26 Fed. Rep. 57.

<sup>9</sup> The filing of a petition operated like an attachment on an unrecorded bill of sale in *Logan v. Nebraska Moline Plow Co.*, 3 Neb. 516, 92 N. W. 129, affirmed, 3 Neb. 526, 93 N. W. 1128. Possession and title passed to a trustee under a contract of conditional sale absolute for want of record under state law as it might have been levied on and sold by subsequent creditors. *Chilberg v. Smith* (C. C. A. 9th Cir.), 174 Fed. Rep. 805, 98 C. C. A. 513, 23 Am. B. R. 483. Machinery transferred by unrecorded bill of sale—defendant paid rent—bankrupt kept possession—defendant had no title as trustee takes whatever creditors could have taken. *Haskell v. Merrill*, 179 Mass. 120, 60

N. E. 485. Where a bill of sale of carriages was made more than four months before the bankruptcy, but not recorded as required by state law, although the creditor had no reason to believe that a preference was intended still the transaction could not stand as against other creditors of the bankrupt. *In re* Burlage Bros., 169 Fed. Rep. 1006, 22 Am. B. R. 410. The mere delivery of a bill of sale without possession of the goods was held to transfer title when made in good faith. *Farnham v. Friedmeyer*, 109 Ill. App. 54; *Christ v. Zehner*, 202 Pa. St. 188, 61 A. 822.

<sup>14</sup> *Coxe v. Hale*, No. 3310 Fed. Cas., 10 Blatch. 56; *Catlin v. Hoffman*, No. 2521 Fed. Cas., 2 Saw. 486; *Ashuelot Sav. Bank v. Frost*, 19 Fed. Rep. 237.

<sup>15</sup> *In re* Gregg, No. 5797 Fed. Cas., 4 N. B. R. 436.

<sup>16</sup> See Sec. 406, *ante*. "Where a conditional sale is made in one state which contemplates or expressly provides that the property is to be delivered or used in another state, the law of the latter state governs." Citing text. Where

lien may be enforced in the bankruptcy proceedings.<sup>18</sup> If it is invalid the property passes to the trustee.<sup>23</sup>

there is no peculiar local law, the general law will govern. *In re* Gray, 170 Fed. Rep. 638, 21 Am. B. R. 375. A sale "terms cash" is conditional on payment and leaves the title in the vendor until payment under the laws of Michigan. *In re* Pittsburgh Industrial Iron Works, 179 Fed. Rep. 151, 25 Am. B. R. 221.

<sup>18</sup> *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633; *Hewit v. Berlin Mach. Wks.*, 194 U. S. 296, 48 L. Ed. 986, 11 Am. B. R. 709; *In re Shirley* (C. C. A. 6th Cir.), 112 Fed. Rep. 301, 50 C. C. A. 252, 7 Am. B. R. 299; *In re Cavagnaro*, 143 Fed. Rep. 668, 16 Am. B. R. 320. See Sec. 406, *ante*; *Crucible Steel Co. of America v. Holt* (C. C. A. 6th Cir.), 174 Fed. Rep. 127, 98 C. C. A. 101, 23 Am. B. R. 302, though some of the creditors became so after the date of the contract.

A seller of an engine to the bankrupt under a contract of conditional sale can recover the engine without accounting for payments made upon it where the engine has been used and has very much deteriorated in value since its sale. *In re Canuet Lumber Co.*, 178 Fed. Rep. 340. Enforcing the condition in a conditional sale does not operate to make the transfer to the vendor a preference. *In re Cohen*, 163 Fed. Rep. 444, 20 Am. B. R. 796. A right in the buyer to resell the goods did not avoid the lien though unrecorded. *Bryant v. Swofford Bros.*, 214 U. S. 279, 53 L. Ed. 997, 22 Am. B. R. 111 (in

Arkansas); *In re Gray*, 170 Fed. Rep. 638, 21 Am. B. R. 375; *In re Perlhefter*, 177 Fed. Rep. 299, 25 Am. B. R. 576.

A contract of conditional sale by which the vendor kept title, although the vendee had power to resell was delivered to the bankrupt in July, 1902, filed for record November 9, 1903, and bankruptcy ensued November 30, 1903. The court distinguishes the chattel mortgage decisions as there the debtor has title, while here he has not and says that the provision of the act as to recording (60a) refers to transfers originally intended as preferences or which at the time of execution constituted such. The court upholds the validity of the contract. *Bradley, Clark & Co. v. Benson*, 93 Minn. 91, 100 N. W. 670.

<sup>23</sup> *In re Butterwick*, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re Garcewich* (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 53 C. C. A. 510, 8 Am. B. R. 149; *In re Carpenter*, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re Rasmussen's Estate*, 136 Fed. Rep. 704, 14 Am. B. R. 462. See Sec. 152a, *ante*; *In re Bement* (C. C. A. 7th Cir.), 172 Fed. Rep. 98, 96 C. C. A. 412, 22 Am. B. R. 616; *In re G. & K. Trunk Co.*, 176 Fed. Rep. 1007, 23 Am. B. R. 914.

A right to resell made the conditional sale void. *West v. Fulling*, 36 Ind. App. 617, 76 N. E. 325, and a want of record avoided the sale. *In re Bement* (C. C. A. 7th Cir.), 172 Fed. Rep. 98, 96 C. C. A. 412, 22 Am. B. R. 616.

In respect to such property it was held in the earlier cases that the trustee occupied the position of a judgment or attaching creditor from the date of the filing of the petition in bankruptcy, which was held to have the effect of an attachment or seizure under legal process.<sup>26</sup> When the question reached the supreme court, it held that an adjudication in bankruptcy is not equivalent to a seizure or an attachment of the debtor's property, and that a conditional sale valid as between the bankrupt vendee and the vendor at the time of bankruptcy under the state law is valid as against the trustee.<sup>27</sup> The effect of this decision was avoided by the amendment of 1910.\*

If such conditional sale contract is invalid as against creditors at the date of bankruptcy it may be avoided by the trustee under section 67*a* of the bankruptcy act. Where property is delivered to the vendee for consumption or sale or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction will not be upheld as a conditional sale, because it is a fraud upon the creditors of the vendee.<sup>28</sup>

<sup>26</sup> *In re* Rodgers (C. C. A. 7th Cir.), 125 Fed. Rep. 169, 60 C. C. A. 567, 11 Am. B. R. 79; *In re* Pekin Plow Co. (C. C. A. 8th Cir.), 112 Fed. Rep. 308, 50 C. C. A. 257, 7 Am. B. R. 369; *Dolle v. Cassell* (C. C. A. 6th Cir.), 135 Fed. Rep. 52, 67 C. C. A. 526, 14 Am. B. R. 52; *Chesapeake Shoe Co. v. Seldner* (C. C. A. 4th Cir.), 122 Fed. Rep. 593, 58 C. C. A. 261, 10 Am. B. R. 466; *In re* Butterwick, 131 Fed. Rep. 371, 12 Am. B. R. 536; *In re* Ducker (C. C. A. 6th Cir.), 134 Fed. Rep. 43, 67 C. C. A. 117, 13 Am. B. R. 760;

*McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641, 74 S. W. 878.

<sup>27</sup> *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. Ed. 782, 15 Am. B. R. 633.

\* Statute June 25, 1910, discussed at length under section 372, *ante*.

<sup>28</sup> *In re* Garcewich (C. C. A. 2d Cir.), 115 Fed. Rep. 87, 53 C. C. A. 510, 8 Am. B. R. 149; *In re* Carpenter, 125 Fed. Rep. 831, 11 Am. B. R. 147; *In re* Howland, 109 Fed. Rep. 869, 6 Am. B. R. 495; *In re* Rasmussen's Estate, 136 Fed. Rep. 704, 14 Am. B. R. 462.

















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